



**Kenya Aids NGO'S Consortium (KANCO) v Okumu (Miscellaneous Application
1 of 2022) [2022] KEELRC 12874 (KLR) (13 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12874 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
MISCELLANEOUS APPLICATION 1 OF 2022**

JW KELI, J

OCTOBER 13, 2022

[FORMERLY KISUMU ELRC MISC APPLICATION NO E035 OF 2022]

BETWEEN

KENYA AIDS NGO'S CONSORTIUM (KANCO) APPLICANT

AND

LINDA ACHIENG OKUMU RESPONDENT

(Application for leave to appeal out of time and for stay and execution of judgement delivered by Hon Dolphina Alego (Chief Magistrate) on March 28, 2022 in Kakamega CMCC No 151 of 2019 Linda Achieng Okumu v Kenya AIDS NGO's Consortium.)

RULING

1. The applicant, upon delivery of judgment against it in Kakamega CMCC No 151 of 2019 Linda Achieng Okumu v Kenya AIDS NGO's Consortium on the March 28, 2022, approached the court by way of notice of motion under section 79G and section 95 of *Civil Procedure Act*, order 51 rule 1 and order 42 rule 6(2) of the *Civil Procedure Rules* under certificate of urgency dated June 10, 2022 seeking the following orders:-
 - a. That the application be certified as extremely urgent requiring to be placed before the next available judge.
 - b. Pending the hearing and determination of this application this honourable court be pleased to issue an order of stay of the orders issued on March 28, 2022.
 - c. Pending the hearing and determination of this appeal this honourable court be pleased to issue an order of stay of the orders issued on March 28, 2022.
 - d. The applicant be granted leave to file appeal out of time against the judgment given on the March 28, 2022 by Hon Dolphina Alego (Chief Magistrate).



- e. Upon grant of leave to appeal out of time, the draft memorandum and record of appeal lodged herein be deemed as duly filed.
 - f. This honourable court be pleased to issue any order it deems fit and just in the circumstances.
 - g. Cost of this application be provided for.
2. Orders (a) and (b) are spent.
 3. The application is based on grounds that the impugned judgment of March 28, 2022 was in favour of the claimant and the respondent being aggrieved filed an application on the April 25, 2022 seeking to review and /or set aside the orders of the trial court however the court declined to hear the said application and gave directions on the May 23, 2022 hence the delay in filing the appeal.
 4. The application is opposed by the respondent vide grounds of opposition dated June 10, 2022 being that the application is unmerited, the applicant having opted to apply for review of the orders of March 28, 2022 cannot come on appeal after the review application was declined, there in no substantive appeal duly filed by the applicant to be admitted out of time pursuant to the provisions of section 79G of the *Civil Procedure Act*, the applicant has no good cause for not filing appeal in time, the application amounts to fishing expedition and the delay in filing appeal was inordinate. That further, the applicant has not satisfied the conditions for grant of orders of stay pending appeal as provided for under order 42 rule 6(2) of the *Civil Procedure Rules* namely, the establishment of sufficient cause, satisfaction of substantial loss and furnishing security. That the applicant stands to suffer no prejudice as there is no appeal duly filed to be admitted out of time.
 5. The application was canvassed by way of written submissions. The applicant's written submissions drawn by NOW Advocates LLP are dated July 21, 2022 and filed in court on the September 26, 2022.
 6. The respondent's written submissions drawn by Odhiambo Opar and Company Advocates are dated July 27, 2022 and filed in court on the July 28, 2022.

Determination

Issues For Determination

7. The applicant has identified the following issues for determination:-
 - a. Whether the order of stay of execution pending appeal should be granted
 - b. Whether the leave to appeal out of time should be granted to the applicant.
8. The respondent has identified the following as the issues to be determined:-
 - a. Whether the application for extension of time to appeal has any merit.
 - b. Whether the orders sought for stay of execution pending appeal should be granted.
9. The court considers that the issues raised are similar and frames the same as follows for the purposes of the ruling:-
 - a. Whether the orders sought for stay of execution pending appeal are merited.
 - a. Whether the leave sought to appeal out of time is merited.



Whether The Orders Sought For Stay Of Execution Pending Appeal Are Merited

10. Order 42 (6) (2) of the [Civil Procedure Rules](#) sets two key conditions for grant of stay pending appeal outcome:-
 - "(1) That substantial loss may result to the applicant unless the order is made and application is made without unnecessary delay.
 - (2) Such security as the court order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."
11. The applicant submits that further to the above criteria the Court of Appeal in [Vishram Ravji Halai v Thornton & Turpin](#) Civil Application No 15 of 1990 [1990] KLR 265 the court is also enjoined to give effect to the overriding objective under section 1A and 1B of the [Civil Procedure Act](#).
12. The applicant further relies on the decision in [Jairus Momanyi Buranda & another v Ojwang Emmanuel Ochieng](#) [2021] eKLR where court rendered itself to effect that, flowing from order 42 rule 6(2) the applicant has to establish that :-
 - i. " he will suffer substantial loss if the stay is not granted
 - ii. That the application was filed without unreasonable delay
 - iii. That the applicant is willing to furnish security for the due performance of the decree
 - iv. That the applicant has arguable appeal."

Whether The Applicant Will Suffer Substantial Loss If Stay Is Not Granted

13. The applicant submit that the decree sum is significant and if paid to the respondent the applicant is unlikely to recover the said sum from the respondent if the appeal succeeds. That the respondent is a lady of unknown means and hence the appeal will be rendered nugatory.
14. On other hand the respondent submit that it is a NGO relying on done funds to achieve it objectives of health and well being of communities and if the stay of execution is not granted its operations will be negatively impacted and eventually paralyzed and relies on the decision of the Court of Appeal in [Meteine Ole Kilelu & 19 others v Moses K Nailole](#) [2009] eKLR to buttress its foregoing submissions.
15. The applicant further relies on the decisions of Justice Kimaru at High Court in [Century Oil Trading Company Limited v Kenya Shell Limited](#) Nairobi (Milimani) HCMCA No 1561 of 2007 where the court held that in considering whether the applicant will suffer substantial loss the financial position of the applicant and the respondent becomes an issue and the court must balance the interest of the applicant of seeking to preserve status quo pending hearing of appeal so that the appeal is not rendered nugatory and that of the Respondent to enjoy fruits of their judgment.
16. The applicant further relies on the decision of the court of appeal in [National Industrial Credit Bank Limited v Aquinas Francis Wasike and another](#) [2006] eKLR where the court held that once the applicant expresses that a respondent is unable to pay back the decretal sum then the evidential burden shifts to the respondent to show resources he has since that is a matter which is peculiarly within their knowledge. The applicant submits the response that the respondent has failed to discharge that burden.
17. In reply the respondent submits that apart from bare assertions that the claimant would not be able to pay back decretal sum without tangible evidence that is not sufficient reason to grant stay and relies



on the decision of Emukule J in Cosmas Kipkoech Sigei v Madrugada Ltd & another [2010] eKLR where the court held that

"A stay will not be made on the ground that the decree holder is a pauper and will not be able to refund the decretal sum if paid to him."

18. The respondent submits that the applicant has not demonstrated how it will suffer substantial loss were it to pay the respondent the decretal sum which is a drop in the ocean compared to its balance sheet/ financial statement. The respondent to buttress the foregoing submissions relies on the decision in Republic v the Commissions Investigations and Enforcement Exparte Wananchi Group Kenya Limited [2014] eKLR where Odunga J held that:-

"the issue of substantial loss is a crucial issue that ought to come out clearly in the supporting affidavit, that it is not sufficient for the applicant to merely state that the decretal amount is a lot of money and the applicant would suffer loss if the money is paid. .. the applicant must show the damages it will suffer if the order is not granted."

19. The court is in agreement with the decisions of Justice Odunga (*supra*) and Justice Kimaru (*supra*) and finds that the court must balance the interest of the parties by taking into consideration the question of possible substantial loss to the applicant and the right to enjoy fruits of judgment of the respondent/claimant. The court adds that it also has to consider the possibility of the appeal being rendered nugatory if the applicant is successful. The court agrees that the applicant had burden to prove she was capable of refunding the decretal sum once the issue was alleged by the applicant as held by the Court of Appeal in National Industrial Credit Bank Limited v Aquinas Francis Wasike and another [2006] eKLR. The respondent did not file an affidavit of service and the court finds she did not discharge that burden.

Whether There Was Inordinate Delay In Making The Application

20. The applicant submits that the judgment subject of the proceedings was rendered on the March 28, 2022, they filed application for review on the April 25, 2022 which the court declined to hear as per orders issued on the May 23, 2022. That the instant application was filed on the June 10, 2022 being within 10 days of the court's refusal to hear the application despite having jurisdiction.
21. The respondent submits that there is inordinate delay of 3 months since passing of judgment as the timeline set by law to appeal from Chief Magistrate's Court to this court is 30 days. That the reason of having filed review which was rejected by trial court is not sufficient reason. That the applicant is estopped from appealing having exercised the option of review under section 80 of the Civil Procedure Act and under order 45 (2) of the Civil Procedure Rules. That the memorandum of appeal must be filed before considering the prayer of for stay pending appeal.
22. The court finds that though the applicant expressed interest to seek review of the judgment from the trial court , the said application was not considered on merit. Consequently the applicant cannot be said to be estopped from exercising right of appeal in the licit of section 80 of the Civil Procedure Act.
23. The court finds that the failure by the trial court to review its judgment contributed to the delay in filing appeal beyond 30 days. The court is satisfied that the delay is not inordinate and that it is explained.



Security Performance

24. On the 2nd limb of order 42 rule 6 of the *Civil Procedure Rules* requiring security of performance as a condition for grant of stay, the applicant submits that it is willing to furnish security and this is stated in the supporting affidavit of Betsy Jerotich sworn on the June 10, 2022 in paragraph 10.
25. The Court of Appeal has settled the principles for stay of execution in the case cited by Justice Ongudi in *MFI Document Solutions Ltd v Paretto Printing Works Limited* [2021] eKLR of *Butt v Rent Restriction Tribunal* [1982] KLR 417 where the Court of Appeal gave guidance on how a court should exercise discretion in an application for stay of execution and held that:-
- “ 1. the power of the court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle is granting or reusing a stay is : If there is no other overwhelming hindrance , a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge ‘s discretion. (sic)(trial court judgement).
 3. A judge should not refuse a stay if there is a good grounds for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.
 4. The court in exercising its powers under order XLI rule 4 (2) (b) of the Civil Procedure Rules can order security upon application by either party or on its own motion. Failure to put security of costs as ordered with cause the order for stay of execution to lapse”.
26. The decree/judgement sought to be challenged in the instant application is a monetary decree. Costs and interest can adequately cover any prejudice the respondent may suffer if the application is granted. The applicant stated it would meet any conditions as to security if the application for stay is granted.
27. The court applying the binding Court of Appeal decision (*supra*) finds merit in the applicant and grants order sought for stay of execution. In order to protect the right of the judgment creditor to enjoy fruits of his judgment and balance with need to ensure the appeal is not to be rendered nugatory if appeal successful, the court orders security of performance of the total decretal sum of Kshs 582,769/-.

Whether The Leave To Appeal Out Of Time Should Be Granted To The Applicant

28. The applicant submits that that the court has inherent jurisdiction to grant the prayer and consequently enlarge time and allow the applicant to file appeal out of time. To buttress this submission the applicant cites *Hulsbury Laws England* 4th Ed Vol 37 para 14 which states in part:-
- “The jurisdiction of the court which is comprised within the term inherent is that which enables it to fulfill itself properly and effectively as a court of law”.
29. The applicant submits that inherent jurisdiction instrinsic authority which the court may resort to put right would what would otherwise be injustice and relies on the decision of the Court of Appeal in *Stanely Kaboro Mwangi and 2 others v Kanyamwi Trading Company Limited* [2015] eKLR where the Court of Appeal held that the principles that affect the court in deciding such an application are discretionary and unfettered therefore applicant must explain to satisfaction of the court why the



discretion should be exercised in favour. The applicant relies on other decisions cited therein and which the court has noted, and submits that it has demonstrated why the instant memorandum of appeal seeks to be filed out of time.

30. The respondent submits that there is no proper appeal before court for the court to decide on the chances of the appeal succeeding that the applicant will be prejudiced if the appeal is allowed to be filed out of time as she has to wait longer to realize the fruits of her judgment, the application for filing appeal out of time is not merited. The respondent relies on the decision of the Court of Appeal in *Equity Bank v West Link MBO Limited* [2013] eKLR to extent that the stay of execution can only be considered after filing of an appeal.
31. The Court of Appeal in CA 71/2016 between *Charles Karanja Kiiru v Charles Gitbinji Muigwa* (*supra*), was faced with a similar situation. The superior court posed the following question:

“Having expressed ourselves as herein above the other issues that falls for considered is whether the appeal filed out of time on October 24, 2014 could be deemed as being properly on record. There is a plethora of authorities from the High court which interpret the proviso to section 79G of the *Civil Procedure Act* to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted. Emukule, J in the *Gerald M’Limbine v Joseph Kangangi* [2009] eKLR stated that:

“my understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the stipulated period to do so would actually be an abuse of the court’s process under section 79B.”

32. The Court of Appeal in the above stated case cited with approval Aburili, J in *Martha Wambui v Irene Wanjiru Mwangi & another* (*supra*) where this court stated:

“In my view, the use of the term “admitted” connotes both the act of allowing an appeal to be filed out of time and also the act of allowing or permitting an appeal already filed to be admitted out of time.....” see also *APA Insurance Ltd v Michael Kinyanjui Muturi* (*supra*).

The Court of Appeal went on to state;

“This is the position this court has taken when dealing with applications for extension of time. We have always, and we believe lawfully so, deemed as fully filed applications without leave where leave is sought and subsequently granted. Learned counsel for the appellant submitted that this position as found to be untenable by the Supreme Court which pronounced itself as follows in the *Nicholas Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014]eKLR (Salat case):

“.....counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed.

What we hear the applicant telling the court is that he is acknowledging having file a ‘document’ he calls ‘an appeal’ out of time without leave of the court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of



filing the notice of appeal. Under rule 53 of the Court's Rules, this court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one needs to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize such 'an appeal', is tantamount to moving the court to remedy an illegality. This, court cannot do.

To file an appeal out of time and seek the court to extend time is presumptive and inappropriate. no appeal can be filed out of time without leave of the court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court." (Emphasis added).

Guided by the Supreme Court in *Nicholas Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR (Salat case): The Court then finds that the Application before the court for extension of time within which to lodge appeal is proper. The court has already stated it was satisfied with the reasons for the delay and exercises its discretion in favour of the applicant under section 79G of the *Civil Procedure Act* to extent time for filing appeal out of time.

Conclusion

33. I find merit in the notice of motion application filed in court on June 16, 2022 and issues the following orders:-

1. There shall be a stay of execution of the judgment and/or decree in Kakamega CMCC No 151 of 2018 Linda Achieng Okumu v Kenya AIDS NGOS Consortium pending the filing, hearing and determination of the intended appeal to the court on condition that decretal sum of Kshs 582,769/- is deposited in court within 14 days of this order.
2. Failure to comply with the deposit will lead to automatic vacation of the order No 1 above.
3. Order of leave extending the time of filing appeal and to file appeal out of time against the judgment of Hon Dolphina Alego (CM) Kakamega CMCC No 151 of 20189 Linda Achieng Okumu v Kenya aids NGOs Consortium of March 28, 2022.
4. Failure to file the notice of appeal, memorandum of appeal and the record of appeal within 30 days of this order will lead to automatic lapse of order No 3.
5. Costs to the respondent.

It is so ordered.

WRITTEN, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 13TH OCTOBER 2022.

JW KELI

JUDGE

In the presence of:-

Court assistant – Brenda Wesonga

Applicant:-Shago holding brief for Naingo



Respondent:- Obande

