



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Waititu v Company (Miscellaneous Application E341 of 2023)  
[2024] KEHC 4162 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4162 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION E341 OF 2023**

**HM NYAGA, J**

**APRIL 24, 2024**

**BETWEEN**

**TERESIA NJOKI WAITITU ..... APPELLANT**

**AND**

**BRITAM GENERAL INSURANCE COMPANY ..... RESPONDENT**

**RULING**

1. Before me is an Application dated 9<sup>th</sup> October, 2023 brought under Section 3, 3A, 95 & 79G of the [Civil Procedure Act](#) and Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules wherein the Applicant, Teresia Njoki Waititu seeks for orders THAT;
  - a. Spent
  - b. Spent
  - c. This Honourable Court be pleased to extend and/or enlarge time within which to file an appeal against the Judgement in NAKURU CMCC NO. 742 OF 2018: TERESIA NJOKI WAITITU VS BRITAM GENERAL INSURANCE COMPANY delivered by Honourable Orege K.I (PM) on 25<sup>th</sup> August, 2023.
  - d. Pending the hearing and determination of the intended appeal, this Honourable Court be pleased to stay execution of the Judgement delivered on 25<sup>th</sup> August, 2023 in NAKURU CMCC NO. 742 OF 2018: TERESIA NJOKI WAITITU VS BRITAM GENERAL INSURANCE COMPANY and all consequential orders against the Applicant.
  - e. Costs of this Application be provided for.



2. The Application is supported by the grounds set out on its face and the Supporting Affidavit of the applicant's Counsel sworn on the even date.
3. In a nutshell, Applicant's counsel states that the Judgement in the aforesaid matter was delivered on 25<sup>th</sup> August,2023 in absence of both parties and without prior notice, and that she found out that the same had been delivered on 5<sup>th</sup> October,2023 and upon perusing the judgement the Applicant was dissatisfied with it and by this time, the time within which to appeal had lapsed hence her prayer for extension of time to lodge an appeal.
4. She avers that the Applicant has an arguable appeal with high chances of success and that dismissal of her suit exposes her to imminent execution of the Judgement.
5. She deposes that unless stay is granted the execution of the judgement therein and all consequential orders, the intended appeal which has a very high chances of success will be rendered nugatory.
6. She avers that the Applicant is willing to abide by any reasonable condition that may be attached to the orders of stay that will be issued herein.
7. The Application is opposed. Paul Murimi Kiongo, the advocate for the respondent, swore a replying affidavit on 25<sup>th</sup> October, 2023 on behalf of the respondent.
8. He avers that the application is wholly incompetent and it is for striking out ex-debito justitiae.
9. He deposes that there is inordinate delay in filing this application.
10. He avers that the judgement of the lower court was slated for 18<sup>th</sup> August,2023 when the court was not sitting and the parties logged in on this date and were advised by the court assistant that the judgement will be delivered on 25<sup>th</sup> August,2023 and there was no indication by the court that the judgement would be delivered on notice.
11. That as such the Applicant was well aware of the judgement slated for 25<sup>th</sup> August,2023 and the contrary contention has no basis.
12. He deposes that the issue at hand is a contract of insurance between the Applicant and the respondent providing the respondent's obligation to a maximum of Kshs. 5,000,000.00 for any single claim, and in the suit before the lower court the applicant sought to have the respondent to satisfy a claim beyond a sum of Kshs.5million.
13. He thus asserts that the court cannot rewrite a contract for the parties and the suit before the lower court was a waste of precious judicial time so is the Application before the court.
14. He contends that there is no merit whatsoever on the proposed appeal and thus the application should fail.
15. He avers that the respondent would suffer irreparable prejudice if the application is allowed as the matter has been in court for over 11 years now and it is time the same comes to a close.
16. He contends that none of the requirement of order 42 rule 6 of the Civil Procedure Rules have been satisfied.
17. It is his deposition that only a positive order can be stayed as it is capable of execution but not a dismissal order.
18. He deposes that the respondent is a reputable insurance company, one of the biggest insurers in Kenya, and capable of repaying any sums to the Applicant if the Appeal was to succeed.



19. He avers that there is no appeal in this matter on the basis of which stay pending appeal can be granted.
20. He urges the court to dismiss the Application.
21. The Application was canvassed through written submissions. Both parties filed their respective submissions on 19<sup>th</sup> January,2024.

### **The Applicant's Submissions**

22. On whether the Applicant should be granted leave to appeal out of time, the Applicant's counsel made reference to the provisions of Section 79G of the *Civil Procedure Act* and on the length of delay, submitted that the time for filing an appeal had lapsed by 13 days.
23. In regards to reason for delay, the Counsel reiterated her averments in her Supporting Affidavit that the judgement was delivered on 25<sup>th</sup> August, 2023 in absence of both parties and without prior notice.
24. She disputed the Respondent's contention that parties logged in court on 18<sup>th</sup> August 2023 and were advised on the next court's date by the court assistant for reason that the matter herein did not have a date of 18<sup>th</sup> August, 2023 but rather 17<sup>th</sup> August 2023 and therefore there was no way the respondent could be present in court on the alleged date.
25. She submitted that failure to file intended appeal on time was occasioned by factors beyond their control. She relied on the case of Geoffrey Maina Njuguna vs Waweru Ndirangu [2022] eKLR for the proposition that a successful applicant is obligated to adduce material upon which the court should exercise its discretion and the case of Telkom Kenya Limited vs John Ochanda and 996 Others [2015] eKLR cited in the said case for the proposition that the Court has inherent jurisdiction to admit an appeal filed out of time, provided sufficient explanation is proffered for the cause of delay.
26. She posited that if at all the notice was issued, then the inadvertence and failure to note the same was on her part and such mistake should not be visited upon the innocent litigant.
27. On whether the Appeal is arguable, the Counsel for the Applicant submitted that the Applicant has demonstrated that she has plausible, conceivably and persuasive grounds of facts and law to overturn the original verdict as evidenced by the Draft Memorandum of Appeal.
28. To buttress her submissions, the counsel referred to the case of Housing Finance Company of Kenya vs Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR on what amounts to an arguable appeal.
29. With respect to whether orders for stay of execution pending appeal should issue, the Counsel cited the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, the cases of Halai & another vs Thornton & Turpin (1963) Ltd [1990] eKLR & Butt vs Rent Restriction Tribunal (1982) KLR 417 quoted in the case of Patrick Kithaka Borici & another vs Shadrack Nyaga Njeru[2019]eKLR on the applicable principles in deciding whether or not to grant stay of execution pending appeal.
30. On substantial loss, the counsel submitted that if execution of the judgement proceeds, then the subject matter of the intended appeal will be defeated. She contended that the judgement in Nakuru CMCC No.1082: Maseno University vs Teresia Njoki Waititu was issued against the respondent for a sum of Kshs. 4,211,478/= on 26<sup>th</sup> April,2017 which sum was within the policy limit however the respondent failed to pay on time and the same accrued interest to the tune of Kshs.7 Million. That consequently the respondent paid the sum of Kshs. 4,211,478/= leaving a balance of Kshs. 3,344,773/- being the accrued interest which the Applicant should not be made to pay. She posited that considering this colossal amount in issue the Applicant will suffer irreparable loss if execution ensues.



31. On unreasonable delay, the counsel submitted that on learning of the delivery of the judgement on 5<sup>th</sup> October 2013, she immediately filed this application on 9<sup>th</sup> October, 2023 and as such there was no unreasonable delay in filing this application.
32. On Security, the applicant prayed that this court does impose a reasonable security in view of the huge amount in question.
33. On whether the court can stay the dismissal herein, the applicant submitted that upon dismissal of the declaratory suit, the plaintiff is left exposed to the orders and judgement in Nakuru CMCC NO.1082 OF 2012 meaning the said judgement becomes a positive order in the declaratory suit. She argued that the stay of the said dismissal therefore stays the execution of the Judgement in NAKURU CMCC NO.1082 OF 2012 which operates as a positive order.
34. The counsel submitted that the trial case being in the nature of a declaratory suit, is unique in its prayers and circumstances as its dismissal restores the Respondent to a positive order capable of being executed.
35. She urged this court to exercise its discretion in applicant's favour and allow the application as prayed.

### **Respondent's Submissions**

36. With respect to whether the Applicant has met the threshold for leave to appeal out of time, the Respondent's counsel referred to Section 79 G of the *Civil Procedure Act* and the case of Omar Shurie vs Marian Rashe Yafar (Civil Application No. 107 of 2020) where the court set out the factors to be considered when determining an application seeking leave to appeal out of time.
37. On reason for delay, the counsel reiterated that the applicant was aware of the judgment date as both parties had logged in to court on 18<sup>th</sup> August, 2023 and were advised by the court clerk that the judgement will be delivered on 25<sup>th</sup> August, 2023. He argued that this court should thus not exercise discretion in favour of a party who attempts to circumvent the cause of justice by misleading the Honourable court. To bolster his submissions, reliance was placed on the case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR where the court held that extension of time is an equitable remedy that is only available to a deserving party at the discretion of the court.
38. He also referred this court to the case of Susan Ogutu Oloo & 2 others vs Doris Odindo Omolo [2019] eKLR where the court held inter alia that a party seeking extension of time has the burden of laying a basis to the satisfaction of the court.
39. The counsel posited that the applicant has not advanced any good or sufficient cause for the delay. Reliance was placed on the case of London Distillers (K) LTD vs Philip Kipchirchir & 2 others [2007] eKLR for the proposition that delay is affront to the administration of justice.
40. With respect to the merit of the Appeal, the Respondent's counsel reiterated that the issue at hand is a contract of insurance between the parties herein with the respondent committing to pay a maximum of Kshs.5 million for a single claim. That the Applicant sought before lower court to satisfy a claim over the said amount and as such there is no merit in the appeal as the court cannot rewrite contracts for the parties.
41. The counsel argued that the respondent stands to be prejudiced if the application is allowed since this matter has been in court for over 11 years now.
42. On whether the Applicant has met the threshold for stay of execution pending appeal, the counsel cited the provisions of Section 42 Rule 6(2) and the case of Kiambu Transporters vs Kenya Breweries



- (2000) eKLR and submitted that the Applicant has not met the threshold of grant of stay of execution pending appeal.
43. He submitted that there is inordinate delay in filing this application since the same has been filed 45 days later since the delivery of the judgement.
  44. He submitted that the Applicant has not demonstrated that she will suffer substantial loss if stay of execution is not granted. To bolster his submissions, the respondent's advocate relied on the case of *Meteine Ole Kilelu & 19 others vs Moses K. Nailole* [2009] eKLR where the court opined that in a matter where the decree appealed against is a money decree, the applicant has to show either that once the execution is done after refusal of the stay application, he may never get back that money even if his appeal succeeds or that the decretal amount is so large vis a vis his status, or business that the execution would in itself ruin his business or threaten his very existence.
  45. He argued that the Applicant has not offered any security and the respondent therefore stands unprotected. It was argued that this condition is primary and without it, the application stands disallowed. To buttress his submissions, the respondent's counsel cited the case of *Vista Holdings International Limited v Span Image (K) limited* [2014] eKLR.
  46. He prayed for dismissal of the Application with costs to the Respondent.

### **Analysis & Determination**

47. The issues that fall for determination are: -
  - a. Whether the application seeking leave to appeal out of time is merited.
  - b. Whether the trial court's judgement of 25<sup>th</sup> August, 2023 is capable of being stayed.
  - c. Whether stay orders sought should be granted.

### **Issue No.1**

48. Section 79G of the *Civil Procedure Act* 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.”
49. The Supreme Court of Kenya sitting at Kisumu in the case of *County Executive of Kisumu vs County Government of Kisumu & others* [2017] eKLR while relying to its decision in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others* Application No. 16 of 2014 (supra) the Hon. Judges reiterated the considerations to be made in such a case to be as follows:
  - 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 a case to case basis;
- d. Whether there is a reasonable reason 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.”

50. The discretion to extend time must be exercised within the principles of the law and factors to be considered when determining such an application. The principles were set out in the Court of Appeal case of Omar Shurie vs Marian Rashe Yafar (supra) 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.”

51. It is not disputed that the judgment in the primary suit Nakuru CMCC NO.1082 OF 2012: Maseno University vs Teresia Njoki Waititu was delivered on 26<sup>th</sup> April, 2017. Thereafter the Applicant filed a declaratory suit being Nakuru CMCC No. 742 of 2018 which was dismissed on 25<sup>th</sup> August,2023. The Applicant’s counsel states that the judgment in the latter case was delivered in their absence and without prior notice. She posited that they had been advised on 17<sup>th</sup> August, 2023 that the judgment would be delivered on notice. The Respondent disputes this position. According to the respondent, the matter was slated for judgement 18<sup>th</sup> August, 2023 when the court was not sitting and both parties who had logged in to court on this day were advised that the judgement would be delivered on 25<sup>th</sup> August, 2023. It is not clear which position is correct but considering the judgment was delivered in absence of both parties and their advocates, it is highly probable that the applicant and her counsel were unaware of the judgment date.
52. The applicant has explained that she learnt of the delivery of judgment on 5<sup>th</sup> October,2023 and by then the 30 days within which an appeal should have been filed had lapsed. Subsequently, the instant Application was filed on 9<sup>th</sup> October, 2023.
53. In light of the above, I find the Applicant acted diligently upon learning of the delivery of the Judgment. The explanation offered is satisfactory and I find that the delay by the applicant is not so inordinate as to make this court deny her the opportunity to challenge the judgment by the trial court.
54. In the instant case, the Applicant averred that her appeal is arguable and if stay is not granted the same will be rendered nugatory. An arguable appeal is not one which must necessarily succeed, but one which is not frivolous. I have perused the annexed draft Memorandum of Appeal and I find the same raises triable issues.
55. Consequently, I allow prayer 3 of the application and grant leave to the applicant to file an appeal out of time.



## Issue No.2

56. The Respondent averred that the suit before the trial court was dismissed and therefore there is nothing to stay. The Respondent's counsel position is that only a positive order is capable of being executed.
57. The Applicant posited that dismissal of the declaratory suit left her exposed to the orders and judgment in Nakuru CMCC No.1082 of 2012 and that stay of the said dismissal stays the execution of the judgment in Nakuru CMCC 1082/2012 which operates as a positive order.
58. It is true the lower court on 25<sup>th</sup> August, 2023 dismissed the Applicant's case with costs.
59. In *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* [2015] eKLR the Court of Appeal (Kantai J.A) held as follows:

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984)* where it was stated:

‘..... an order for stay of execution must be intended to serve a purpose .....’ ”

60. Similarly, in the more recent case of *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others* [2016] eKLR, the Court of Appeal expounded on stay of execution stating:

“In *Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah* [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December, 2006. The order of 18<sup>th</sup> December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences vs. Oranga & Others* [1976] KLR 63 at page 66 paragraph C).”

61. The same reasoning was applied in the case of *Raymond M. Omboga vs Austine Pyan Maranga Kisii* HCCA 15 of 2010, that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:

“The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the Respondent which is capable of execution, there can be no stay of execution of such an order ... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...”



62. Guided by the above precedents, I find and hold that the judgment/order the Applicant seeks to stay is a negative order which is incapable of being stayed. The only execution that can take place is in respect to costs in the suit in question which is the subject of this appeal. There is no indication that the respondent has commenced any execution for the said costs.
63. Be it as it may, and in order to ensure that the intended appeal is not rendered nugatory, I will stay the execution for costs in the said suit.
64. Having stated the above, I note that the applicant's apprehension is over the execution of the decree in the initial suit, in Nakuru CMCC No. 1082 of 2012. Even if a stay is granted as sought in the declaratory suit, which was dismissed, the same cannot stop the execution in the initial suit.
65. In conclusion, I make the following orders;
- a. The applicant is granted leave to appeal out time.
  - b. The Memorandum of Appeal to be filed and served within the next 14 days, failing which the leave shall be deemed to have lapsed.
  - c. The prayer for stay of execution is granted but only in respect to costs in the suit in CMCC NO. 782 of 2018.
  - d. Costs shall abide the outcome of the intended Appeal and if no appeal is filed the applicant shall bear the costs of the application.
66. It is so ordered.

Dated, Signed and Delivered at Nakuru this 24<sup>th</sup> day of April, 2024.

---

**H. M. NYAGA,**

**JUDGE.**

**In the presence of;**

Court Assistant Kipsugut

Ms Gitau for Applicant

No appearance for Respondent

Nakuru H.C. Misc. App No. E 341 of 2023 Page 6 of 6

