



REPUBLIC OF KENYA



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**KCB Bank Kenya Ltd v Omonde t/a Dimonde Agencies Auctioneers (Civil Appeal E083 of 2023) [2024] KEHC 1740 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1740 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E083 OF 2023**

**DK KEMEL, J**

**FEBRUARY 22, 2024**

**BETWEEN**

**KCB BANK KENYA LTD ..... APPELLANT**

**AND**

**DICKSON OMONDE T/A DIMONDE AGENCIES  
AUCTIONEERS ..... RESPONDENT**

**RULING**

1. The Appellant/Applicant has filed two applications dated 10<sup>th</sup> August, 2023 and 28<sup>th</sup> August, 2023. The first application seeks the following reliefs: -
  - i. Spent
  - ii. Spent
  - iii. Spent
  - iv. That this honourable court may be pleased to issue an order of stay of execution of the ruling, order and/or decree delivered by the Honourable T. M Olando (PM) in CMCC Civil Miscellaneous Application No. E001,E004,E006,E007,E008,E009,E010,E011E012,E013,E014,E015,E016,E017,E018,E019,E020,E021,E022 and E056 OF 2023 ( Bungoma) being Dickson Omonde T/A Dimonde Agencies & Auctioneers -vs KCB Bank Kenya Limited & 8 Others on the 13<sup>th</sup> day of July, 2023 pending the hearing and determination of the applicant's appeal.
  - v. Spent
  - vi. Spent
  - vii. That the costs of this application be provided for.



2. The application is supported by the grounds set out on its face and by the supporting affidavit of Edward Siya, the applicant's recovery manager, Western Region. The Applicant's gravamen is inter alia; that Hon T. M Olando ( PM) delivered a ruling in CMCC civil Miscellaneous Applications Nos. E001,E004,E006,E007,E008,E009,E010, E011E012,E013,E014,E015,E016,E017,E018,E019,E020,E021,E022,E023,E024,E025,E026,E027,E027,E028,E029, and E056 OF 2023 ( Bungoma) being Dickson Omonde T/A Dimonde Agencies & Auctioneers -VS- KCB Bank Kenya Limited & Others ( hereinafter CMCC Civil Misc. No. E001 -E056 OF 2023 Bungoma ) in favour of the respondent; that the learned magistrate allowed the respondent's applications filed in the said matters and proceeded to assess and/or tax the respondent's Bills of Costs annexed to the said application as drawn; that the appellant applied for leave to appeal, as well as an order for stay of execution of the ruling for a period of 30 days to allow the applicant to lodge an appeal against decision and certified copies of the proceedings and the ruling; that the application was allowed; that the applicant has filed an appeal; that in view of foregoing unless the application for stay pending appeal is heard very urgently on a priority basis, the applicant is reasonably apprehensive that the respondent shall proceed to execute the order and or decree issued in CMCC CIVIL MISC. NO. E001 - EO56 of 2023 Bungoma to its detriment. This is especially in view of the fact that the 30 days stay of execution order issued on the 13<sup>th</sup> day of July, 2023 is set to lapse on the 12<sup>th</sup> day of August, 2023; that the applicant is reasonably apprehensive that if the assessed and/or taxed amount in CMCC civil Misc. No. E001 – E056 of 2023 Bungoma is paid over to the respondent the respondent would not be in a position to refund the same if the intended appeal is successful.; that if the assessed and /or taxed amount in CMCC civil Misc. No. E001 – E056 of 2023 Bungoma is paid over to the respondent the intended appeal will be rendered nugatory and the applicant will suffer substantial loss and damage; that the applicant has an arguable appeal with high chances of success; that the application ought to be granted in the interest of equity and justice.
3. The application was opposed by the Respondent who filed a replying affidavit sworn on 22<sup>nd</sup> day of August, 2023 wherein he averred inter alia; that upon the court pronouncing itself on his application for his fees on the 13.7.2023, the Applicant herein through its advocate sought for 30 days stay of execution from which they could file an appeal which the trial court granted; that he knows as a fact that notwithstanding the 30 days stay of execution, the applicants were supposed to have filed their appeal within 7 days i.e on or before 20<sup>th</sup> July, 2023; that unfortunately the applicant filed its Memorandum of Appeal on the 9<sup>th</sup> of August, 2023, thus 30 days from the date of judgment contrary to the provisions of Rule 55 ( 5) of the Auctioneers Rules 1997; that the applicant also never sought leave to appeal out of time as per the provisions of section 79C of the *Civil Procedure Act* 2010 and hence the purported appeal is a candidate for dismissal; that the applicant is not keen with its appeal but intends to ride on stay after another to deny the Respondent the fruits of the judgement; that the judgment of the trial court is now his property and a debt owing against the applicant which has not been paid to him; that the Applicant has a right of appeal but however the same has to be balanced with the award of the judgment to him as the cited amount therein is now his property which needs to be protected; that the appeal having been filed out of time without leave of the court, the chances of its success is minimal; that if this court is inclined to grant the applicant with stay as prayed in the application, then the applicant be ordered to deposit security for due performance of the decree.
4. The Applicant's second application is dated 28<sup>th</sup> August, 2023 seeking the following reliefs:
  - i. Spent
  - ii. Spent



- iii. That this court be pleased to issue an order that the time limited to lodging the appeal from the decision of Hon T. M Olando (Pm) delivered on 13.7.2023 and the filing of the Memorandum of Appeal be extended from 20.7.2023.
- iv. That this court be pleased to issue an order that the Memorandum of Appeal dated 9.8.2023 and filed on even date be deemed as duly filed and served out of time.
- v. That this court be pleased to issue an order that the Memorandum of Appeal dated 9.8.2023 and filed on even date be admitted on record out of time.
- vi. Spent
- vii. That the costs of the application be provided for.

5. The application is supported by the grounds set out on its face

And by the supporting affidavit of Edward Siya, the Applicant's recovery manager Western region sworn on even date. The Applicant's gravamen is inter alia; that the trial court allowed the Respondent's Bill of Costs in several cases taxed and or assessed as drawn; that the Applicant sought for leave to lodge an appeal as well as an order of stay of execution and further sought for copies of the proceedings and ruling; that upon receipt of instructions the Applicant filed a memorandum of appeal on 9.8.2023; that the applicant's Advocates inadvertently failed to file the appeal within the timelines stipulated under Rule 55(5) of the Auctioneers Rule 1997 for which the applicant sincerely apologizes to the court; that the delay was not deliberate; that the applicant has an arguable appeal with high chances of success; that it is in the interest of justice that the appellant's memorandum of appeal dated 9.8.2023 and filed on even date as properly filed and on record; that the Respondent will not suffer any prejudice if the orders sought are granted.

- 6. The application was strongly opposed by the Respondent who filed a replying affidavit sworn on 2.10.2023 wherein he averred inter alia; that the applicant ought to have filed its reference within 7 days as per the provisions of Rule 55(5) of the Auctioneers Rules 1997; that the applicant has come to court with unclean hands as it has filed a Memorandum of Appeal without leave of the court yet the time to lodge it had already elapsed; that the applicant cannot sneak in its appeal under the gates of justice and wants the court to sanitize it after being served with a notice of preliminary objection; that the court cannot sanction an illegality; that the applicant has not secured a certificate of delay from the court registry as it seems to blame it for the delay to lodge appeal in time.
- 7. The Respondent filed a notice of preliminary objection dated 22.8.2023 wherein it raised grounds inter alia; that the applicant's appeal is statutorily barred as it has been brought contrary to Rule 55(5) of the Auctioneers Rules 1997; that the appeal offends the provisions of section 79 G of the [Civil Procedure Act](#) for failure to seek leave to lodge appeal out of time; that the Memorandum of Appeal filed out of time without the leave of the court is incompetent and incurably defective; that the application is an abuse of the court process and should be dismissed with costs.
- 8. The applications were canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
- 9. I have given due consideration to the rival affidavits, preliminary objection and submissions presented. It is not in dispute that the Applicant failed to file its reference within the timelines provided by the Auctioneers Rules 1997. It is also not in dispute that the Applicant has filed its reference out of time without leave of the court as provided by section 79 G of the [Civil Procedure Act](#). The issues for determination are firstly, whether the preliminary objection has merit and whether the two applications have met the threshold for grant of the orders sought.



10. As regards the preliminary objection, it is the contention of the Respondent that the Applicant's appeal was filed out of time and without leave of the court contrary to procedure. According to the Respondent, the appeal ought to have been filed within seven days from the date of the impugned ruling by the taxing master. It was also the Respondent's contention that the Applicant should have filed a chamber summons but not a memorandum of appeal. Finally, it was contended that the Applicant's reliance on section 79 G of the Civil Procedure Act is misplaced since the same only applies to a party who intends to lodge an appeal but not one who has already filed one like the Applicant. It was urged that the memorandum of appeal should be struck out.
11. I have considered the preliminary objection. A preliminary objection was described in the case of *Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Co. Ltd* [1969] 1 EA 696 as one consisting of points of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary objection may dispose of the suit and that anything that purports to be a preliminary objection must not deal with disputed facts. It is noted that under Rule 55 of the Auctioneers Rules an appeal in the form of a reference should be filed within seven days of the decision of the registrar or magistrate. Again, under section 79 G of the Civil Procedure Act, 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. As the applicant is solely relying on the provisions of section 79 G of the Civil Procedure Act which behooves on it to render an explanation for the delay and which might require presentation of facts and evidence, then the preliminary objection raised will not dispose of the matter at that stage. The fact that the Applicant has a right to render an explanation for the delay to lodge appeal out of time and to present evidence, then the Respondent's reliance on the provisions of Rule 55 of the Auctioneers Rules 1997 fails to meet the test. I am satisfied that the preliminary objection would not dispose of the suit at that stage. It is common knowledge that the current jurisprudence is in tandem with the dictates of the constitution vide Article 159 (2) (d) which demands that justice should be administered without undue regard to procedural technicalities. Hence, the Appellant's conduct in filing a memorandum of appeal instead of a chamber summons is excusable in the circumstances. Consequently, I find the preliminary objection dated 22.8.2023 lacks merit.
12. As regards the application dated 10.8.2023, it is noted that the key prayer sought is for an order of stay of execution of decree pending the determination of the appeal. The guiding provisions of the law is found in Order 42 Rule 6 (2) of the Civil Procedure Rules which is as follows:

“No order of stay of execution shall be made under sub rule (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.”

The impugned order by the taxing master was made on 13.7.2023 and that the present application was filed on 10.8.2023 which is a period of less than thirty days from the date of the ruling. I find the period not to be unreasonably late in the circumstances.

On the aspect of substantial loss, the applicant maintained that it stands to suffer substantial loss if an order of stay of execution is not granted. It is noted that this is a money decree and ordinarily orders of stay cannot be granted as the only issue for consideration is whether the Respondent is a person of means and will be able to refund the monies in the event of success of the appeal. The Respondent in his replying affidavit did not come out clearly as to



whether he is a person of financial means and in a position to refund the monies in the event of success of the appeal herein. It is not in doubt that the sums involved in the 50 matters are colossal and thus tidy by any standards and that they can have a huge dent on the applicant's finances if the Respondent fails to refund the same in the event of success of the appeal and hence the Applicant stands to suffer undue prejudice and hardship if the stay is not granted as its appeal will be rendered nugatory in the end.

As regards the last condition namely the deposit of security, the Applicant has averred that it is ready and willing to offer security and or comply with any reasonable conditions to be imposed by this court for the due performance of the decree herein. Indeed, the Respondent in his replying affidavit urged the court to order the Applicant to deposit security for the due performance of the decree. I find an order that the Applicant deposits the decretal sums into a joint interest earning account in the names of the Advocates for the parties pending determination of the reference will take care of the parties' concerns.

The upshot of the foregoing observations is that the Applicant has satisfied the conditions meriting a grant for an order of stay of execution pending determination of the appeal (reference).

13. As regards the application dated 28.8.2023, the same basically seeks for the court to grant the Applicant leave to lodge its appeal out of time and or that the already filed Memorandum of Appeal be deemed as duly filed. As noted above, the memorandum of appeal was lodged on 9.8.2023 which was clearly outside the period provided for under Rule 55(5) of the Auctioneers Rules 1997 which provides for seven days from the decision of the registrar or magistrate. There was thus delay on the part of the Applicant. Both the Applicant and Respondent duly cited the provisions of section 79 of the Civil Procedure Act which provides that an appeal may be admitted out of time if an applicant satisfies the court that he had good and sufficient grounds cause for not filing the appeal in time. It was the view of the Respondent that the Applicant has made a fatal mistake in filing the appeal out of time without seeking the leave of the court as it cannot now seek to request this court to sanitize an illegality.
14. The principles to be considered by the court in exercising discretion whether or not to enlarge time were laid down by the Supreme Court in th case of Nicholas Kiptoo Arap Korir Salat v. IEBC and 7 Others [2014] eKLR as follows:
  - a. 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;
  - 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 to 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 respondents if the extension is granted;
  - f. Whether the application has been brought without undue delay; and
  - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.



The Applicant's explanation for the delay is that the court's civil registry delayed in furnishing it with the copy of the ruling in order for it to lodge appeal. The other reason is that there was delay in engaging with its Advocates over the appeal regarding all the 50 matters. The Respondent's counsel has urged this court to dismiss the explanation offered as the Applicant has confused the seven days period of appeal with a normal thirty days and further proceeding to lodge appeal out of time without seeking leave of the court. The Applicant has averred that the delay in filing the appeal within the timelines stipulated under Rule 55 of the Auctioneers Rules was an honest and inadvertent error for which it sincerely apologizes to the court for the same. The applicant now beseeches this court to validate the appeal that had been lodged out of time.

As the court's discretion is wide under section 3A and 79G of the *Civil Procedure Act*, the same can be invoked in the circumstances. I find the Respondent's discomfiture will be taken of by an award of costs. In any case, the Respondent has already indicated that he is willing to accommodate the Applicant if it deposits security for the due performance of the decree. It is my considered view that an appeal filed out of time can still be admitted as being properly on record once extension of time is granted upon the applicant rendering an explanation for the delay. It is not in dispute that the parties to dispute expect to be accorded an opportunity to ventilate their cases in court and hence the court ought to provide a conducive arena for that purpose by ensuring that each party has his day in court. In the present scenario, the applicant filed an appeal without seeking the leave of the court. I am inclined not to punish the applicant who has rendered an explanation and who is ready and willing to provide security for the due performance of the decree. I am guided by the decision of the Court of Appeal in the case of *Joseph Kiangoi V. Wachira Waruru & 2 Others* [2010] eKLR where it held as follows:

"The cure would come about because in the circumstances, justice is to be found in sustaining the appeal for it to be heard on merit instead of striking it out on a technicality. Indeed, in our view there cannot be a better case for the invocation of the overriding objective principle than this case. Courts should in our view lean more towards sustaining appeals rather than striking them out as far as practicable and fair. As a tool of justice, the overriding objective principle is both procedural and substantive."

15. Going by the above authority, it is my view that even though the Applicant did not comply with the provisions of Rule 55 of the Auctioneers Rules, the same did not cause a miscarriage of justice to the Respondent as he can comfortably be cushioned by an award of costs as well as a deposit of the decretal sums into a joint interest earning account in the names of the Advocates for both parties pending determination of the appeal. Consequently, I find merit in the applicant's application dated 28.8.2023.
16. In the result, it is my finding that the applications dated 10.8.2023 and 28.8.2023 have merit and are allowed in the following terms:
  - a. The Memorandum of Appeal dated 9.8.2023 and filed on even date be and is hereby admitted on record out of time as well as duly filed and served out of time.
  - b. An order of stay of execution of the ruling, order and or decree dated 13.7.2023 by Hon T.M Olando in Bungoma CM Civil Misc. Application numbers E001, E004, E005, E006, E007, E008, E009, E010, E011, E012, E013, E014, E015, E016, E017, E018, E019, E020, E021, E022, E022, E023, E024, E025, E026, E027, E028, E029, E030, E031, E032, E033, E034, E035, E036, E037, E038, E039, E040, E041, E042, E043, E044, E044, E045, E046, E047, E048, E049, E050, E051 and E056 all of 2023 pending the hearing and determination of the appeal upon the Applicant depositing the entire decretal sums into a joint interest earning account in the names of both Advocates within the next thirty (30) days from the date hereof failing which the stay shall lapse.



c. The costs shall abide in the appeal/reference.

**DATED AND DELIVERED AT BUNGOMA THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024**

**D.KEMEI**

**JUDGE**

In the presence of :

Miss Mechuma for Macharia for Appellant/Applicant

No appearance for Musundi Lukoye for Respondent

Kizito Court Assistant

