



**Njiwa Housing Coopertive Society Limited v Okwiri (Civil Appeal  
635 of 2022) [2024] KEHC 3003 (KLR) (Civ) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3003 (KLR)

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

**CIVIL**

**CIVIL APPEAL 635 OF 2022**

**JN NJAGI, J**

**MARCH 20, 2024**

**BETWEEN**

**NJIWA HOUSING COOPERTIVE SOCIETY LIMITED ..... APPELLANT**

**AND**

**BENSON OKWIRI ..... RESPONDENT**

**RULING**

1. The applicant herein has filed an application dated 23<sup>rd</sup> August 2022 seeking for the following orders: -
  1. Spent
  2. Spent
  3. Spent
  4. Spent
  5. That the Honourable Court be pleased to grant a stay of execution of the decree in Nairobi Co-operative Tribunal No. 309 of 2022 Benson Okwiri vs. Njiwa Co-operative Society Ltd pending the hearing and determination of this suit.
  6. That the Honourable Court be pleased to grant orders lifting the garnishee order/restriction/inhibition/ operation of the applicant's Co-operative Bank University Way branch account No. 01XXXX00 which has been garnished in execution of the decree by the respondent pending the hearing and determination of the suit
  7. That the proposed Appellant be granted leave to appeal out of time against the whole decision in Nairobi Co-operative Tribunal No. 309 of 2022 Benson Okwiri vs. Njiwa Co-operative Society Ltd pending the hearing and determination of this suit



8. Costs of this application be provided for.
2. The application is based on grounds on the face of the application and supported by the affidavit of the Chief Executive officer of the applicant, Elijah Muthuri Muriungi, sworn on 23<sup>rd</sup> August 2022.
3. The gist of the application is that the applicant was not served with summons to enter appearance or any pleadings and came to learn of the matter on 21<sup>st</sup> July 2022 when they were served with Notice of Entry of judgment dated 17<sup>th</sup> July 2022 claiming payment of a sum of Ksh.4,196,679.94. That thereafter on 30/7/2022, they were informed by their bank that the respondent had garnished their account stated above in execution of the said decree. That they filed an application with the Tribunal seeking that the ex parte judgment be set aside, stay of execution be granted and leave to defend the suit. The Tribunal declined to grant stay orders which act provoked the instant appeal.
4. The application was opposed by the respondent vide a replying affidavit sworn on 25<sup>th</sup> November 2022 in which he avers that the application does not meet the legal threshold for grant of the orders sought.
5. The application was canvassed by way of written submissions.

### **Applicant's submissions**

6. The applicant submitted that the judgment was obtained ex-parte and hence it was condemned unheard. Efforts to seek stay at the tribunal were not successful and hence the reason why he approached this Court.
7. The applicant relied in the case of KCB Bank Kenya Limited vs. Odidio Spark Limited (2021) eKLR to urge this court to grant the applicant an opportunity to be heard on merit.
8. The applicant submitted that the application has satisfied all the conditions as set out in Order 42 rule 6 of the Civil Procedure Rules for grant of stay execution pending appeal. Counsel relied in the authorities in Mohamed Alwy & another vs. En Group (k) International Limited (2002) and Tabiro Transporters Ltd vs, Absalom Dova Lumbasi (2012) eKLR to support this position.
9. The applicant submitted that it has shown sufficient cause to warrant grant of the orders sought and joins issues with the respondent's statement of claim filed at the Tribunal as per the annexed statement of defence EMM6.
10. The applicant submitted that it stands to suffer irreparable loss since its operations have now been paralyzed and is unable to meet its obligations including paying taxes, salaries and offering services to its other members. It was contended that no prejudice would be suffered as the subject matter of the suit being a Certificate of Title is in the respondent's name and he is still a member of the Sacco.
11. The applicant has submitted that the instant application was filed without delay. That the judgment of the Tribunal was entered on 17/2/2022 and that the applicant became aware of it on 17/6/2022. That they instructed their advocates who filed an application to set aside the ex parte judgment. However, that the Tribunal failed to issue any order staying the execution and/or lifting the garnishee orders leaving the applicant with no choice but to file the present application. That the same was filed on 12<sup>th</sup> August 2022 and therefore there was no delay in filing the application.
12. On security for due performance of the decree, the applicant submitted that this court on 2/9/2022 granted prayer No.3 on condition that the garnishee sums be preserved as the security in the meantime. That the condition is too hard since there is a title in the name of the respondent.



13. On leave to file an appeal out of time, the applicant submitted that the impugned judgment was entered on 17/2/2022 in his absence and was only made aware when served with notice of entry of judgment on 17/6/2022 when they were served with entry of ex parte judgment. That by that time the default period of filing an appeal had already lapsed and thus left with no choice but to file this application.
14. Counsel relied in the case *Cicilia Wanja Wamwira Kerugoya Civil Appeal No. 211 of 2013(2018) eKLR* to buttress its position that it did not occasion the delay.
15. It was submitted that extension of time to file an appeal is a matter of exercise of discretion by the court which discretion must be exercised judiciously. In support of this proposition, the applicant cited the case of *Kinyunjuri Muguta v Wotuku Muguta (2018) eKLR*. The applicant submitted that the respondent will not suffer any prejudice if the application is allowed. The applicant urged the court to allow the application.

### **Respondent's Submissions**

16. In response, the respondent submitted there has been an inordinate and inexcusable delay in seeking this court's intervention to admit the appeal more than 7 months after the delivery of the said judgment. That the applicant has always been fully aware of the proceedings before the tribunal but chose to ignore the same.
17. Further, that the applicant has not given reasonable/plausible explanation for the 7 months delay. That the reason given must be reasonable or satisfactory as required. Counsel relied in *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet (2018) eKLR*, *Kenya National Highway Authority vs. Cycad Properties Limited & 33 others (2021) eKLR* and *Patrick Wanyonyi Khaemba vs. Teachers Service Commission & 2 others (2019) eKLR* to buttress this position.
18. Counsel submitted that the intended appeal has no chances of success whatsoever as it relates to monies lawfully paid to the applicant to deliver specific identified parcels of land and failure by the applicant to avail the said parcels of land only dictate that it is fair and just that the monies paid by the respondent to the applicant be refunded.
19. It was contended that should the orders sought in this application be granted, they would have an effect of prolonging litigation which has spanned over a period of 4 years. Counsel urged that his client would suffer prejudice if the clock was rolled back. Reliance was placed in the case of *Regional Centre on Small Arms in the Great Lakes Region, the Horn of Africa and Boarding States (RECSA) vs. Marie Claire Bisamaza (2021) eKLR*.
20. It was submitted that the applicant had not met any of the requirements required for stay of execution pending appeal as there is no demonstration of any substantial loss that the applicant is likely to suffer if the orders sought are not granted; that there is unexplained delay in filing the application and the applicant has not pledged its willingness to deposit any form of security for due performance of the decree. The respondent prayed that the application be dismissed with costs.

### **Analysis and Determination**

21. I have given due consideration to the pleadings and submissions filed in this application. The main issue for determination is whether the application has any merit and therefore whether the orders sought should be granted. The application is in two limbs - leave to file appeal out of time and stay of execution pending appeal.



## Extension of time to file appeal

22. This court has wide discretion to enlarge time under Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules, 2010. The same provide as follows:

### Section 95. Enlargement of time

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

Power to enlarge time [Order 50, rule 6.]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

23. The factors that the court has to consider in deciding on whether or not to grant leave to file an appeal out of time are as was laid out in the case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi*, cited with approval by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR where it was held:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly) the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.”

13. In *First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* [2002] eKLR, the court set out factors to be considered in granting such an application as follows:

1. The explanation if any for the delay;
2. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
3. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favour of the Applicant.

24. The Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & & Others* [2014] eKLR set the following guidelines for consideration in an application for enlargement of time:

- “(1) 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;



- (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- (3) Whether the court should exercise discretion to extend, is a consideration to be made on a case to case basis;
- (4) Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court;
- (5) Whether there will be any prejudice suffered by the Respondent if the extension is granted;
- (6) Whether the application has been brought without undue delay; and
- (7) .....

25. It is therefore incumbent in an application for enlargement of time for the court to consider whether the application has been made without undue delay, the explanation for the delay and whether there will be prejudice suffered by the respondent if leave to file appeal out of time is granted.
26. The judgment that the applicant is seeking to appeal against was delivered on the 17/2/2022. The instant application was filed on the 23/8/2022. This is a delay of about 6 months. The question is whether the applicant has given satisfactory explanation for the delay.
27. The explanation given by the applicant for the delay is that the same was occasioned by failure of the respondent to serve them with summons to enter appearance and or demand notice. That the process of the Tribunal was served on persons who had no authority to accept service on their behalf.
28. I have considered the reason for the delay given by the applicant. The process server in his affidavit of service stated that the summons from the Tribunal and the Statement of Claim were served on personnel at the security desk at the building where the offices of the applicant are located. In my view, this is an issue that needs further interrogation by the court on service on the said people was proper service. The explanation given by the applicant for the delay is not far-fetched. The delay was not inordinate if it were true that they came to learn of the case on 17/6/2022 when they were served with entry of ex parte judgment. The application should be allowed on this ground.
29. The court in an application for extension of time is required to consider whether there is any prejudice to be occasioned to the respondent if the application is granted. I have gone through the replying affidavit of the respondent. The only prejudice the respondent alludes to is that he will be delayed in enjoying the fruits of his judgment if leave to file appeal out of time is granted. In my view such delay can be compensated by way of costs. The respondent has not shown that he will suffer prejudice in relation to the hearing of the appeal if the application is granted. Since there is no prejudice to the respondent, I find that this is a proper case for this court to exercise its discretion and extend time to file appeal out of time.

### **Stay of execution pending appeal**

30. An Applicant for stay of execution pending appeal has to satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. These are that:
  1. The application was brought without unreasonable delay.
  2. The Applicant will suffer substantial loss unless the orders sought are granted.



3. The Applicant has given security for due performance of the decree as may be binding on him.
31. The court has already dealt with the question of delay above and there is no need to repeat it again.
32. On the second condition, an applicant is required to demonstrate that it will suffer substantial loss if the orders sought are not granted. In the case of *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997*, Warsame J. (as he then was) held as follows on the question of substantial loss:
- For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...
33. In *Kenya Shell Limited v Kibiru & another (1986) KLR 410*, Platt Ag. JA (as he then was) expressed himself as follows on this subject:
- “It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.
34. The Applicant herein says that they are suffering substantial loss because their money is garnished and they are not able to meet their obligations. This, in my view, is not proof of substantial loss as execution is a lawful process. The applicant has not shown that it will suffer substantial loss if stay of execution is not granted.
35. The third condition for grant of stay of execution pending appeal is that the Applicant has to offer security for the due performance of the decree. This is meant to give the Respondent something to fall back to in the event that the appeal is not successful. In *Arun C. Sharm Vs. Ashana Raikundalia T/A/ Rairundalia & 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...”
36. The security offered by the Applicant must be sufficient. The court in the case of *Mwaura Karuga T/ a Limit Enterprises v Kenya Bus Services Ltd & 4 Others (2015) eKLR* stated as follows:
- ...The security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.



37. Though the applicant in this matter has not offered security for due performance of the decree, there is money that has been garnished that can act as security. I therefore find that there is sufficient security for due performance of the decree. The condition for security has been met.
38. In an application for stay of execution pending appeal, the court is required to balance the competing interests of the two parties where one party is exercising its undeniable right of appeal and the other which has a judgment in its favour and who should not be deprived the fruits of the judgment without just cause. This position was aptly articulated in the case of Kenya Commercial Bank Ltd –vs- Sun City Properties Ltd & 5 Others [2012] eKLR where it was held:
- “In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.
39. In the circumstances of this case, I am persuaded that I should allow the application for stay of execution so as to enable the Applicant to exercise its constitutional right of appeal even though the question of substantial loss has not been substantiated. The stay is on condition that the garnished money acts as security for due performance of the decree.
40. The upshot is that the application dated 23/8/2022 is allowed on the following terms:
1. The applicant to file and serve the intended appeal within 21 days from the date hereof.
  2. The garnished money in applicant’s Co-operative Bank University Way branch account No. 01XXXXX00 to act as security for due performance of the decree pending the hearing and determination of the intended appeal.
  3. The costs of the application to abide by the outcome of the intended appeal.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MARSABIT THIS 20<sup>TH</sup> DAY OF MARCH 2024.**

**J. N. NJAGI**

**JUDGE**

**In the presence of;**

Mr. Bariki HB for Mr. Kirimi for Applicant

Prof. Muma for Respondent (muted)

Court Assistant – Jarso

30 days R/A.

