



**Kenia Rafikis Limited v Kawa Paradise Limited (Miscellaneous Civil Application E011 of 2022) [2023] KEELC 17619 (KLR) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 17619 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
MISCELLANEOUS CIVIL APPLICATION E011 OF 2022**

**AE DENA, J**

**FEBRUARY 27, 2023**

**BETWEEN**

**KENIA RAFIKIS LIMITED ..... APPLICANT**

**AND**

**KAWA PARADISE LIMITED ..... RESPONDENT**

**RULING**

**The Application**

1. The application the subject of this ruling is dated 12/07/22 and seeks the following prayers;
  1. Spent
  2. That the firm of P L Wasilwa and Company Advocates be granted leave to come on record for the Applicant.
  3. That the honorable court be pleased to issue an order of stay of execution of the judgment delivered by Hon. P.M. Wambugu Principal Magistrate on the 31<sup>st</sup> day of May 2019 in CMCC No. 1 14 of 2015 *Kenya Rafikis Limited v Kawa Paradise Limited (Kwale)* and any other consequential orders pending the hearing and determination of this application.
  4. That this honourable court be pleased to enlarge time and grant leave to the applicant to file an appeal out of time.
  5. That upon grant of order 4 above herein the honorable court be pleased to grant an order of stay of execution of the judgment delivered by Hon PM Wambugu Principal Magistrate on the 31<sup>st</sup> day of May 2019 in CMCC No 114 of 2015 *Kenya Rafikis Limited v Kawa Paradise* and other consequential orders pending the hearing and determination of the appeal.
  6. That the costs of this application be provided for.



2. The application is supported by an affidavit sworn by Bianca Beyer a director of the Applicant company. It is averred that on the 6<sup>th</sup> day of July 2015 the deponent instructed the firm of L.A. Oketch and Company advocates to institute Civil Suit No. 114 of 20i5 (Kwale) *Kenia Rafkhis Limited v Kawa Paradise Limited* and subsequently instructed the firm of Lawrence Obonyo and Legal Associates to take over the matter from L.A. Oketch and Company advocates.
3. It is averred that judgment in the said matter was delivered on the 31<sup>st</sup> May 2019 when the deponent was away in Germany and she was neither aware nor informed by her advocate the same had been delivered. That she became aware in November 2020 through one Birgit Rehfeld, a common friend between the directors of the respondent company and herself. That Brigit informed her that the directors of the respondent company had told her that the case was over and she had lost. That on inquiry from her advocate, the said advocate had no knowledge of any determination on the matter and who promised follow up. That subsequently all her attempts to follow up with her advocate for an update were futile.
4. It is deponed that she visited the court registry and was advised to follow up with her advocate on the status of the file. A demand was made to allow her peruse the file but she was informed that the file could not be traced and the same time had not been uploaded on the system. She was requested to give them time until January 2021 to try and locate the file. That the applicant decided to engage another lawyer to assist her in tracing the file and who confirmed that she had lost the case. That her then advocate on record was present during the delivery of the judgement but failed to inform her about the same. It is averred that the time to file the appeal had since lapsed. The applicant prays that she be allowed to file the appeal out of time as the intended appeal has a high chance of success. The delay in filing the appeal was not deliberate.

## **Response**

5. The Respondent raised the following grounds of opposition; -
  1. That the Application is frivolous and an abuse of the process of this Honourable Court.
  2. That the Application is bad in law, incompetent and fatally defective,
  3. That the Applicant seeks to benefit from its own acts of omission or commission.
  4. That the Application is Prejudicial to the Respondent as it seeks to deny the Respondent it's constitutionally granted and express rights to have matters concerning it determined and concluded expeditiously without undue delay.
  5. That the Application is filed inordinately late and is an attempt to deny the Respondent the fruits of its judgment.
  6. That the Applicant has slept on its rights, is indolent and is guilty of laches.
  7. That the delay is prolonged and inexcusable, no sufficient cause has been demonstrated to explain the more than three (3) years delay in seeking the Court's discretionary powers.
  8. That the Substratum of the Appeal no longer exists as the Suit Property is no longer owned/ in possession, control or registered in the Respondent's name. Equity does not act in vain.
  9. That the grounds stated in the Application do not meet the stringent conditions or threshold granted under Order 9 Rule 9 of the *Civil Procedure Rules* for a party seeking the discretionary exercise of the Court, for leave to come on record for the Applicant after Judgment,



10. That the Application as drawn offends the mandatory provisions of Order 42 Rule land 2 of the *Civil Procedure Rules* read with Section 65 (1) of the [Civil Procedure Act](#).
11. That the grounds stated in the Notice of Motion Application Hearing do not meet the stringent conditions or threshold for the exercise of the Court's discretionary powers as provided under Order 42 Rule 6 (2) of the *Civil Procedure Rules* and Section 79G of the [Civil Procedure Act](#) for stay execution and leave for enlargement of time to file an appeal out of time.
12. That the Application is unmeritorious. No sufficient grounds and reasons have been proffered, upon which the Orders prayed for can be granted.

### **Submissions**

The application was disposed of by way of written submissions.

### **Applicant's submissions**

6. It is submitted that pursuant to the provisions of section 95 of the [Civil Procedure Act](#) the power to enlarge and/or extend time within which to file an appeal is a purely a discretion of the court. That the judgement in this matter was delivered on 31/5/2019 and the instant application filed in July 2022. That the delay to file the application was occasioned by the failure of the advocate on record then to inform the Applicant of the judgement. That the mistake of counsel should not be visited upon the client. Several court decisions were cited in this regard. The Applicant urges the court not to deny it the right to be heard on appeal and defend its property on account of its previous Advocate. That its draft memo of appeal has high chance of success and should be allowed to exercise its right to be heard and defend its property as guaranteed under [the constitution](#) by granting leave to appeal out of time. It is stated there will be prejudice to the Respondent if leave is granted. The court is urged to allow the application as prayed in the interest of justice and fairness.

### **Respondent's submissions**

7. The Respondent's filed their submissions in support of the grounds of opposition on 27/10/2022. It is submitted that the application herein is frivolous and an abuse of the court process. That the judgement by the court was delivered on 31/5/2019 in the presence of counsel for the Applicant who even made an oral application for stay of execution and the court ordered that a formal application be filed.
8. It is submitted that the application is bad in law, incompetent and fatally defective. That no memorandum of appeal had been there was no basis upon which the court can extend time. The discretion of the court cannot be invoked on nothing. Further that no order or certificate of delay has been retrieved in this matter. That the applicant has further not applied or retrieved the decree against which he seeks to enlarge time. That no evidence has been tendered giving plausible explanation and sufficient cause to warrant enlargement of time to file the appeal. It is also stated that the delay in filing the application was inordinately long. That the court will not assist an applicant who is indolent as equity aids the vigilant not the indolent. Several decisions were supplied in support of the Respondents submissions. The court is asked to dismiss the application.

### **Determination**

9. I have considered the application, the affidavit in support of the same, the grounds of opposition and the submissions by both parties as well as the authorities cited by counsel.



10. The application for leave for the Firm of P.M. Wasilwa to come on record has been vigorously opposed by Counsel for the Respondent for failure to serve the advocate previously on record. In my view this is one of those circumstances the court can close its eyes to technicalities and focus on the merits. It is four years since judgement was delivered and I see no prejudice that shall be suffered by the grant of this leave for the firm to come on record and I hereby grant the same.
11. The main orders sought is to issue and order of stay against the judgement of P.M. Wambugu in CMCC No. 114 of 2015 delivered on 31/05/2019. In this regard the court has been moved under the provisions of article 159 (2) of *the Constitution* and Sections 1A, 1B, 3A of the *Civil Procedure Act*. However, the jurisdiction of the High Court to grant stay of execution pending appeal is provided under the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, the relevant part of which states as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) 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.

12. From the above the grant of the orders are discretionary but the same is guided. The Court of Appeal in *Vishram Ravji Halai v Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, had this to say; -

‘whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 (sic) rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.’

From the Rules the application ought to be made without unreasonable delay

13. I will first determine whether the application has been brought within reasonable time. The present application is filed before court in July 2022 whereas judgement in the matter was entered on 31/5/2019. This is a period of at least over three years. The Respondent is of the view that this delay is unreasonable. The applicant states that she was not aware judgment in the matter had been delivered by the court as she was not in the jurisdiction of the court and was only informed of the same by a common friend with the Respondent. The Applicant has not demonstrated the efforts she made in pursuing



the matter while she was away from jurisdiction and had she followed up maybe the application would have been filed albeit late but within reasonable time. The delay herein is clearly not only unreasonable but inordinate. See *Nilan v Patel & Others* (1969) EA cited by Lenaola J in *Dickson Muriti Kimonde v Kenya Commercial Bank Ltd.* (2006) eKLR where a delay of one year in prosecuting a case was found inexcusable. The court held that an indolent party must reckon with consequence of inaction.

14. On sufficient cause, the same reasons are given as stated above. From the court record, it is evident that the Applicant was represented in the suit further that her counsel on record at that time was present in court. The applicant cannot state that she was not aware of the matter because she participated in the proceedings. The basis of the application seemingly is on the mistake and negligence of previous counsel acting for the Applicant. I have considered the reasons given and it is my view that in as much as a mistake of counsel should not be visited a client, it is also very important for litigants should be vigilant in pursuing their matters. The mistake of counsel as alleged is not evident as the record bears the evidence that counsel was present before court. In *Rukenya Buuri v Marimi Minyora and 2 others* (2018) eKLR the court held that where a party has not been a diligent litigant must be diligent enough to follow up how his case is being handled by his advocate. The court observed in that case that the plaintiff had failed in his duty to give his advocate proper instructions. The upshot is sufficient cause has not been given as to why the stay of execution orders should be granted.
15. On the requirement to demonstrate substantial loss, it is not enough for the Applicant to state she will suffer substantial lose, the same ought to be proved. The court in Bungoma Ha Misc App No. 42 of 2011 *James Wangalwa and another v Agness Naliaka Cheseto* discussed what substantial loss entails as follows;

“the application must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very the very essential care of the Applicant as the successful party in the appeal. This is what substantial loss would entail”
16. The Applicant herein states that substantial loss will be suffered however no evidence has been tendered to show the nature of loss that the Applicant stands to suffer should the order of stay be denied.
17. It is also noteworthy that the Applicant has not made any offer for security for costs. The said issue has not been adequately addressed. No basis has been laid to show that the Applicant is keen on making any deposit for security for costs.
18. The record discloses the fact that no notice of appeal; has been filed to demonstrate the strength of the intended appeal and whether the same is arguable.
19. The upshot of the foregoing applicant has not tendered enough evidence to demonstrate the necessity for grant of the orders sought. The court finds that the Applicant has not met the conditions set out under order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules*.
20. In view of the foregoing the other prayers in the application automatically fail except the orders on leave. The substantive application lacks merit and it is hereby dismissed with costs to the Respondent. It is so ordered.

**DELIVERED AND DATED AT KWALE THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2023**

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:



Mr. Wasilwa for the Applicants

Ms. Chege holding the brief of Mr. Kinyanjui for the Respondents

Mr. Disiii- Court Assistant.

