



REPUBLIC OF KENYA



**Kibos Distillers Limited v Onyango (Miscellaneous Case E123 of 2024)
[2024] KEELRC 13471 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13471 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS CASE E123 OF 2024
JK GAKERI, J
DECEMBER 19, 2024**

BETWEEN

KIBOS DISTILLERS LIMITED APPLICANT

AND

NYAPARA OSIKE ONYANGO RESPONDENT

RULING

1. Before the Court for determination is the applicant's Notice of Motion dated 14th November, 2024 filed under Certificate of Urgency seeking Orders that: -
 1. Spent.
 2. Spent.
 3. The applicant is granted leave to appeal out of time against the whole judgment dated and delivered on 30th August, 2023 in Kisumu Chief Magistrate's Court ELRC No. E172 of 2021, Nyapara Osike Onyango V Kibos Distillers Ltd.
 4. Pending the hearing and determination of the intended appeal (to be filed), there be a stay of execution of the decree in Kisumu chief Magistrate's Court, ELRC No. E172 of 2021, Nyapara Osike Onyango V Kibos Distillers Ltd.
 5. Costs of this application abide the outcome of the intended appeal.
2. The Notice of Motions is expressed under Section 1A, 1B, 3A, 79G and 95 pf the *Civil Procedure Act* and Order 50 Rule of the Civil Procedure Rules and is based on the grounds set out in its face and the Supporting Affidavit of Richard B. O. Onsongo Advocate who deposes that on 15th August, 2023, the trial Magistrate indicated that the judgment would be delivered on notice and on 27th September, 2023, he received a draft decree and learnt that judgment was delivered on 30th August, 2023 and was instructed to file an appeal.



3. The affiant deposes that he filed a Notice of Appeal on 15th October, 2023 under Certificate of Urgency seeking leave to appeal out of time but the application was not heard because the record of proceedings and court file were not availed to the to the Court at Kisumu and the file had since been availed.
4. That the respondent is likely to commence execution of the decree and the appellant has a good appeal which raises triable issues and arguable grounds of appeal with high chances of success.
5. That the applicant stands to suffer serious and substantial pecuniary loss is not allowed to appeal and the decree is executed.
6. That the Applicant is ready and willing to provide security by way of a bank guarantee or deposit of half of the decretal sum in an interest earning account in a reputable bank in the joint names of counsel for the parties and abide by reasonable terms and condition the Court may impose.
7. The affiant further deposes that the respondent did not respond to the application and it is thus unopposed.
8. The salient issue for determination is whether the Notice of Motion is merited in terms of extension of time to file appeal and stay of execution pending the intended appeal.
9. Order 50 rule 5 of the Civil Procedures Rules confer on the Court power to extend time to enable a party file an appeal out of time.
10. Similarly, Order 42 rule 6(2) provide for the grant of stay of execution pending appeal provided the Court is satisfied that substantial loss may result to the applicant unless the Order is made, the applicant is ready willing to furnish security for due performance and the application was made without unreasonable delay.
11. Equally, Section 59 of the *Interpretation and General Provisions Act* gives the Court authority to extend time where the law prescribes the time within which an act or proceeding must be taken.
12. It is however trite law that such extension of time is discretionary as held in *Joseph Odide Walome V David Mbadi Akello [2022] eKLR* where the Court expressed itself as follows:

... It is trite that extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court, that discretion however, must be exercised judiciously”.
13. In *Nicholas Kiptoo Arap Salat V Independent Electoral & Boundaries Commission & 7 Others [2014] eKLR*, the Supreme Court set out the factors the court is required to take into consideration in determining how to exercise its discretion including the burden of proof on the applicant who must avail sufficient evidence to demonstrate that the delay though inordinate is sufficiently explained.
14. The Court was unambiguous that:

Extension of time is not a right of a party. It is an equitable remedy that is only available to the deserving party at the discretion of the Court and a party seeking for extension of time has a burden of laying a basis to the satisfaction of the Court”.
15. It requires no belabouring that the judgment sought to be appealed against was delivered on 30th August, 2023 and the affiant learnt of it when he received a draft decree on 29th September, 2023.
16. The affiant did not explain why he was unaware of the delivery of the judgment yet counsel for the other party appear to have been aware. There is no evidence of any follow up in the CTS or by email.



17. Similarly, the affiant has not disclosed when the file was retrieved and to whom it was availed as it is not before this Court.
18. A perusal of Kisumu Misc. No. E083 of 2023 reveals that the same was filed under Certificate of Urgency on 19th October, 2023 seeking orders to those sought in the instant suit.
19. Indeed, the instant Notice of Motion is a replication of the ELRC Misc. No. E083 of 2023. The application was served on 24th October, 2023 and M/s Omondi Abande & Co. Advocates accepted service but no response was filed.
20. However, M/s omondi Abande & Co. Advocates served a mention Notice dated 13th May, 2024 electronically vide email address info@onsongoadvocates.co.ke on the same day and both parties were present on 20th May, 2024.
21. The Court marked the filed closed.
22. Counsel was directed to move the trial Court as appropriate.
23. A review of the CTS reveals that on 20th May, 2024 the Application was marked as having been overtaken by events.
24. In the Court's view, since the Applicant's Counsel has confirmed that the file has finally been traced or reconstructed and thus exists, it is only fair that the applicant be accorded some time to file and prosecute the intended appeal bearing in mind that the earlier application Misc. No. E083 of 2023 was made without unreasonable delay as is the instant application. The former was disposed off in about 7 months; which in the courts view, underscores the applicants desire to pursue the appeal.
25. On stay of execution pending appeal, the Court is satisfied that the applicant has met the threshold prescribed by Order 42 Rule 6(2) of the Civil Procedure Rules.
26. In the end, based on the judicial authorities cited herein above and the material circumstances of the case, the Court is persuaded that the applicant has made a sustainable case for the Court to exercise its discretion favour by granting the applicant stay of execution and leave to appeal out of time against the judgment dated and delivered on 30th August, 2023 in Kisumu Chief Magistrates Court ELRC No. E172 of 2021 Nyapara Osiko Onyango V Kibos Distillers Ltd provided that:
 - i. The Applicant provides the requisite security by way of a bank guarantee or deposit of the decretal sum in an interest earning account in the joint names of counsel for the parties in a reputable bank within 45 days and;
 - ii. The appeal is filed within 45 days.

In default of either (i) or (ii) or both above, the respondent is at liberty to execute the decree.

There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 19TH DAY OF DECEMBER, 2024.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions



of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

DRAFT

