



REPUBLIC OF KENYA



**Chame v Adongo & another; Pioneer General Insurance Ltd & 2 others (Interested Parties)  
(Miscellaneous Civil Case E008 of 2023) [2024] KEHC 827 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 827 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
MISCELLANEOUS CIVIL CASE E008 OF 2023**

**JN NJAGI, J**

**JANUARY 31, 2024**

**BETWEEN**

**KASA HAIGE CHAME ..... APPELLANT**

**AND**

**ESTHER ADONGO ..... 1<sup>ST</sup> RESPONDENT**

**FREDRICK NJERU NDUKU ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**PIONEER GENERAL INSURANCE LTD ..... INTERESTED PARTY**

**OFFICE OF THE ATTORNEY GENERAL ..... INTERESTED PARTY**

**NATIONAL ADMINISTRATION POLICE ..... INTERESTED PARTY**

**RULING**

1. The Applicant herein has filed an application dated 20<sup>th</sup> December 2023 seeking for orders that:
  - (1) Spent
  - (2) Spent
  - (3) Spent
  - (4) That this Honourable court be pleased to grant leave to the Applicant to file his appeal (out of time) against the judgment in Marsabit CMCC No.E013 of 2022, Esther Adongo Wanyama v Fredrick Nduku & Kasa Haide Hame, and that the memorandum of appeal filed herein be deemed to have been properly filed.
  - (5) This Honourable court be pleased to grant stay of execution in Marsabit CMCC No.E013 of 2022 pending the hearing and final determination of the (proposed) appeal.



- (6) This Honourable court make such further/other orders it may deem just and expedient in the circumstances of this case.
- (7) Costs be in the cause.
2. The application was based on grounds on the face of the application and supported by the affidavit of the applicant. The applicant avers that the suit at the lower court was being handled by his insurers and that the advocate instructed by insurer did not inform him of the proceedings and the outcome. That he later on came to learn that the respondents had sued him and they had obtained judgment against him, by which time the right of appeal had lapsed. That there has not been delay in filing the application as he did so immediately he became aware of the judgment. That the respondents have proclaimed his property. Further that the applicant stands to suffer substantial loss and damage having believed that the subject matter of the suit was being or had been conclusively dealt with but auctioneers have obtained warrants of attachment against him.
  3. The Application was also based on the ground that the respondent shall not suffer any hardship or prejudice as she has received substantial payments from Ms Pioneer Insurance Co Ltd of Ksh.3,000,000/=.
  4. The applicant further contended that his right to be heard shall be rendered nugatory and academic in the event that stay orders are not granted.
  5. The respondents did not file any affidavit in opposition to the application but their advocates sought for the applicant to deposit the decretal sum in court if the application is to be allowed.
  6. The application was canvassed by way of oral submissions. The applicant submitted that the application was not opposed as there were no grounds filed in opposition to the application. That the applicant was not heard in the suit and they will be seeking to have the judgment set aside. That it will be unfair to condemn the applicant to deposit the decretal amount in court when he was not heard by the trial court. That he has no capacity and the means to deposit the decretal sum. That for the court to order so will lock him out of the case. Further that Order 42 of the *Civil Procedure Rules* does require for the decretal sum to be deposited in court. That there is property that has been proclaimed and the court can order the property not to be transferred. That the requirement to provide security should not lock out a party from a case.
  7. The respondents on the other hand submitted that there are 3 conditions set out under Order 42 Rule 6 of the *Civil Procedure Rules*. That the conditions are conjunctive and that being the case, the court cannot consider one condition and leave out the other conditions. It was submitted that all conditions have to be met.
  8. I have considered the grounds in support of the application and the oral submissions by the respective advocates for the parties. The issues for determination are whether the applications for stay of execution and for enlargement of time to file appeal out of time are merited.



## Enlargement of time

9. This court has wide discretion to enlarge time under Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules*, 2010. The same provide as follows:

### Section 95. Enlargement of time

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

### Power to enlarge time [Order 50, rule 6.]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

10. The Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & Others* [2014]eKLR set the following guidelines for consideration in an application for enlargement of time:

- “(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 discretion to extend, 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 Respondent if the extension is granted;
- (6) Whether the application has been brought without undue delay; and
- (7) .....
”

11. It is therefore incumbent in an application for enlargement of time for the court to consider whether the application has been made without undue delay, the explanation for the delay and whether there will be prejudice suffered by the respondent if the extension is granted.

12. In this case, the impugned judgment was delivered on 26<sup>th</sup> September 2023. The applicant was required to file an appeal within 30 days of the delivery of the judgment. He did not do so. The instant application was filed on 22<sup>nd</sup> November 2023. There has therefore been a delay of close to a month in filing the application. The applicant has explained the delay in that he was not aware that judgment had been adjudged against him. I do not think that a delay of one month can be said to be unreasonable



delay. I find the explanation for the delay to be reasonable and excusable. The application has thus been brought without undue delay.

13. On the question of prejudice, the respondents did not file an affidavit in opposition to the application. There is no evidence that the respondents will suffer any prejudice if the application for enlargement of time is allowed.
14. The applicant has an inherent right of appeal. This should not be denied unless there are good grounds. The application to file appeal out of time was not opposed. I therefore grant the application to file appeal out of time.

### **Stay of execution**

15. The application for stay of execution pending appeal is brought pursuant to the provisions of Order 42 Rule 6(2) of the [Civil Procedure Rules](#) which provides as follows:

- (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 Applicants 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 Applicants”.

16. An applicant for stay of execution pending appeal has to satisfy the conditions set out in Order 42 Rule 6(2) of the [Civil Procedure Rules](#), 2010. These are that:

- (1) The application was brought without unreasonable delay.
- (2) The applicant will suffer substantial loss unless the orders sought are granted.
- (3) The applicant has given security for due performance of the decree as may be binding on him.

17. As stated above, the judgment that gave rise to the instant application was delivered on 26<sup>th</sup> September 2023 and the instant application filed on 22<sup>nd</sup> November 2023. The applicant has explained the delay in that he was not aware that judgment had been adjudged against him. The delay has been satisfactory explained.

18. The applicant is further required to demonstrate that he will suffer substantial loss if the orders sought are not granted. In the case of [Samvir Trustee Limited vs. Guardian Bank Limited Nairobi](#) (Milimani) HCCC 795 of 1997, Warsame J.(as he then was) held as follows on the question of substantial loss:

For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...

19. In [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR, it was observed that for a party establish substantial loss he/she has to show:

“..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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has



to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

20. In *Kenya Shell Limited v Kibiru & another* (1986) KLR 410, Platt Ag. JA (as he then was) expressed himself as follows on this subject:

“It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

21. The issuance of orders for stay of execution by a court are meant to prevent an applicant from suffering substantial loss. If then a party does not show that he will suffer substantial loss, there would be reason of granting the application. All what the Applicant herein said on the issue is that he will suffer substantial loss because he believed that the subject matter of the suit had been dealt with by his then advocates. That statement, in my view, does not demonstrate the loss the applicant will suffer if stay is not granted. The fact that execution has commenced does not amount to substantial loss as was noted in the *James Wangalwa case* (supra), where the court stated that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

22. The applicant has therefore not demonstrated that he will suffer substantial loss if stay orders are not granted.
23. An applicant for stay of execution pending appeal is required to give security for due performance of the decree. This is meant to give the parties an equal footing so that the respondent has ready security to turn to in the event that the appeal is not successful.
24. The application herein was silent on the question of security. During submissions, counsel for the respondents asked the court to order that the applicant deposits the decretal sum in court if the court was inclined to allow the application for stay pending appeal. Counsel for the applicant responded that the applicant was not capable and had no means of raising the decretal sum. Counsel said that some vehicles for the applicant had been proclaimed. That the court could make an order for the said vehicles not to be transferred during the pendency of the appeal.
25. From the foregoing, it is clear that the applicant has not offered security for the due performance of the decree as required by Order 42 rule 6 of the *Civil Procedure Rules*, 2010. Whereas the applicant seems to own some motor vehicles, he has not offered them as security in court such as depositing their log books with the court. His advocate was instead asking the court to make some cumbersome orders for the vehicles not to be transferred during the pendency of the appeal without any suggestion as to how such orders can be implemented. In the final end, I find that the applicant is unwilling to deposit security. A party who is unwilling to deposit security for due performance of the decree does not deserve the discretion of the court to grant stay of execution pending appeal.



26. In view of the foregoing and considering that the Applicant has not demonstrated that he will suffer substantial loss if orders for stay of execution are not granted, I am inclined to reject the application for stay of execution pending appeal. I therefore make the following orders:

- (1) The Applicant is granted leave to file appeal out of time.
- (2) The Applicant to file the appeal within 14 days from the date of this ruling.
- (3) The prayers for stay of execution pending appeal are declined.
- (4) The counsel for the Respondents to have the costs for his appearance in court on the 14/12/2023.

**DELIVERED, DATED AND SIGNED AT MARSABIT THIS 31<sup>ST</sup> JANUARY 2024**

**J. N. NJAGI**

**JUDGE**

In the presence of:

N/A for Applicant

Mr. Opondo for Respondents

Parties Absent

Court Assistant – Jarso

30 days R/A.

