



Charles Kyalo Mailanga t/a Glorious Farm Feeds v KIP Plast Limited (Commercial Case E150 of 2023) [2024] KEHC 2982 (KLR) (Civ) (20 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2982 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

COMMERCIAL CASE E150 OF 2023

DKN MAGARE, J

MARCH 20, 2024

BETWEEN

CHARLES KYALO MAILANGA T/A GLORIOUS FARM FEEDS APPELLANT

AND

KIP PLAST LIMITED RESPONDENT

RULING

1. The matter is for ruling on an application for a stay pending Appeal. The appeal has been dancing in court since 31/7/2023. It was ordered to be placed before me during the service week. Parties wanted time to negotiate. As usual in these kinds of matters, I gave them a few minutes to do so. They were not committed to negotiations. I have always understood that the purpose of the case being filed is to be heard not to pack them in court.
2. The respondent filed a replying affidavit to the Application through a 21-paragraph replying affidavit. It is not desirable to have such a long affidavit for a simple application for a stay. At some stage, I was unable to know whether I was dealing with a replying affidavit or submissions.
3. The application was seeking to stay the decree arising from the Ruling of 28/4/2023. The decree was said to have been issued on 28/6/2023. The respondent filed humongous submissions, for the economy of space, I shall not repeat the same herein.
4. The Applicant field submissions dated 1/11/2023. The gravamen of their submissions was that the Appellant is not a legal entity. The judgment was against a nonexistent person. They admit that the Appeal is filed out of time but they are entitled to enlargement of time reliance was placed in the case



of [Nicholas Mututu Mwasuna v Patricia Mueni Kilonzo](#) [2022] eKLR where Justice G V Odunga stated as doth: -

“ 31. It therefore follows that parties are entitled to a notice of the date of delivery of judgement and where such notice is not given, that omission may well amount to a sufficient reason for the purposes of enlargement of time to appeal if the applicant moves the Court for regularisation of his position expeditiously. See *Kwach, JA in Zacky Hinga v Lawrence Nthiani Nzioki & Another* Civil Application No. Nai. 359 of 1996. In fact, the Court of Appeal held in *Ngoso General Contractors Ltd. v Jacob Gichunge* Civil Appeal No. 248 of 2001 [2005] 1 KLR 737 that:

“The failure by the Superior Court Judge in an application for extension of time to file an appeal, to consider, as a matter of law, whether the Appellant, who was admittedly absent when the Judgement was delivered, was served with notice of delivery of the Judgement was a misdirection...The law under Order 20 r 1 is explicit in terms and mandatory in tone that a Judgement which is not delivered ex tempore must be delivered on a subsequent date only upon notice being given to all parties or their advocates and where only the successful party in the Judgement had prior knowledge of the delivery of the Judgement and no apparent reason was advanced for the failure to serve or to attempt to serve the Appellant or his advocate, the Appellant’s right of appeal was grossly compromised...An order was made by the Magistrate granting a right of appeal within 28 days and directing the party in attendance to inform the other side does not cure the flagrant breach of the mandatory procedural rule which accords with fundamental rules of natural justice and the right to be heard which *the Constitution* safeguards.”

5. The foregoing decision is useful if we were considering an application to extend time. This is not the case. The Applicant is proceeding as if nothing happened and nothing needs to be done. The matter shall proceed as it is and not how it ought to be.
6. On stay the Applicant relied on the decision of [Pascal Otieno Amoke v Collins Omondi Omondi](#). [2022] eKLR.
7. It was the Appellant’s case that the Appeal raised triable issues. One of the issues related to cross-examination of the process server.

Analysis

8. Before the court makes a decision, it has to be satisfied that it has jurisdiction. In this case jurisdiction is conferred by section 79G OF the [Civil Procedure Act](#). The time for filing an Appeal is set out in section 79G of the [Civil Procedure Act](#) as doth: -

“79G. Time for filing appeals from subordinate courts 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.”

9. In *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, Justice Nyarangi JA, as he then was, stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.”

10. It therefore means that before jurisdiction is established, the court has no jurisdiction. This being an Appeal, the power to grant stay is enshrined in Order 42 rule 6, which provides as doth: -

“6. Stay in case of appeal [Order 42, rule 6.]

- (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 order set aside.
- (2) 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.



- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
 - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 - (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
11. An application for a stay must be predicated on the existence of an appeal. I do not agree with the Respondent that filing an application in the lower court, precludes the Applicant from filing another Application in this court. Order 42 Rule 6(1) of the Civil Procedure Rules deals with the issue.
 12. The court can also issue stay informally before an appeal is filed. It cannot however grant stay on basis of a nonexistent Appeal.
 13. However, there must be an Appeal. In this matter, the Appeal was dated 4/7/2023 and filed in July 2023. The appeal is from a decision made on 28/4/2023. The same ought to have been filed by 28/5/2023. This means the Appeal was filed out of time.
 14. There is no Application to extend the time within which to appeal. The court has not been moved in any way. There is no valid appeal before this court for the court grant stay of execution pending Appeal. The court has no jurisdiction to issue stay *in vacuo*. In the circumstances, the Application dated 4/7/2023 lacks merit and is consequently dismissed with costs.
 15. Having found that there is no valid Appeal, I proceed and strike out the appeal filed herein as the same was filed out of time without leave.
 16. The Appeal had not been admitted. Consequently, I shall not grant costs for the main Appeal

Determination.

17. The upshot of the foregoing, is that I make the following orders: -
 - a. the Application dated 3/7/2023 lacks merit and is consequently dismissed with costs of Ksh 25,000/= to the Respondent.
 - b. The Appeal having been filed out of time is struck out. The same had not been admitted, hence each party will bear their costs for the main Appeal.
 - c. The file is closed.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 20TH DAY OF MARCH, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE



JUDGE

In the presence of:

No appearance for the Appellant

Makura for the Respondent

Court Assistant – Kimoine

KIZITO MAGARE

JUDGE

