



Muli v Musyoki (Civil Appeal E021 of 2024) [2024] KEHC 3194 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3194 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL E021 OF 2024

FR OLEL, J

MARCH 19, 2024

BETWEEN

MICHEAL MULI APPELLANT

AND

NESTER MUSYOKI RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated 24th January 2024 brought pursuant to provisions of Section 3A, 79G and 95 of the *Civil Procedure Act*, Order 22, rule 22, Order 42 Rule 6, Order 50 rule 6 and Order 51 rules 1 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers (1) and (2) of the said application are basically spent and the main prayer sought in the said application are prayer's (3) & (4) that; they be granted leave to Appeal out of time as against the judgement of Hon Ole Keiwua Chief Magistrate dated 21st December 2023 in Kangundo CMCC No E228 of 2022 and further that pending hearing and determination of the Appeal , they be granted an order of stay of execution of the judgment/decree referred to above. The application is supported by the grounds on the face of the said application and the supporting affidavit of one; Joy Muthoka and Joel N Ngigi both dated 24th February 2024.
2. The applicant aver that judgement in the primary suit was delivered on 21st December 2023 in favour of the respondent for a sum of Kshs 713,000/= plus costs and interest. The advocate on record did inform the applicant's insurer on time, but it took a while to get a feedback/instruction given that it was festive season and most commercial offices closed for extended X-mas holidays. By the time instruction were given to file an appeal in late January 2024, time had lapsed and thus the need to seek leave to appeal out of time.
3. The application was filed in good faith, and the delay caused was not deliberate but due to inadvertence as explained above. The intended Appeal was not an afterthought and had overwhelming chances of success. If stay was not granted, there was likelihood of the Respondent proceeding to attaching his property which would render the Appeal filed to be rendered nugatory. The applicant further deposed



that he was willing and ready to abide by any reasonable conditions/orders as to security as directed by court.

4. This application is opposed by the Respondent, through his advocate, Kithome L Mutinda, who filed a Replying Affidavit dated 20th February 2024. She deposed that the said application was misconceived as the applicant was all along aware of the lower court decree and that the reasons advanced as to why there was a delay in filing the appeal were not plausible nor were they sufficient to allow the court to exercise its discretion in favour of the applicant. Secondly the applicant had not met the conditions for granting stay under Order 42 Rule 6(2)(b) of the Civil Procedure Rules, 2010 and was merely using court process to deny the respondent his right to enjoy the fruits of his judgment.
5. The respondent therefore urged the court not to grant the prayers sought. But in the event the court was inclined to do so, then the respondent prayed that half the decretal amount should be released to the respondent and half deposited in a joint interest earning account in the names of both advocates herein.

Analysis & Determination

6. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and discern that the only issues which arise for determination is whether time should be extended to allow the Appellants file their Appeal out of time and subsequently, if allowed, should this court grant an order of stay of execution of the Judgment/Decree dated 21st December 2023 issued in Kangundo CMCC No 228 of 2022.
7. Under Section 79G of the *civil procedure Act* a party is allowed to appeal against a decree/ruling within 30 days. But where there was a delay, the court could admit/allow the appeal to be filed out of time if the applicant satisfies the court that he/she had a good and sufficient cause for not filing the appeal in time. In the Supreme court citation of Nicholas Kiptoo arap Korir Salat Vs IEBC & 7 Others (2014) eKLR the following principles of extension of time was laid down;
 - 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 case by case basis;
 - d. Whether there is a reasonable explanation 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.
8. The court too could fall back on provisions of Section 1A, 1B & 3A which grants the court inherent powers to grant such orders as it may deem necessary and further enjoined court to determine disputes in a just manner while considering the lower rather than higher risk of injustice. In the citation of *Shabbir Ali Jusab Vs Anaar Osman Gamrai & another* (2013) eKLR it was held that; the court should focus on substantive justice and disregard procedural technicalities.



9. 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. An applicant must give court a reasonable explanation for the delay to the satisfaction of the court before the court can issue discretionary orders to his/her favour.
10. The explanation put forth explaining the delay are plausible as it is an undisputed fact that during festive seasons, especially X- mas most law firms and insurance firms slow down and/or close for charismas. Be that as it may the appellant too did not factor in that under provisions of Order 50 rule 4 of the [civil procedure rules](#), which provides that time stops to run from 21st December to 13th January the following year. Had they factored in this period, they would have realized that they do not need leave to appeal out of time as time to file the said appeal would have started to run from 14th January 2024.
11. With respect to orders of Stay of execution pending appeal, the is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant.(see *Butt Vs Rent Restriction Tribunal* (1982) KLR 417 and *James Wangalwa & Another Vs Agnes Nalika Chereto* (2012) eKLR).
12. The judgment appealed against was delivered on 21st December 2023. This Application and memorandum of Appeal herein was filed on 26th January 2024. Thus, it can be said that this appeal and application for stay of execution have been file timeously. Further leave to appeal having been granted herein, no delay can be so alleged.
13. On the likelihood of suffering substantial loss, it is sufficient if an applicant seeking a stay of execution demonstrated that he/she would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful. See G. N. Muema P/A (516) *Mt View Maternity & Nursing Home Vs Miriam Maalim Bisbar & Another* (2010) eKLR, *National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another* (2006) eKLR.
14. Guided by the above authorities and in the absence of the requisite proof from the Respondent that she is a person of means, I find that the Appellant have satisfied this court that he would suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.
15. On the security, the Appellants have indicated that they are ready and willing to abide by this courts orders as to security for due performance of the decree. The respondent has averred that liability was properly determined and if the appellant is to be granted stay of execution, then it would only be fair that they pay half the decretal sum and deposit the other half in a join interest earning account, held by both advocates' herein.
16. The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See *Attorney General Vs Halal Meat Produces Limited*



Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd Vs Kibiru & another* (Supreme); *Mukuma Vs Abuoga (1988) KLR 645*.

Disposition

17. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, I do order as follows;
 - a. Appellant/Applicant granted 14 days within which to file his Appeal.
 - b. The Appellant/Applicant do pay the respondent half the decretal sum and deposit the other half of the decretal sum in a joint interest earning account in the joint names of advocate for the appellant and advocates for the respondent at a reputable financial bank for the whole duration of this appeal.
 - c. This condition is to be met within 45 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
18. The costs of this Application will be in the cause.
19. It is so ordered.

RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 19TH DAY OF MARCH, 2024

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 19TH DAY OF MARCH, 2024

In the presence of: -

Ms Mutuku for Appellant

Ms Kithome for Respondent

Sam Court Assistant

