



REPUBLIC OF KENYA



**Seven L. General Trading Ltd & another v Karau (Miscellaneous Application
42 of 2024) [2024] KEHC 3979 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3979 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION 42 OF 2024**

**FR OLEL, J
APRIL 24, 2024**

BETWEEN

SEVEN L. GENERAL TRADING LTD 1ST APPLICANT

MIRIAM WANZA KASIM 2ND APPLICANT

AND

SIMON GITHUKU KARAU RESPONDENT

RULING

A. Introduction

1. The Application before this court is a notice of motion application filed on 16.02.2023 brought pursuant to the provisions of section 1A, 1B,3, 3A of the *Civil Procedure Act*, Order 21, rule 1(b), Order 22 rule 22, Order 40 rule 6, Order 51 rule 1 of the *Civil Procedure Rules* and Article 159 (2)(d) of *the Constitution* of Kenya. The Applicant seeks the following prayers, that;
 - a. Spent
 - b. spent
 - c. Leave be granted to the Applicant herein to lodge an appeal against the entire judgement and decree in Mavoko CMCC 585 of 2022 out of time.
 - d. This honourable court be pleased to stay execution of the decree in Mavoko CMCC 585 of 2022 pending the hearing and determination of the intended Appeal.
 - e. This Honourable court allow the Applicant to furnish the court with security in the form of a bank guarantee from the Family Bank.
 - f. The Application be heard inter parties on such date and time as this Honourable court may direct.



- g. The costs of the Application abide the outcome of the intended appeal.
- h. The honourable court be pleased to issue any other order and/ or direction it deem fit in the circumstances.
2. The Application is supported by the supporting affidavit of the 2nd Applicant dated 16.02.2024, wherein she deposed that judgment was entered as against them on 11.12. 2023. Liability was determined at 100% as against the Appellants and general damages assessed at Ksh.505,550/= . It was further deposed that being aggrieved by the said judgment, they had wished to challenge the same, but had delayed to do so due to the fact that the said judgment had been delivered during December festive season, when the court took leave and also by the unavailability of the judgement to enable the applicant make an informed decision on the grounds of Appeal of Appeal, they intend to raise. Upon receipt and review of the said judgment, the applicants had opted to Appeal and hence filed this Application.
3. The Applicant further averred that they stood the risk of suffering substantial loss, if leave to Appeal and stay of execution was not granted as prayed as it would expose them to execution proceedings to their loss and detriment. Finally, the applicant also deponed that they were ready and willing to provide a bank guarantee as security to secure their obligations under the decree and prayed that the orders sought be granted as no prejudice would be occasioned to the respondent.
4. This application is opposed by the respondent, who filed his replying affidavit dated 02.04.2024, wherein he did state that the applicant never adduced sufficient reason as to why they had failed to file the Appeal out of time and therefore had not satisfied the pre requisite condition to justify extension of time and/or being granted orders of stay pending Appeal. The respondent further averred that this application was filed as an afterthought, lacked merit and prayed that the same be dismissed with costs.

B. Analysis & Determination

5. I have carefully considered the Application and corresponding affidavits thereto on record.

Section 79G of the provides that:

“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.”

6. The principles of granting leave to file an appeal out of time were discussed by the Court of Appeal in the case of *Omar Shurie v Marian Rashe Yafar* (Civil Application No. 107 OF 2020) UR 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.”



7. Similarly, The Court of Appeal in the case of *Thuita Mwangi V Kenya Airways Ltd* [2003] eKLR discussed some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time, They include the following:
- i) The period of delay;
 - ii) The reason for the delay;
 - iii) The arguability of the appeal;
 - iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
 - v) The importance of compliance with time limits to the particular litigation or issue; and
 - vi) The effect if any on the administration of justice or public interest if any is involved.
8. The importance of giving a sufficient reason for the extension of time to appeal was discussed in the Court of Appeal case of *Susan Ogutu Oloo & 2 Others v Doris Odindo Omolo* (2019) eKLR where it was held:-
- “In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC (2014) eKLR Sup Ct Application No 16 of 2014*.
- The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted”.
9. From the record, the judgment appealed against was delivered on 11.12. 2023. The Application herein was filed on 19.02.2024, approximately two months later. I find that the delay in filing this application is not inordinate, and the reasons advanced, though week are plausible.
10. On the issue of arguability of the appeal, the applicant has annexed a draft memorandum of appeal indicating the issues they intend to take up on appeal. In the case of *Athuman Nusura Juma v Afwa Mobamed Ramadhan* [2016] eKLR the court held that
- “whether the intended appeal has merits or not is not an issue to be determined by a court when dealing with an application of this nature but by the court dealing with the merits of the appeal, that is why the requirement that the intended appeal be arguable is preferred with the word “possibly.”
11. The court cannot at this point determine whether the appeal will succeed or not but upon perusal of the memorandum of appeal, it does it raise issues that are open for determined on appeal. Lastly, The Respondent will not suffer any prejudice if leave to appeal is granted, which cannot be compensated by way of thrown away cost.
12. Stay of execution pending appeal 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 v Rent Restriction Tribunal* (1982) KLR 417 and *James Wangalwa & Another v Agnes Nalika Chereto* (2012) eKLR).

13. Having found that the delay was not inordinate. I move to the issue of the likelihood of suffering substantial loss. It was 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 v Miriam Maalim Bisbar & Another* (2010) eKLR , *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* (2006) eKLR.
14. Guided by the above authorities, I do find that the applicants have demonstrated that if the decretal amount is paid out, there is likelihood that, if they succeed in this Appeal, they may not recover the said amount from the respondent, who did not file any affidavit of means and thus will suffer irreparable loss and damage. On the security, the Appellants indicate that they are willing to furnish the court with a bank security from Family Bank.
15. In determining this ground, 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. In other words, the court should not only consider the interest of both parties. See;Kenya *Shell Ltd v Kibiru & another* (Supreme); *Mukuma v Abuoga* (1988) KLR 645.

Disposition

16. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, and since based on the grounds of appeal the Appellant is mainly challenging the quantum awarded, I do grant issue the following orders;
 - a. Leave is granted to the applicant to file appeal out of time against the judgment delivered in Mavoko CMCC 585 of 2022 and they are directed to file and serve the same within 14 days from the date of issuance of this order.
 - b. An order of stay of execution of the Judgment/decreed issued in Mavoko CMCC 585 of 2022 is hereby granted pending the hearing and determination of this appeal on condition that the applicants pay the respondent a sum of Ksh.252,775/= and provide a bank guarantee for the balance of the decretal amount being Kshs 252,775/=, which bank guarantee will be specific to this Appeal and shall be valid for the entire duration of the Appeal.
 - c. The appellant shall have 45 days within which to comply with order (b) above and In default, the orders staying execution of the decree issued in Mavoko CMCC No 585 OF 2022 shall lapse and the respondent shall be at liberty to execute.
 - d. The costs of this Application will be in the cause.
17. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF APRIL, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 24TH DAY OF APRIL, 2024.



In the presence of;

No appearance for Appellant

No appearance for Respondent

Sam Court Assistant

