



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Nyoike (Civil Appeal 10 of 2023)
[2024] KEHC 1952 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1952 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 10 OF 2023
FN MUCHEMI, J
FEBRUARY 29, 2024**

BETWEEN

JUDY WAWIRA KAMAU APPELLANT

AND

HEZBON KAMANDE NYOIKE RESPONDENT

RULING

Brief Facts

1. The application dated 7th July 2023 seeks for orders of leave to file an appeal out of time against the judgment in Thika CMCC No. 674 of 2017 delivered on 24th April 2023. The applicant further seeks for orders of stay of execution in respect of the same judgment pending the hearing and determination of this appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 11th September 2023.

Applicant's Case

3. The applicant states that judgment in Thika CMCC No. 674 of 2017 was delivered on 24th April 2023 whereby the respondent was awarded Kshs. 2,000,000/= as general damages and Kshs. 62,500/- for special damages plus costs and interest. Being aggrieved by the decision, the appellant lodged the instant appeal formerly filed in Kiambu High court as HCCA No. E225 of 2023 and later transferred to this court where it was allocated a new number HCCA No.10 of 2023. The applicant contends that the failure to file the appeal within the stipulated time was not intentional but was occasioned by the delay to supply her with a copy of the judgment as the file was retained in the trial magistrate's chambers since 24th April 2023.
4. The applicant avers that the appeal is arguable and meritorious and that it has overwhelming chances of success. The applicant further avers that stay of execution orders granted in the matter lapsed. Unless



fresh orders of stay of execution are granted, the appeal will be rendered nugatory resulting in the applicant suffering irreparable loss and damage. The applicant is apprehensive that the respondent will execute the judgment against him which will render the intended appeal nugatory.

5. It is further stated that the application has been brought promptly and without unreasonable delay. The applicant further states that her insurance company, Directline Assurance Limited is willing and able to furnish the court with a bank guarantee from Family Bank Limited as security for performance of the decree.

The Respondent's Case

6. The respondents oppose the application on the premise that it is muddled up in form and substance, is a total abuse of the court process and ought to be dismissed with costs. The respondent states that he was present when the judgment was delivered online and M/s Kimondo Gachoka Advocates for the applicant were present in the virtual court. In any event, the respondent states that the trial magistrate stated that the judgment was available online.
7. The respondent avers that the delay is inexcusable and an attempt to deny him the fruits of the judgment. Furthermore, the respondent states that a delay of two and a half months cannot be said to be excusable and reasonable.

The Applicant's Submissions

8. The applicant relies on Section 3A of the [Civil Procedure Act](#) and the case of Wachira Karani vs Bildad Wachira (2016) eKLR and urges the court to exercise its discretionary powers and do justice between the parties by admitting the appeal and determining it on its merits to ensure that the ends of justice are met.
9. The applicant further relies on Section 95 of the [Civil Procedure Act](#) and the case of Bake 'n' Bite Limited vs Daniel Mutisya Mwalonzi [2015] eKLR and submits that the appeal is arguable as the award given by the trial court was not comparable in relation to the injuries suffered by the respondent.
10. Relying on Section 79G of the [Civil Procedure Act](#) and the case of Esther Wamaitha Njhia & 2 Others vs Safaricom Limited (2014) eKLR and argues that the delay in filing the appeal was occasioned by the fact that her advocates on record had a challenge in obtaining a copy of the judgment so as to advise her accordingly. The applicant further contends that by the time she gave instructions to her counsel on record to file an appeal, the time within the appeal could be filed lapsed. Thus, the applicant argues that she has demonstrated a good and sufficient cause for not filing the appeal on time and thus urges the court to enlarge time in her favour.
11. The applicant relies on Order 42 Rule 6(1) of the Civil Procedure Rules and the case of Tabro Transporters Ltd vs Absalom Dova Lumbasi (2012) eKLR and argues that she has satisfied the conditions set out for the grant of orders of stay of execution. Further that the respondent's means are unknown and it is unlikely that the respondent will be capable of refunding the decretal amount in the event her appeal succeeds. The applicant further submits that the respondent has not disclosed nor furnished the court with any documentary evidence to prove his financial standing. The applicant relies on the case of Edward Kamau & Another vs Hannah Mukui Gichuki & Another [2015] eKLR and submits that in the absence of an affidavit of means by the respondent, the applicant is apprehensive that he will be unable to refund the decretal amount. The applicant further states that she shifted the evidentiary burden to the respondent to show that he has the financial resources to satisfy the decretal amount but the respondent chose not to show that he has the financial resources to refund the decretal



- amount in the event that the appeal succeeds and therefore the court ought to allow the application for stay of execution.
12. The applicant submits that her memorandum of appeal should not be dismissed as she filed an application dated 7th September 2023 praying that the said memorandum filed out of time be deemed as properly filed. Thus, the applicant argues that there was no unreasonable delay in bringing the instant application. The applicant further states that she has a right to be heard under Articles 47, 50 and 159 of *the Constitution* and Section 4 of the Fair Administrative Action Act.
 13. The applicant submits that in line with the court's order of 12th July 2023, she has deposited security of Kenya Shillings Five Hundred and Fifty Eight Thousand, Two Hundred and Seventy Five (Kshs. 558,275/-) being half the decretal amount.

The Respondent's Submissions

14. The respondent submits that the application is an afterthought and a knee jerk reaction upon the applicant realizing the impending execution of the judgment. The respondent further submits that the applicant deliberately omitted to specify which date she finally managed to procure the impugned judgment. Furthermore, the applicant filed her memorandum of appeal on 3rd July 2023 and thus the applicant is asking the court to sanction the illegality committed by her by filing the appeal out of time by deeming it as duly filed within time. To support his contentions, the respondent relies on the case of Misc. Application No. E024 of 2021 Siaya, Stecol Corporation Ltd vs Susan Awuor M.
15. The respondent submits that the judgment was delivered online and the applicant's counsel was online in attendance. Further, the trial magistrate indicated that the said judgment was available online, which facts have not been denied by the applicant. The respondent argues that if the trial court did keep the court file in the magistrate's chambers for a duration of two and a half months as alleged by the applicant, the applicant did not demonstrate what efforts she made in having the file returned to the registry. The applicant did not attach any letter addressed to the Executive Officer seeking his intervention and assistance in having the file traced and brought back to the registry. Further the applicant did not obtain a certificate of delay nor did the applicant produce a receipt of payment for the copies of the ruling which would have supported her claim with the date on it showing that a certified copy of the ruling was promptly requested and paid for.
16. Relying on the case of Civil Appeal No. E068 of 2021 Nairobi Zaccheaus Omia vs Nicholas Kirangi, the respondent submits that leave to file the appeal out of time ought to be denied as the applicant has not shown any valid excuse for the delay and moreover the appeal is not meritorious.
17. In the event the court is inclined to grant the application, the respondent urges the court to find that a bank guarantee is not appropriate in the circumstances and proceed to issue other or further conditional orders of stay of execution as it may deem just and expedient. To support his contentions, the respondent relies on the case of Civil Appeal No. E002 of 2021 Garissa, Osman Godhana Wario vs JMN.

Issues for determination

18. The two main issues for determination herein are:-
 - a. Whether the court should exercise its discretion to grant the applicant leave to file her appeal out of time;
 - b. Whether the applicant has met the prerequisite for grant of stay of execution pending appeal.



The Law Whether the court should exercise its discretion to grant the applicant leave to file her appeal out of time;

19. Section 79G of the *Civil Procedure Act* states:-

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 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.

20. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicant must satisfy the court that that she has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

21. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs 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:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. 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;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.

22. Similarly in the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay,



the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

23. The applicant has faulted the trial court for the delay in providing a certified copy of the ruling which she needed to file her appeal. The court record shows that the judgment was delivered on 24th April 2023 in the presence of both advocates for the parties. The trial court on the same day granted 45 days stay of execution. The applicant filed the instant application on 10th July 2023 which is about 1 month and 10 days after the expiry of the requisite period allowed for filing an appeal. Upon further perusal of the court record, it is noted that although the applicant faults the trial court for delaying the supply of the proceedings appeal, she has not annexed any evidence to support the allegation. If indeed, the court file was in the magistrate’s chambers, the applicant has not presented any evidence from the court administrator to support the allegation of delay. The applicant has not shown any extra efforts she made to obtain said ruling from the court. A reminder to the Executive Officer or even the receipt for payment of the court fees for proceedings would show which date the applicant applied for a copy of the judgment and how she followed up. The applicant’s supporting affidavit does not state which date the applicant finally obtained a copy. It is not denied that the applicant’s counsel was present in the virtual court during delivery of judgment and as such, it cannot be said that the applicant and her advocate were not aware of the time within which the appeal ought to have been filed.
24. It is my considered view that although the delay of one month and ten days may not be inordinate, the applicant has not given any plausible explanation on the cause of that delay. Accordingly, I find that the applicant has not established to the satisfaction of the court extension of time should be granted.
25. I have further perused the grounds of appeal as set out in the Memorandum of Appeal and without delving into the merits of the appeal noted that the appeal does not raise any arguable grounds of appeal. Thus, it is evident that the chances of the appeal succeeding if the instant application is granted are minimal. This is another aspect that this court must consider in an application of this nature.

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

26. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
 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 orders set aside.
 2. No order for stay of execution shall be made under sub rule 1 unless:-
 - a. The Court is satisfied that substantial loss may result to the 1st 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.



27. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
28. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

“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.

29. The applicant in her affidavit, contends that she stands to suffer irreparably if the respondent levies execution against her. It is in her submissions that the applicant states that she stands to suffer irreparable damage as the respondent will not be financially able to repay back the decretal sum in the event the appeal succeeds.
30. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how failure to stop execution of judgement shall cause irreparable injury to her or rendering the appeal nugatory. Furthermore, the applicant cannot at submissions filing stage, bring up the issue of the respondent being unable financially to refund the decretal sum If it is paid to her upon concluding this application. The applicant ought to have raised that issue in her affidavit to give the respondent a chance to respond to it appropriately. It is therefore my considered view that the applicant has not demonstrated that she stands to suffer substantial loss.

Has the application has been made without unreasonable delay.

31. Judgment was delivered on 24th April 2023 and the applicant filed the instant application on 10th July 2023. It took the applicant two months and ten days from the time the expiry of the period for filing the appeal to the time this application was filed. In my view, this period is not inordinate and would work in favour of the applicant if the other conditions under Order 42 Rule 6 are satisfied. The application was filed timeously and I so find.

Security of costs.

32. The purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment



is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

33. Evidently, the issue of security is discretionary and it is upon the court to determine the same. I have perused the court record and noted that the court on 11/7/2023 granted stay of execution on condition that that the applicant deposit in court half the decretal sum within 30 days from the said date. The applicant made the deposit of Kshs. 558,275/- on 1st August 2023 thus complying with the orders of stay of execution as directed by the court.
34. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”
35. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue is whether there is just cause for depriving the respondent his right of enjoying his judgment. As I have already said, the grounds of appeal do not raise any arguable points of law.
36. The core element of granting stay of execution pending appeal is demonstration of substantial loss which the applicant has not shown. As such, I find that this his application has no merit and it is hereby dismissed with costs.
37. The costs shall abide in the appeal.
38. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 29TH DAY OF FEBRUARY 2024.

F. MUCHEMI

JUDGE

