



**Supercoach Safari Sacco Society & another v Maundu alias John Muli (Miscellaneous Application E057 of 2023) [2024] KEHC 476 (KLR) (26 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 476 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
MISCELLANEOUS APPLICATION E057 OF 2023  
SN MUTUKU, J  
JANUARY 26, 2024**

**BETWEEN**

**SUPERCOACH SAFARI SACCO SOCIETY ..... 1<sup>ST</sup> APPLICANT**

**BENARD AMEY OGERO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JAMES MUI MAUNDU ALIAS JOHN MULI ..... RESPONDENT**

**RULING**

1. The Applicants brought a Notice of Motion dated 18<sup>th</sup> May, 2023 under section 3A, 79G and 95 of the *Civil Procedure Act*, Order 22 rule 22, Order 42 Rules 6, Order 50 rule 6 and Order 51 rule 1 and 3 of the *Civil Procedure Rules* and all other enabling provisions of the law seeking the following orders:
  - i. Spent.
  - ii. That the Memorandum of Appeal be admitted as properly on record.
  - iii. That this Honourable Court be pleased to grant leave to the Applicants to appeal out of time against the judgement of Honourable Gatambia Ndugu (R.M) sitting at Loitoktok in CMCC E014 of 2021 delivered on 4<sup>th</sup> April, 2023.
  - iv. That this Honourable Court be pleased to grant stay of execution of the judgement and/or Decree issued by the Honourable Gatambia Ndugu (R.M) sitting at Loitoktok in CMCC E014 of 2021 delivered on 4<sup>th</sup> April, 2023 pending the hearing and determination of the application herein.
  - v. That this Honourable Court be pleased to grant a stay of execution of the judgement and/or issued by the Honourable Gatambia Ndugu (R.M) sitting at Loitoktok in CMCC E014 of 2021 delivered on 4<sup>th</sup> April, 2023 pending the hearing and determination of the intended appeal.



- vi. That the Appellant/Applicant is able and willing to provide security for the entire decretal sum in the form of Bank Guarantee to be issued by Family Bank Limited which is a reputable bank in Kenya.
  - vii. That the application be heard inter-partes on such date and time as this Honourable court may direct.
  - viii. That cost of this application abide the outcome of the Appeal.
  - ix. That this Honourable Court be pleased to issue any other order and/or direction it deems fit to grant in the circumstances.
2. The grounds in support of the Application are found on the face of it and in the supporting affidavit sworn by the 2<sup>nd</sup> Applicant in which he has deposed that the judgement was delivered on 4<sup>th</sup> April, 2023. That their lawyers tried to obtain a copy of the said judgement without success. That during this time the 30 days period to appeal had lapsed. That they therefore seek time to file an appeal out of time and state that the delay was not inordinate. It is their case that the judgement was entered for an amount of kshs. 851,150/-. That the said amount is too high for the injuries sustained.
  3. It is sated that applicants will suffer substantial loss if the orders sought are not granted as the Respondent would be in no position to refund the same if the appeal is successful. That the Respondent has not provided any documentary evidence of his financial standing. That there is a threat of execution by the Respondent and there is need for stay orders. That the Applicants insurer is ready, willing and able to provide security in form of a bank guarantee. It is their averment that unless stay is granted they are likely to suffer injustice and irreparable loss. That the Application has been made in good faith and will not occasion prejudice to the Respondent.
  4. The Respondent opposed the Application through a Replying Affidavit by stating that the application is an abuse of court process. That the Applicants claim that it took a long time to trace the judgement is a flimsy excuse. That the said application is made after an unreasonable delay; that the judgement was delivered and no orders for stay were applied for and therefore the application is an afterthought and that the Applicants have not demonstrated how they would suffer substantial loss as no execution process has been commenced.
  5. It is their case that the bank guarantee is not a proper form of security as banks in this country collapse all the time. That the applicants ought to give proper security in that they should deposit half the amount being Kshs. 425,000/- to be released to their advocates and the balance to be held in a joint interest account in the names of both advocates.

### **Submissions**

6. The Applicants filed their submissions dated 15<sup>th</sup> September, 2023. They argued that this court should grant them stay pending appeal as they have shown that they have an arguable appeal through their annexed Memorandum of Appeal. They relied on *Bake 'N' Bite (Nrb) Limited -Daniel Mutisya Mwalonzi* [2015] eKLR where the court held thus:

“ ....This court has pronounced itself in several decisions that under Order 42 Rule 6 (2) of the Civil Procedure Rules, the applicant in seeking orders of stay pending appeal from the subordinate court to the High Court, the applicant is not required to prove that they have an arguable appeal, unlike if it was an application before the Court of Appeal seeking stay of execution of decree of the High Court pending appeal to the Court of Appeal...”



7. They relied on Order 42 rule 6 of the *Civil Procedure Rules* on the requirements for grant of stay pending appeal and argued that the granting of stay is discretionary. They also cited Order 22 Rule 22(1) of the *Civil Procedure Rules* to support their arguments.
8. On whether they have satisfied the conditions to be met in granting stay of execution, they submitted that the Respondent has not disclosed his financial status. That it is unlikely that the Respondent would be able to refund the decretal sum if the appeal is successful. That the appeal shall be rendered nugatory and they are likely to suffer irreparable damage if the orders sought are not granted. They relied on *Edward Kamau & Another vs- Hannab Mukui & Another*[2015]eKLR.
9. They further argued that there was no inordinate delay in filing the Application. That their insurer is ready and willing to furnish security in form of a bank guarantee.
10. The Respondent filed his submissions dated 31<sup>st</sup> July, 2023 in which it is argued that the Applicants have not met the threshold for grant of stay orders as per Order 22 Rule 22 and Order 42 rule 6 of the *Civil Procedure Rules*. That the bank guarantee being offered by the Applicants as security is not proper. That there was inordinate delay in bringing the application as it was done after the lapse of the 45 days stay of execution. That no explainable excuse has been rendered for this delay.
11. They further argued that the appeal lacks merit as the Applicant did not present any contrary evidence before the trial court despite being aware of the same and the trial court pronouncing itself on the issue of liability and quantum. That it is therefore unfair and unjust for the indolence of the Applicants to be rewarded. That equity guides the vigilant and not the indolent. It is their case that the right of appeal must be balanced against an equally weighty right of the Respondents to enjoy the fruits of the judgement delivered in their favour. That there must be a just cause for depriving the Respondents of that right.

### **Determination**

12. I have considered the application and the affidavit in support as well as the Replying Affidavit in opposition. I have also considered the written submissions. Stay of execution pending an appeal is provided for under Order 42 of the *Civil Procedure Rules*. Order 42 Rule 6 (2) provides that:
  - 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.
13. The Applicant pleads substantial loss because the Respondent has not demonstrated that they have the capacity to refund the money paid to them should the appeal succeed. The applicants have also pleaded that they are able to comply with any order as to security of costs as they have secured a bank guarantee from Family Bank.
14. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, 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. 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 ... 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.”

15. I have noted that the Respondent has not responded to this issue by showing how they are likely to refund the amount of Kshs. 851,150/- should the appeal succeed. They have only addressed the issue of the appeal lacking merit and the issue of security.
16. The Applicants herein have attached a bank guarantee from family bank. The Respondent have stated that the same is not proper security and stated that in the alternative this court should order that half the decretal sum be deposited in their advocates account and the balance to be deposited in a joint interest account in the names of both advocates. The issue of form of security and what amounts to sufficient security is discretionary.
17. The Applicants in their application have stated that they be granted leave to appeal out of time. It is their case that they had challenges tracing a copy of the judgement for them to file the appeal. This excuse has however been opposed by the Respondent. The judgement was delivered on 4<sup>th</sup> April, 2023. The same was delivered in the presence of both counsel for the Applicants and Respondent. From the judgement copy the Honourable Magistrate granted 30 days stay of execution and noted that a certified copy of the judgement be delivered.
18. The Application herein was made on 18<sup>th</sup> May, 2023, the 30 days period therefore lapsed on 4<sup>th</sup> May, 2023. The delay was for about 14 days. Is this an inordinate delay? In *Simon Wachira Nyaga v Patrick Wamwirwa*, Kerugoya Civil Appeal No.211 of 2013[2018] eKLR the court referred to the Court of Appeal decision in *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014], eKLR where the Court of Appeal held: -

“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the appellant’s conduct from the time the appeal was filed up to the date the application for reinstatement was filed.....

We have to ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or the delay in filling the application for reinstatement constitute an excusable mistake or was it meant to deliberately delay the cause of justice..... Why didn’t she set the appeal down for hearing for almost 14 years”? The reasonable explanation would be that the appellant had been indolent and had slept on her rights. She was only awakened from her slumber by the dismissal of the appeal.”

19. From the above case law, the issue of inordinate delay depends on the circumstances of the case. From this instant suit the delay was for 14 days. In my view this delay is not inordinate.
20. I have addressed my mind to the issues raised in this matter and I am persuaded to allow the application, which I hereby do on the following terms:
  - i. That the Memorandum of Appeal be and is hereby admitted as properly on record upon payment of court fees.



- ii. That leave is hereby granted to the Applicants to file appeal out of time against the judgement of Honourable Gatambia Ndugu (R.M) sitting at Loitoktok in CMCC E014 of 2021 delivered on 4<sup>th</sup> April, 2023.
- iii. That stay of execution of the judgement and/or Decree issued by the Honourable Gatambia Ndugu (R.M) sitting at Loitoktok in CMCC E014 of 2021 delivered on 4<sup>th</sup> April, 2023 is hereby granted pending the hearing and determination of the appeal.
- iv. That the Appellant shall deposit the decretal amount in an joint interest earning account in both names of the counsel for the parties currently or record within 45 days failure to which the order for stay of execution shall lapse.
- v. That cost of this application shall abide the outcome of the Appeal.
- vi. That the Appellant shall file and serve the Record of Appeal within 60 days from today's date.

21. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 26<sup>TH</sup> JANUARY 2024.**

**S. N. MUTUKU**

**JUDGE**

