



**Radar Systems Limited v Kenya National Private Security Workers Union & another
(Miscellaneous Application E008 of 2022) [2022] KEELRC 1305 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1305 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E008 OF 2022**

**HS WASILWA, J
JULY 14, 2022**

BETWEEN

RADAR SYSTEMS LIMITED APPLICANT

AND

**KENYA NATIONAL PRIVATE SECURITY WORKERS UNION 1ST
RESPONDENT**

NEXTTGEN AUCTIONEERS 2ND RESPONDENT

RULING

1. This ruling is in respect of the Applicant's notice of Motion dated 1st April, 2022 filed under certificate of urgency on 20th April, 2021 pursuant to Section 1A, & 1B of the *Civil Procedure Act*, Order 40 Rule 5 and Order 50 Rule 1 of the Civil Procedure Rules, 2010 and all other provisions of law, seeking the following orders;
 1. Spent.
 2. That the Court do grant a temporary stay of execution of the ruling delivered on the 28th September, 2021 until this application is heard and determined.
 3. That the Applicant be granted leave to appeal out of time and the annexed memorandum of Appeal be deemed as filed upon payment of requisite Court fees.
 4. That the Court do make an order of stay of execution of the ruling made on 28th September, 2021 pending the hearing and determination of the intended Appeal.
 5. This Honourable Court be pleased to grant an injunction restraining the Respondent's their employees, servants, agents and all other persons claiming under especially Nextgen Auctioneers from attaching, selling, advertising for sale, removing for purposes of sale any of the objectors'/Applicants property being motor vehicle registration number KBW 808S.



6. The costs of this application bound by the outcome of the intended Appeal.
2. The application is supported by the grounds on the face of the application and the affidavit sworn on 1st April, 2022 by Rinah Ondego, the Applicant's operations manager and based on the following grounds: -
 - a. That, pursuant to execution proceedings in CMELR 005 of 2020 Nakuru, the Applicants Motor vehicles registration numbers KBW 77R and KCJ 206R were seized by the Respondent on the 26th April, 2021.
 - b. The Applicant filed application dated 9th April, 2021 and another one dated 11th May, 2021 in objection of the attachments and sale of the said motor vehicle.
 - c. Both applications were canvassed by way of written submission and a ruling scheduled for 17th August, 2021 however in the said date the Court was not sitting and no further date was given for the ruling.
 - d. The Applicant's advocates kept asking about the said ruling and the ruling will be delivered to no avail. They only learnt on the 31st March, 2022 that their sister company was served with a proclamation notice in satisfaction of a decree issued on 15th March, 2022, which included costs of the objection applications.
 - e. It is at that point that the advocates for the Applicant perused the Court file and realized that the ruling of the applications had been delivered on 28th September, 2021 in absence of both parties.
 - f. The Applicant contends that it learnt of the said ruling on 1st April, 2022 when the sister company forwarded the proclamation notice served upon them on 31st March, 2022.
 - g. In the proclamation notice, the Respondents are seeking to illegally proclaim Motor Vehicle registration number KBW 808S which belongs to the Applicant and they now intend to prefer an appeal against the ruling of the lower Court of 28th September, 2021 on the basis that the trial Court failed to acknowledge the Applicants legal ownership of the said vehicle.
 - h. It admitted being the subsidiary of the main company but it is a separate legal entity as such since no corporate veil has been lifted the Respondent ought to execute solely on the company they sued not on all other subsidiaries.
 - i. It maintained that it is not the judgement debtor and the proclamation of its motor vehicles was done against the law a fact that they will prove in the intended Appeal.
 - j. It is contended that the Decree holder will not be prejudiced if the orders sought are granted by this Honourable Court.
 3. In opposing the application, the Respondents mounted a joint grounds of opposition dated 6th May, 2022 and filed on 9th May, 2022, that came out as follows; -
 - a. That the application is totally unmerited and is an afterthought, an abuse and misuse of judicial process.
 - b. That the Applicant has no good and sufficient cause for not filling an appeal within time.



- c. That the Applicant had not placed any material evidence either through a letter and or an email to the Court on the efforts it had taken to follow up on the ruling dated 28th September, 2021 for over seven months before filing the instant application.
 - d. There is no substantive Appeal filed by the Applicant to be allowed out of time.
 - e. There is no order or ruling appealed against by the Applicant attached to the Application.
 - f. That the application amount to a fishing expedition as the motor vehicle registration number KCJ 2016 R and KBW 775 R had long been sold by Public Auction on the 4th of May, 2021 to third parties who are not parties to this suit at a sum of Kshs 714,400 long before the ruling was delivered on the 28th September, 2021 and after the interim orders of 14th April, 2021 in the Applicant's application of 9th April, 2021 were vacated on the 27th April, 2021 for none attendance by the Applicant's Advocates . The outstanding balance of Kshs 658,905 has since be paid to the 1st Respondent in Three cheques of 10th April, 2022, 10th May, 2022 and 10th June, 2022.
 - g. That the Applicant stands to suffer no prejudice as the appeal does not have any chances of success.
 - h. That the Application herein has no merit and should be dismissed with costs.
4. The parties herein disposed of the application by way of written submissions with the Applicant filing on 25th May, 2022 and the Respondents on 16th June, 2022.

Applicant Submissions.

- 5. The Applicant set out three issue for determination being; Whether the Applicant should be granted leave to file appeal out of time, Whether the Applicant has demonstrated sufficient grounds to be granted stay pending hearing and determination of the indented appeal and Who is liable to pay the costs of this application.
- 6. On the first issue, the Applicant cited the case of Nicholas Mutuku Mwasuna v Patricia Mueni Kilonzo [2022] Eklr, where G V Odunga J reiterated the principles to consider before exercising discretion and granting stay as set in the case of First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65 where the Court set out the factors to be considered in deciding whether or not to grant such an application and these are:
 - i. The explanation if any for the delay;
 - ii. The merits of the contemplated action, whether the matter is arguable one deserving a day in Court or whether it is a frivolous one which would only result in the delay of the course of justice.
 - iii. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favour of the Applicant.
- 7. Consequently, the Applicant submitted that the reason for delay is because it was not aware a ruling had been delivered by the trial Court as the same was delivered in absence of the parties and the Applicant was made aware of the Ruling on 1st April, 2022 when its sister company was proclaimed. It was argued that the ruling was pronounced contrary to the provisions of Order 21 rule 1 of the Civil Procedure Rules provides that: In suits where a hearing is necessary, the Court, after the case has been heard, shall pronounce judgment in open Court, either at once or within sixty days from the conclusion of the



trial notice of which shall be given to the parties or their advocates. Provided that where judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the Chief Justice and shall immediately fix a date for judgment.

8. It was further submitted that the delay alone in the delivery of the ruling ought to be a reason that this Court considers in enlarging time. To buttress this argument, the Applicant relied on the case of *Nicholas Mutuku Mwasuna v Patricia Mueni Kilonzo (Supra)* in which Court placed its reliance in the Court of Appeal case of *Ngoso General Contractors Ltd v Jacob Gichunge Civil Appeal No. 248 of 2001 [2005] 1 KLR 737* which held:

“The failure by the Superior Court Judge in an application for extension of time to file an appeal, to consider, as a matter of law, whether the Appellant, who was admittedly absent when the Judgement was delivered, was served with notice of delivery of the Judgement was a misdirection...The law under Order 20 r 1 is explicit in terms and mandatory in tone that a Judgement which is not delivered ex tempore must be delivered on a subsequent date only upon notice being given to all parties or their advocates and where only the successful party in the Judgement had prior knowledge of the delivery of the Judgement and no apparent reason was advanced for the failure to serve or to attempt to serve the Appellant or his advocate, the Appellant’s right of appeal was grossly compromised...An order was made by the Magistrate granting a right of appeal within 28 days and directing the party in attendance to inform the other side does not cure the flagrant breach of the mandatory procedural rule which accords with fundamental rules of natural justice and the right to be heard which *the Constitution* safeguards.”

9. On the third limb, whether the appeal is arguable, it was submitted that the grounds of Appeal raises issues that deserves a day in Court and cannot be said to be a frivolous one which would only result in the delay of the course of justice. In this he relied on the case *Equity Bank Limited v Richard Kerochi Ayiera [2020] eKLR* in which the learned Judge referred to the apt finding of the Court of Appeal in the case of *Kenya Railways Corporation v Erdemann Property Limited [2012] eKLR* where the Court succinctly stated that an arguable appeal is not one which will necessarily succeed but is one that raises arguable grounds.
10. On the prayer for stay, it was submitted that the principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules. It was argued that substantial loss will occur as its operations has/will be negatively impacted if an order for a stay of execution is denied, and more importantly, that the Respondents will not be able to refund the vehicles that they wrongly attached if the same is allowed and the appeal succeeds. In this they relied on the case of *Equity Bank Limited v Richard Kerochi Ayiera (Supra)* and urged this Court to allow the Application as prayed.

Respondent’s Submissions.

11. The Respondent submitted on whether the application before Court has any merit and whether Orders prayed for therein can be issued.
12. It was submitted that rules governing leave to appeal out of time is now well settled. The Applicant has to demonstrate a good and sufficient cause for not filling the appeal in time. In this they relied on the case of *Thiuta Mwangi v Kenya Airways [2003] eKLR* where the Court cited the case of *Leo Sila*



Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported), that Court expressed itself thus:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the Respondent if the application is granted”.

13. It was argued that the Appeal from a subordinate Court to this Court has to be preferred within 30 days as provided for under section 79G of the *Civil Procedure Act*. It was further argued that this Court has discretion to enlarge time within which this Appeal can be filed and while exercising its discretion this Court is guided by factors such as explanation for the delay, as was stated in *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR where the Court held that:-

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the Respondent if the application is granted, and whether the matter raises issues of public importance.”

14. On the first limb, it was argued that the intended appeal is on a decision rendered on the 28th September, 2021, Seven (7) months ago. The reason given according to the Respondent was on allegation that they could not trace the file to ascertain the outcome of their Application, however that their allegation is not backed up with any evidence in support. To support this argument the Respondent relied on the case of *Utalii Transport Company Limited and 3 others v NIC Bank Limited & another* [2014] eKLR where the Court held that:-

“Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying Court’s mind on the delay, caution is advised for Courts not to take the word “inordinate” in its dictionary meaning, but in the sense of excessive as compared to normality.”

15. The Respondent in conclusion submitted that no appeal has been filed before this Court to clothe it with the requisite jurisdiction to hear this stay of execution proceedings as envisaged under Order 42 Rule 6(1) of the Civil Procedure Rules. Furthermore, that no execution proceedings are pending against the Applicant as such the Application is not meritorious and the same should be dismissed with costs.
16. I have considered the averments of the parties herein. The Applicants filed this application on 1/4/22 following dismissal of their objection proceedings filed vide an application dated 9/4/2021.
17. They aver that the main suit was against their sister company Radar Systems Ltd. The objection proceedings were dismissed.
18. The Ruling in respect of these objection proceedings was delivered on 28/9/2021 and they aver that they only came to learn of the delivery of the Ruling later on 31/3/22 hence their current application.



19. The Respondents opposed the application stating that it is an afterthought and that the items attached have since been sold to 3rd parties.
20. Given the contention by the Respondents, it would be a waste of this Court's time to grant stay orders sought as this Court cannot grant orders in vain.
21. The prayers for appeal of the Court's Ruling out of time is however granted with a rider that the said appeal if at all be filed within 15 days from the date of this Ruling.
22. Costs of this application to abide the appeal.

RULING DELIVERED VIRTUALLY THIS 14TH DAY OF JULY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Opar for Respondent – present

Applicants – absent

Court Assistant - Fred

