



**Matunda (Fruits) Bus Services Limited & another v Njeri (Miscellaneous Civil Application E145 of 2023) [2024] KEHC 826 (KLR) (Civ) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 826 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS CIVIL APPLICATION E145 OF 2023  
CW MEOLI, J  
JANUARY 31, 2024**

**BETWEEN**

**MATUNDA (FRUITS) BUS SERVICES LIMITED ..... 1<sup>ST</sup> APPLICANT**

**JAMES OKONGO MOTURI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**GIBBINS WANJIRU NJERI ..... RESPONDENT**

**RULING**

1. For determination is the motion dated 17.03.2023 by Matunda (Fruits) Bus Services Ltd and James Okongo Moturi (hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Applicant/Applicants) seeking inter alia that this court be pleased to grant the Applicants leave to appeal out of time the ruling delivered on 04.07.2022 in Nairobi Milimani CMCC No 3725 of 2020; and that the court be pleased to grant an order to stay of proceedings in Nairobi Milimani CMCC No 3725 of 2020 (hereafter lower court suit) pending hearing and determination of the intended appeal. The motion is expressed to be brought under Section 3A, 79G & 95 of the *Civil Procedure Act* (CPA), Order 22 Rule 22, Order 42 Rule 4, 6 & 7, Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* (CPR) and is premised on the grounds thereon as amplified in the supporting sworn by Anerita Salinder Gulenywa, counsel on record for the Applicants.
2. The gist of the affidavit is that the Applicants are dissatisfied and aggrieved by the decision of the lower court and have since resolved to appeal, however the time within which to file an appeal has lapsed. That unless the Applicants are granted leave to file their appeal out of time as prayed, they stand to suffer irreparable loss and damage. She further expresses apprehension that without an order of stay, Gibbins Wanjiru Njeri (hereafter the Respondent) will proceed to execute against the Applicants thereby rendering the motion moot.



3. The Respondent opposes the motion through a replying affidavit dated 10.05.2023. She views the motion as incompetent and an abuse of the court process because of the attendant inordinate delay. Contending further that the motion and intended appeal are part of a series of dilatory and vexatious tactics starting in the lower court. That the motion does not demonstrate any unique circumstance as would warrant the stay of proceedings, or how the appeal will be rendered nugatory if such stay is denied. Moreover, the Applicants have not demonstrated any likely prejudice to them that cannot be reasonably compensated by an award of costs. Regarding the Applicants' offer to provide a bank guarantee, the same is dismissed as premature as no judgment has been delivered by the trial court.
4. Directions were taken to dispose of the motion by way of written submissions. Despite the respective parties being accorded ample opportunity to file submissions, it was only the Respondent who filed his submissions.
5. Counsel for the Respondent after rehashing the history of the matter and reiterating the Respondent's affidavit material, highlighted the inordinate and unexplained delay in bringing this motion, as pointing to indolence on the part of the Applicants. Counsel anchored his submissions on the decisions in *County Executive of Kisumu v County Government of Kisumu & 8 others* Civil App. No 3 of 2016, *Nginyaga Kayole v Mailu Gideon*, Misc. App. No 401 of 2018 and *Union Insurance Co. of Kenya v Ramzan Abdul Dhanji* Civil Appl. No 179 of 1998 in urging the court to disallow the motion with costs.
6. The Court has considered the rival affidavit material and the Respondent's submissions. Firstly, as a preliminary observation, the so-called supporting affidavit sworn by counsel for the Applicants is a mere restatement of the prayers on the face of the motion. Second, the Applicants seek the stay of proceedings in the lower court pending the hearing and determination of the intended appeal. It is evident on a plain reading of Order 42 Rule 6(1) of the *CPR*, that an order to stay proceedings pending hearing and determination of an appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the *Civil Procedure Rules*.
7. It would seem therefore that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the *Civil Procedure Rules* must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the *Civil Procedure Rules*). Thus, where a party specifically seeks stay of proceedings pending hearing and determination of an appeal not yet filed, the court may be acting in vacuo by considering such prayer for stay of proceedings.
8. The Court of Appeal in *Abubaker Mohamed Al-Amin v Firdaus Siwa Somo* [2018] eKLR while citing with approval the decision of the High Court in *Rosalindi Wanjiku Macharia v James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased))* [2017] eKLR concurred and adopted the reasoning that stay of execution pending appeal must be preceded by the filing of an appeal. It is the court's reasoned opinion that this dictum applies mutatis mutandis to a prayer seeking stay of proceedings pending appeal. See also *Equity Bank v Westlink MBO Limited* [2013] eKLR and *Balozi Housing Co-operative Society Limited v Captain Francis E. K. Hinga* [2012] eKLR.
9. Order 42 Rule 1 of the *CPR* provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, an appeal is yet to be filed and therefore, there is no basis upon which this court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter. If the Applicants desired to seek an order to stay proceedings alongside the prayer for the late admission of their appeal, they ought to have first filed the memorandum of appeal in a proper appeal



and the relevant application. In the circumstances, the prayer seeking stay of proceedings in lower court suit pending hearing and determination of the intended appeal has no legal anchor and cannot be entertained.

10. Turning now to the prayer seeking leave to appeal the ruling delivered on 04.07.2022 in Nairobi Milimani CMCC No 3725 of 2020, the power of the Court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the [Civil Procedure Act](#). Section 79G of the [Civil Procedure Act](#) provides 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. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In [Tbuita Mwangi v Kenya Airways](#) [2003] eKLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the [Civil Procedure Act](#), reiterated its decision in [Mutiso v Mwangi](#) [1997] KLR 630 as follows:

“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 general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

12. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor. The Supreme Court in the case of [Nicholas Kiptoo Korir Arap Salat v IEBC and 7 others](#) [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any 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 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.



7. ....”

See also [County Executive of Kisumu v County Government of Kisumu & 8 others](#) [2017] eKLR.

13. At the outset it is pertinent to note that the Applicants’ affidavit is marked by a deficiency of facts. Nevertheless, what the court gathers from the Applicants’ bare affidavit and the replying affidavit, is that the lower court delivered a ruling on 04.07.2022 and aggrieved by the same, the Applicants desire to lodge an appeal. As recited elsewhere in this ruling, the Respondent’s affidavit material sets out in detail the pertinent events before the lower court, leading to the present motion. The deponent of the affidavit in support of the motion did not attempt to explain the delay in lodging the appeal and instant motion. Undisputedly, the impugned ruling having been delivered on 04.07.2022 the present motion was lodged on 20.03.2023, some eight (8) months later.
14. It is settled that the period of delay as well as explanation thereof are key considerations in an application of this nature. A party seeking extension of time must not be seen to presume on the court’s discretion. Here, the period of delay is inordinate, and the Applicants’ affidavit material attempts no explanation for it. The Court of Appeal in [Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 others](#) [2019] eKLR addressed itself on the question of delay as follows; -
- “The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable.....”
15. A motion of this nature principally stands or falls on the demonstration of “good and sufficient cause” by an applicant; it is what unlocks this court’s discretion. The court agrees with the Respondent that the Applicants have not demonstrated “good and sufficient cause”. Notably, the Applicants themselves did not deem it necessary to swear their own affidavit in support of the motion. It could well be that they are disinterested in the matter, and granting the prayers sought on their purported behalf might only work prejudice against the Respondents through delay.
16. While the court is alive to the emphasis in [Vishva Stone Suppliers Company Limited v RSR Stone \(2006\) Limited](#) [2020] eKLR concerning the importance of the right of appeal, the right is not absolute and must be balanced against the Respondent’s corresponding right to have the dispute determined expeditiously. In the circumstances, the court finds no merit whatsoever in the motion dated 17.03.2023. The motion is hereby dismissed with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Applicants: Ms. Gulenywa

For the Respondent: Ms. Wachuka

C/A: Carol

