



REPUBLIC OF KENYA



Taifa Savings & Credit Cooperative Society & another v Ndonga (Miscellaneous Civil Application E003 of 2022) [2024] KEHC 2801 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2801 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS CIVIL APPLICATION E003 OF 2022**

**MA ODERO, J
MARCH 20, 2024**

BETWEEN

TAIFA SAVINGS & CREDIT COOPERATIVE SOCIETY 1ST APPLICANT

SAMUEL NDERITU KABIRU 2ND APPLICANT

AND

PURITY NYAMBURA NDONGA RESPONDENT

RULING

1. Before this court for determination is the Notice of Motion application dated 10th February, 2022 by which the Intended Applicants Taifa Savings & Credit Cooperative Society Limited (1st Applicant) and Samuel Nderitu Kabiru (2nd applicant) seek the following orders
 - i. Spent
 - ii. That this Honourable Court be pleased to grant leave to the intended Appellants/Applicants to appeal out of time against the Ruling of the Senior Resident Magistrate Honourable F. Muguongo in the matter Nyeri CMCC 389 of 2019 delivered on 15th September 2021.
 - (iii) Spent
 - iv. That this Honourable court be pleased to set aside the exparte judgment delivered by the Honourable Trial court on the 26th May, 2021 by the Honourable F. Muguongo Senior Resident Magistrate in Nyeri CMCC 389 of 2019.
 - (v) That upon the Honourable court granting leave to the intended Appellant/Applicant to appeal out of time this Honourable court be pleased to grant stay of execution of the Judgment/Decree obtained in Nyeri CMCC 389 of 2019 and delivered on 26th May 2021 pending the hearing and determination of the intended appellants/applicants Appeal.



- (vi) Spent
- (vii) That the cost of the Application abide the outcome of the Appeal.
2. The application which was premised upon order 22 Rule 22, Order 2, Rule 4 and 6, Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010, Sections 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law was supported by the Affidavit of even date sworn by Martha Mugo an Advocate of the High Court of Kenya.
 3. The Respondent Purity Nyambura Ndonga opposed the application through the Replying Affidavit dated 17th March, 2022 sworn by Davidson Warutere Chegi also an Advocate of the High Court of Kenya.
 4. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated 27th June, 2022 whilst the Respondent relied upon their written submissions dated 13th March, 2023.
 5. The application arises from the Ex parte judgement delivered by the Honourable Trial Magistrate on 15th September, 2021 in favour of the Respondent in the amount of Kshs. 85,350/= plus costs and interest at court rates.
 6. Being dissatisfied with the said judgment the Applicant now wish to file and appeal on the basis that they were not served with any summons to enter appearance in the suit leading to their failure to participate in the same. Further the Applicants claim that they have been negotiating with the Respondent for her to attend a second medical examination as per Section 3A of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act 2013.
 7. The Applicants aver that the Respondent has been proceeding to execute the judgment with the warrants of Attachment dated 12th October 2021.
 8. In opposing the application the Respondent contents that the application had come late in the day. That the Applicants have been fully aware of the existence of this suit since the year 2019. That the intended appeal is devoid of merit and the Respondent is entitled to the fruits of her judgment.
 9. It is not for this court to determine the merits or otherwise the intended appeal. The duty of this court is to determine whether the prayer for leave to appeal out of time and the prayer for stay of execution are merited.
 10. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules 2010 which provides as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 appellant court to have such order 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 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.”

11. The first consideration is whether this application was filed in a timely Manner.

Section 79 G of the [Civil Procedure Act](#) provides as follows;-

“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.” (Own emphasis]

12. The impugned judgments was delivered on 15th September 2021. The current application was not filed until 10th February 2022 a full five (5) months after delivery of the ruling. The application was not in my view filed in a timely manner - it appears to be more of an afterthought.
13. Moreover the Applicant has not advanced any convincing and/or persuasive reason as to why they failed to file the appeal within the legal timelines. No ground have been advanced to persuade this court to execute its discretion in favour of the Applicant.
14. The next question is whether the Applicants are likely to suffer substantial loss if the orders prayed for are not granted. The onus lies upon the Applicant to demonstrate to the court the nature of this substantial loss. To merely allege substantial loss would not suffice.
15. In the case of [Century Oil Trading Company Limited v Kenya Shell Limited](#) (Milimani) HC Misc 1561 of 2007 the court stated as follows:-

“The word “Substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that... Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

16. On the whole I find no merit in this application. The same is hereby dismissed in its entirety.
17. Costs will be met by the Applicants.



DATED IN NYERI THIS 20TH DAY OF MARCH, 2024

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MAUREEN A. ODERO

JUDGE

