



REPUBLIC OF KENYA



**Mokaya v Oyugi (Miscellaneous Case 346 of 2023)
[2024] KEHC 567 (KLR) (26 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 567 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CASE 346 OF 2023
SM MOHOCHI, J
JANUARY 26, 2024**

BETWEEN

GIDEON ONGWAYE MOKAYA APPLICANT

AND

STEPHEN OTIENO OYUGI RESPONDENT

RULING

Introduction

1. This is a notice of motion application dated October 9, 2023, brought pursuant to article 159 of the [Constitution of Kenya](#), orders 42 rule 6 (1), (2) and (7), 50 rule 6, 51 rule 1 of the [Civil Procedure Rules](#), sections 1A, 1B, 3A, 79G, and 95 of the [Civil Procedure Act](#), the Applicant is seeking the following reliefs:
 - i. Spent.
 - ii. This Honourable Court be pleased to grant the Applicant leave to appeal out of time in respect to the judgment/ decree delivered in Molo CMCC No. 46 of 2022 by Hon. D. Mossee (SRM).
 - iii. Spent.
 - iv. This Honourable Court, be pleased to grant an order of stay of execution of the judgment and/or the decree delivered on or about September 4, 2023 and all consequential orders arising therefrom pending the hearing and determination of the intended Appeal herein.
 - v. This Honourable Court be pleased to issue an Order for provision of a Bank Guarantee of the entire decretal sum awarded by the trial court of Kshs. 328,750/= only as security pending hearing and determination of the intended Appeal herein.



- vi. This Honourable Court be pleased to issue any other Order as it may deem just, appropriate and expedient in the interest of justice. and
 - vii. Costs of this application be provided for.
2. The Application is supported by the sworn affidavits of Ann Kagira, and is premised on the following twelve (12) grounds as follows;
- i. The judgment in Molo CMCC N0. 46 of 2022 was delivered vide a judgment dated 04/09/2023 in favour of the Plaintiff/ Respondent as against the Defendant/ Applicant in the following terms; liability 90% in favour of the Plaintiff/Respondent as against Defendant/ Applicant; and general damages of Kshs.350,000/= and special damages of Kshs. 13,750/=; costs of the suit and interest thereon were also awarded to the Plaintiff/ Respondent herein.
 - ii. That, the delay in filing the appeal was inadvertent and excusable due to delay in receiving instructions from our instructing clients..
 - iii. That, the time allowed to file an appeal has run out.
 - iv. That, the appeal has good chances of success.
 - v. That, the Applicant herein is apprehensive that the Respondent will Commence execution proceedings against him to his detriment.
 - vi. That, the Applicant stand to suffer substantial loss and damage if orders sought herein are not granted and further that the intended Appeal will be rendered nugatory if stay is not granted.
 - vii. That, this application is made timely and the Plaintiff/ Respondent will not be prejudiced in any way if the orders sought herein are granted as prayed.
 - viii. That, it is in the interest of Justice that the execution of the Judgment and/or decree delivered on or about 04/09/2023 herein be stayed to pave way for the Applicant to exercise his right of Appeal once leave to appeal out of time is granted.
 - ix. That, there will be no irreparable damage that will be occasioned to the Respondent herein if the orders sought herein are granted.
 - x. That, the judgment subject matter herein is substantial and should the execution process commence the Applicant stand to suffer irreparable loss and prejudice as his right of appeal will be curtailed; and the ability of the Respondent herein to refund the decretal amount is unknown.
 - xi. That, Applicant is willing and ready to furnish a bank guarantee for the entire decretal sum pending the hearing and determination of the intended Appeal; as a condition for allowing this application for leave to appeal out of time and stay of execution pending appeal.
 - xii. That, this Honourable Court has powers to grant the orders sought herein in the interest of justice and fairness.
3. This Court on the October 16, 2023 this Court certified the Application as urgent on the following terms;
- i. The Application is hereby certified as urgent and service of the same is dispensed with in the 1st instance.



- ii. That an Order of Temporary Stay of execution of Judgment/ Decree dated on or about the September 4, 2023 in Molo CMCC No 46 of 2022 is hereby issued, pending hearing and determination of this Application.
 - iii. The applicant shall deposit the entire Decretal amount in the Molo CMCC No 46 of 2022 in a joint interest-bearing bank account in the names of the counsels on record within the next 21 days from the date hereof.
 - iv. The Applicants shall serve the Application upon the Respondent within 7 days from today (not later than October 24, 2023).
 - v. The Respondent shall file his response within 14 days from today (Not later than November 1, 2023)
 - vi. Inter parte mention for further directions on the November 10, 2023.
 - vii. A default in compliance with Order 3 above, shall automatically vacate the temporary order of stay.
4. On the November 10, 2023 Ms. Gakira for the Applicant requested for Respondent through Mr. Maiyo conceded and the Court accordingly extended the temporary orders to the December 8, 2023.
 5. During the Mention of this matter on the December 8, 2023 none of the parties appeared and the Court accordingly vacated the temporary orders and reserved this ruling.
 6. Notwithstanding the failure and want, by the parties to comply with any of my directions herein, I am duty bound to nonetheless evaluate the Application and make my determination.
 7. The court of appeal in *Butt v Rent Restriction Tribunal* (1982) KLR 417 gave guidance on how a Court should exercise discretion and held that:
 - a. The power of the court to grant or release an application for stay of execution is a discretionary power.
 - b. The court in exercising its discretion whether to grant or refuse an application for stay will Consider the special circumstances of the case and unique requirements.
 - c. The court in exercising its powers under order XLI rule 4(2)(b) of Civil Procedure Rules can order security upon application by either party or on its own motion. Failure to put security for costs as awarded will cause the order for stay of execution to lapse".
 8. In the case of *Gianfranco Manenthi & another v. Africa Merchant Assurance Company Ltd* [2019] eKLR, the Court thus held that:-

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant



fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine

9. This Court is unpersuaded that, the three pre-conditions for grant of stay been demonstrated, the manifest disregard of Court directions failure to comply with conditions set is demonstrative of the Applicant undeserving of the interlocutory reliefs sought.

10. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. 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. In this particular instance no memorandum of appeal has been presented as filed out of time to enable the appropriate leave and extension of time, sought to be granted and what the Applicant has opted for, is to annex therewith a draft Memorandum of Appeal.

12. I associate with the reasoning of Emukule, J. in Gerald M’limbine v. Joseph Kangangi [2008] eKLR, where he 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 the court’s leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the statutory period.”

13. In the upshot the Court in exercise of its, discretion and in the interests of justice orders and directs as follows:

- a. The notice of motion application dated December 8, 2022 is hereby dismissed for want of merit.
- b. The Appellant shall file and serves a record of appeal and set it down for Admission, Directions and Hearing within Sixty (60) days from today.
- c. Costs shall be in the cause.

It is so Ordered.

SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 26TH JANUARY, 2024

MOHOCHI S.M

JUDGE

