Kitau & another v Mutuku (Civil Miscellaneous E003 of 2024)
[2025] KEHC 9377 (KLR) (30 May 2025) (Ruling)

Neutral citation: [2025] KEHC 9377 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL MISCELLANEOUS E003 OF 2024

TM MATHEKA, J

MAY 30, 2025

BETWEEN

JERINAH NTHENYA KITAU ..... 1ST APPLICANT

HILLARY MUIA LUKAS ..... 2ND APPLICANT

AND

BENJAMIN MUTUKU ..... RESPONDENT

RULING

1. The application before me is brought under Order 42 Rule 6, Order 50 Rule 5 and order 51 Rule 1 of the *Civil Procedure Rules, 2010*, section 1A, 1B, 3A 63(e), 65(1) (B) and 67 of the *Civil Procedure Act*) seeking orders that:

    1. The application be certified as urgent and service of the same be dispensed within the first instance and interim orders granted ex-parte.

    2. That the applicantintended appellant be granted leave to file an appeal out of time.

    3. Pending the hearing and determination of this application inter-parte, stay of execution of the judgment and resultant decree delivered on 1st August 2023 in Civil Suit No. E169 of 2021 be granted *ex-parte* in the first instance.

        1. There be stay of execution of the aforesaid judgment pending the hearing and determination of the intended appeal.

        2. The court be pleased to grant leave to the applicantintended appellant to appeal out of time against the judgment by Hon. Martin N. Mutua in Makueni CMCC No. E169 of 2021 on 1st August 2023; in the alternative, the draft annexed Memorandum of Appeal be deemed duly filed upon the payment of the requisite fees thereto.

3. The costs of this application be provided for in the course of the intended appeal.

2. The grounds for the application as set out on its face are inter alia that : The matter came up for judgment on 1st August 2023 before Hon. M.N. Mutua – Senior Resident Magistrate. However, judgment was delivered in the absence of the applicantintended appellant and without notice to the parties, the court delivered the said judgment in their absence on 1st August 2023; that there was no stay of execution granted and the applicantintended appellant was apprehensive that enforcement of the said judgment was imminent; The applicantintended appellant filed an application for stay of execution dated 25th August 2023 which application Hon. Mutua dismissed with costs to the applicant on 5th December 2023; That the applicantintended appellant being aggrieved by the judgment delivered on 1st August 2023 intended to file an appeal against the entire judgment hence necessitating this application; that the intended appeal is arguable and has good grounds of success and enforcement will render the same nugatory; that the delay in filing the intended appeal was not deliberate or unreasonable as the judgment was delivered without notice; that the applicantintended appellant was willing to furnish security for the due performance of the decree as shall be directed by the court pending the hearing and final determination of the intended appeal if and when filed ; that was in the interest of justice that there be a stay of execution and the applicantintended appellant be given chance to be heard on the intended appeal; that no loss, damage andor prejudice would be suffered by the respondents as the applicantintended appellant was agreeable to abide by the terms imposed on them by the court pending the final determination of the intended appeal if leave was granted; that the court has inherent powers ex debitio justiciae to order stay of execution pending the hearing and determination of the intended appeal if leave was.

3. The application is supported by the affidavit of Malela Basil sworn on 15122023. He reiterates the grounds on the face of the application. Annexed to the affidavit is the judgment in Makueni MCCC E1692021 the Memorandum of Appeal and application for stay in the lower court.

4. In the memorandum of appeal, he contends that:

    1. The learned magistrate erred in law and f act by awarding inordinately high general damages of Kshs. 500,000= for pain and suffering, having failed to consider conventional awards for general damages in cases of similar injuries.

    2. The learned magistrate erred in law and fact by awarding special damages of Kshs. 7,050= when the respondent produced receipts that did not contain stamp duty stamps.

    3. The learned magistrate erred in law and fact by entering judgment in the matter without granting the appellants their stay in court for them to prosecute their case.

    4. The learned magistrate erred in law and fact in failing to consider the defendant's submissions in arriving at the judgment, with the resultant miscarriage of justice to the appellants.

5. The application is opposed vide replying affidavit of Benjamin Mutuku Nzioka – he depones that: The applications dated 15122023 and 1432024 together with the supporting affidavits have been read and explained to him by his advocates on record and he sore his affidavit in strong opposition thereto; That the applicants have not offered any security for the intended appeal and thus cannot be heard misleading the court to allow them offer security that has not been identified and offered before the court; That no substantial evidence or explanation has been adduced by the applicants for the delay or failure to lodge the appeal within the stipulated timelines and as such it is clear that they are deliberately obstructing andor delaying the course of justice; That he is informed by his advocates on record which

information he believes to be true that the applicant has not met the threshold for grant of the orders sought and prays that the same be dismissed.

6. Parties proceeded by way of written submissions.

7. For the applicant, it is submitted that the issues for determination are;

    1. Whether the application was made without unnecessary delay

    2. Whether the appeal presents arguable grounds with reasonable chances of success.

    3. Whether the applicant has provided such security as to costs.

8. The applicant relies on order 42 Rule 6(2) of the *Civil Procedure Rules* and the following authorities:

    Hezekiah Ngugi v Kenya Power & Lightning Co. Ltd [2020] eKLR, where the learned Judge stated that the law governing filing of appeals to the high Court is governed by section 79G of the *Civil Procedure Act*, which provides that-

    > " Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: provided that an appeal may be admitted out of time if the appellant satisfies the court that he has good and sufficient cause for not filing the appeal in time".

    Michael Opiyo (suing as the administrator of the estate of Tracy Opiyo – deceased) v Solomon Kimeli Bor & Another [2021] e KLR where on whether or not the appeal ought to be one that will succeed the court stated as follows –

    > " It is now trite that an arguable appeal is not necessarily one that must succeed; and that even one arguable point is sufficient for purposes of section 79G of the *Civil Procedure Act*".

    Kenya Tea Growers Association & Another v- Kenya Planters & Agricultural Workers Union (supra), where the Court of Appeal determined that –

    > " He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the court should pronounce its decision."

9. *Khalsa Schools & 2 Others v Samuel Odhiambo Otieno* [2021] e KLR where the court cited Parker LJ in *Rosengren v Safe Deposit Centres Ltd* (1984) E ALL ER 198 that security for the due performance of a decree ought to be given in a way that is least disadvantageous to the party giving the security and may be in many forms including a bank guarantee and that what is important is that it must be adequate and binding.

    1. For the respondent after giving a background to the case, set out the same issues as the appellant for the determination.

    2. On substantial loss, reliance is made on Order 42 Rule 6(2) – and it was submitted that the applicant has failed to establish substantial loss.

    3. On the exercise of the court's discretionary powers – it was submitted that the applicant had not provided sufficient reasons to warrant the exercise of the court's discretion in his favour:

reliance was made on *Jeny Luesby v Standard Group Ltd* (2014) e KLR cited with authority in *Medula Academy v Jacklyne Atieno Otieno & Another* (2018) e KLR, where the court observed that:

> " Granting of stay pending appeal is at the discretion of the court on sufficient cause being established by the applicant. The incidence of the legal burden of proof on matters which the applicant must prove lies with the applicant."
>
> ..... sufficient cause being a technical as well as a legal requirement will depend entirely on the applicant satisfying the court that the substantial loss may result to the applicant unless the order is made, and therefore the court may direct for the deposit of such security for the due performance of the decree or order as may ultimately be binding on the applicant where an applicant has been able to satisfy the court that the application has been made without unreasonable delay. ... the fact that execution process is in motion or the attached properties have been sold does not in itself amount to substantial loss under Order 42 Rule 6 of the *Civil Procedure Rules*".

1. That the prerequisites for granting a stay of execution as outlined under Order 42 Rule 6 must be proved simultaneously but that the applicantsintended appellants had failed to do so. The court was referred to Magnate Ventures –v Simon Mutua Muatha & Another [2018] e KLR, where the court in observing the prerequisites of stay of execution observed that: Order 46 Rule 6(2) of the Civil Procedure Rules, provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -
2. Substantial loss may result to the applicant unless the order was made;
3. The application was made without unreasonable delay; and
4. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

10. The court was also referred to Bungoma High Court Misc. Application No. 42 of 2011 – James Wangalwa & Another vs Agnes Naliaka Cheseto where it was held that:

> " The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail."

1. It was also argued that the applicant had not explained the unreasonable delay of four months. It was argued that the application seeking a stay of execution should be made promptly. That in this case the judgment sought to be challenged was delivered on 182023 in the presence of the respondents' advocates. That the application dated 15122023 was filed approximately 4 months and 2 weeks from the date of the judgment. That the applicants' failed to follow up and prosecute the same necessitating the respondents' advocates to proceed with execution and it was only upon proclamation of the applicants' movable properties that the applicants' woke up from their slumber and filed the application dated 1432024. That the delay the delay

was inordinate, inexcusable and prejudicial to the respondent in that the respondent has been denied his right to enjoy the fruits of his regularly obtained judgment.

2. The respondent cited Congress Rental South Africa –v Kenyatta International Convention Centre; Cooperative Bank of Kenya Limited & Another (Garnishee) [2019] e KLR where the court found a delay for one month inordinate and held:

> "The ruling of this court was made on 19th July 2018. This application is made under Order 22 of Civil Procedure Rules and on the material date on application for stay of execution was informally made following the delivery of this court's ruling. The formal applicant before court was made on 17th August 2018; almost a month from the date of court's ruling. The Notice of Appeal was filed on 30th July 2018. The delay for one month in filing the application has not been explained. I find that the applicant's application is inordinately delayed and no explanation has been offered for the inordinate delay."

1. It was also argued for the respondent that no security for performance of decree had been made by the applicant and reliance was placed on Gianfranco Manenthi & Another vs Africa Merchant Assurance Company Ltd [2019] e KLR: In Mwaura Karuga ta Limit Enterprises vs Kenya Bus Services Ltd & 4 Others [2015] e KLR, it was said

> "... the security must be one which shall achieve de performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words "ultimately the binding' are deliberately used and are useful her, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here.
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> Therefore, the ultimate decree envisaged under order 42 Rule 6(2)(b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted – which is seldom. The security to be given is measured on that yardstick".

1. On whether the application meets threshold for leave to appeal out of time – it is argued that it does not. That

the application is premised on Order 51 Rule 1 of the Civil Procedure Rules 2010, sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*. That Section 79G of the *Civil Procedure Act* provides the timelines when it states that:

> "Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

11. It is further submitted that the applicant has fallen short of the laid down the principles that govern the exercise of the court's discretion in applications for extension of time. The Supreme Court Nicholas Kiptoo Arap Korir Salat v Independent Electro and Boundaries Commission & 7 Others [2014] e KLR put them as follows;

    1. "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;

    2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time".

12. Further that this court is urged to consider the guidance in Omar Shurie v Marian Rashe Yafar (Civil Application No. 107 of 2020) where the Court of Appeal listed 4 factors which ought to be taken into account in deciding whether or not to grant extension of time to appeal namely:

1. The length of delay

2. The reason for the delay

3. Possibly, the chances of appeal succeeding if the application is granted and

4. The degree of prejudice to the respondent if the application is granted.

13. It is the respondent's position that the applicant has not complied with the foregoing by not explaining the delay, by not filing the appeal in time despite having the opportunity to do so, by not having an arguable appeal: It is submitted:

> The intended appeal has no chances of success. This is because the applicants and their advocate failed to attend court when the matter was slated for hearing necessitating an exparte hearing.

14. Subsequently, the applicants filed an application seeking to set aside the exparte proceedings which was allowed on condition that they pay thrown away costs of Kshs.15,000= to the respondents' advocates on record. They failed to comply with the court orders within the timelines set by the court necessitating the filing of an application for enlargement of time. Subsequently, judgment was delivered in favour of the respondent in the presence of his advocate and I the absence of the applicants' advocate. The applicants further went ahead and filed an application for stay of execution which was dismissed with costs necessitating the filing of the application before this honourable court. The respondents' evidence in the lower court was not controverted as the applicants did not defend the suit to its logical conclusion even after having been granted an opportunity to do so. The applicants were given an opportunity to exercise their right to be heard but failed to comply with the conditions set by the court.

15. It is submitted that the intended appeal has no chance of success as it emanates from a judgment were the applicants chose not to participate.

16. It is submitted that this is not a case for exercise of the court's inherent power under section 1A, 1B, 3A and 63(e) of *Civil Procedure Act* and Order 51 Rule 1 Civil Procedure Rules. And the court is referred to the Court of Appeal in Kenya Power & Lighting Company Limited v Benzene Holdings Limited ta Wyco Paints [2016] e KLR where it stated:

1. Section 3A of the *Civil Procedure Act* appears to have been introduced to augment the provisions of section 3, vesting in the courts inherent power to make any orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Of course this

power has now been broadened by the introduction in 2009 of overriding objective in section 1A and 1B and in 2010 by Article 159

2. In that case the inherent power of court was explained to be a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whether it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them ... a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice. See Halsbury's Laws of England, 4th Edn. Vol 37 para 14

3. This court is urged to find that this is not a case that calls for the exercise of its inherent power. That the justice of the case calls for the dismissal of this application and the court is urged to follow Equity Bank Limited –v West Link MBO Limited to the effect that courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met.

4. It is submitted that the applicant has misconducted himself all through and cannot be allowed to benefit from that misconduct something that was stated in George Munge v Sanjeev Pancho Sharma & 3 Others [2012] e KLR and Apollo Onyango Njago & Another vs Savings & Loan Kenya Limited (2012) e KLR that: "Being a discretionary remedy, there is also ample authority that a party who has misconducted himself in a manner not acceptable to a court of equity will be denied the remedy. See Kenya Hotels Limited b Kenya Commercial Bank & Another [2004] eKLR".

5. I have carefully considered the record, the rival affidavits and the submissions by counsel. It is evident that both counsel put great effort in their submissions.

6. Two issues stand for determination – whether the applicant has complied with the conditions pre requisite so eloquently set out in the submissions above to persuade this court to grant the orders sought – leave to file appeal out of time, stay of execution pending that appeal.

7. Order 42 Rule 6 speaks for itself – that the three requisite requirements walk hand in hand. That is the firm rule of procedure. Nevertheless, boundless times, Courts have where the interests of justice call for it, allowed the application for stay of execution by finding that an applicant has complied to some great extent with requisites but also balancing the rights of the appellant to an appeal and those of the respondent to the fruits of their judgment.

8. Nevertheless, in this case I have to agree with the respondent the delay in filing the appeal has not been explained. The applicant, other than laying blame on the trial court for actions which in my view were within the rules of procedure, the applicant does not see his failures – and that in my view blinded him from giving an explanation especially for the delay in filing the appeal in time. Without an explanation even a delay of one day can look bad enough to warrant denial of the extension of time.

9. In this case the applicant had time to file an application for stay in the lower court but for reasons not given never used that time to file the appeal.

10. The factual misconduct of the applicant as set out in the replying affidavit and in supporting the submissions by the respondent has not been controverted and remains the factual back ground to this application – that there is no good reason for the failure on the part of the applicant to file the appeal in time. That misconduct and the absence of explanation does not

allow this court to exercise its discretion in the favour of the appellant, or lay any foundation for the exercise of the court's inherent power.

11. Ultimately the application for leave, and the consequent stay of execution is untenable and the same must fail.

12. Both prayers are dismissed with costs to the respondent.

DATED AND SIGNED AND DELIVERED THIS 30TH MAY 2024

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. MUMBUA T. MATHEKA

JUDGE

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA