



REPUBLIC OF KENYA



**Kamau v Too (Civil Appeal E857 of 2022)  
[2024] KEHC 6303 (KLR) (Civ) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6303 (KLR)

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

**CIVIL**

**CIVIL APPEAL E857 OF 2022**

**JN NJAGI, J**

**MAY 31, 2024**

**BETWEEN**

**DUNCAN KAMAU ..... APPELLANT**

**AND**

**WILFRED KIMUTAI TOO ..... RESPONDENT**

**RULING**

1. The appellant herein filed an application dated October 25, 2022 seeking for the following orders; -
  - a. Spent
  - b. That this Honorable Court be pleased to grant interim stay of execution of the judgment delivered by the Honorable Chief Magistrate H.M Nyaberi delivered on 22/9/2022 in Milimani Civil Suit No. 3411 of 2017 pending the hearing and determination of this application.
  - c. That this Honorable Court be pleased to grant the appellant/applicant leave to file his appeal out of time and thus deem the Memorandum of Appeal filed on 25/10/2022 as being properly on record.
  - d. That this Honorable Court be pleased to grant interim stay of execution of the judgment delivered by the Honorable Chief Magistrate H.M Nyaberi delivered on 22/9/2022 in Milimani Civil Suit No. 3411 of 2017 pending the hearing and determination of this appeal.
  - e. That this Honorable Court allow the applicant provide a bank guarantee from a very reputable and well-known bank in the Republic of Kenya; That the application be heard inter-parties on such date and time as this Honorable Court deem fit;



- f. That this Honorable Court be pleased to issue any other order and/or direction it deems fit to grant in the circumstances.
  - g. That the costs of this application abide by the outcome of the appeal.
2. The application is based on the grounds on the face of the application and supported by the affidavit of counsel appearing for the applicant, Magero Obadiah. Counsel deposes in his supporting affidavit that the application could not be filed timeously due to IT problems with the e-filing platform of the judiciary, consequent to which time lapsed before the appeal was filed. That the appeal was filed three days later after time lapsed.
  3. The applicant further sought that the court stays execution of a judgment and decree in Milimani Civil Suit No. 3411 of 2017 pending hearing and determination of the application and the appeal filed herein. That the court allows the applicant to deposit a bank guarantee from a reputable and well-known bank in Kenya.
  4. The application was opposed by the respondent on the grounds that the matter is an old one having been filed in 2017. That the application is supported by the affidavit of an advocate who is an employee of Kimondo Gachoka & company Advocates but there is no director or legal officer of Directline who has offered guarantee by way of affidavit. That the Applicant has not shown that they will suffer any loss by paying the decretal sum as they pursue the appeal. That they have not met conditions for stay of execution pending appeal.
  5. The application was conversed by way of written submissions.

#### **Appellant's Submissions**

6. The applicant's counsel identified three issues for determination; (a) whether the appeal herein ought to be deemed as properly filed within time; (b) whether stay of execution ought to be granted pending the hearing and determination of this application and appeal; and lastly who should bear the costs of the appeal.
7. On the first issue, Counsel submitted that section 79G of the *Civil Procedure Act* allows an appeal to be filled out of time only when the party shows good and sufficient cause why the appeal was not filed within 30 days. He relied in the case of *Stanley Kaiyongi Mwendu v Cyprian Kubai* (2000) eKLR to state that extension of time is a discretionary jurisdiction.
8. It was submitted that an applicant for leave to appeal out of time has to satisfactorily explain, *inter alia*, the reason for the delay and whether it is reasonable, whether there will be any prejudice to be suffered by the respondent if extension of time is granted, whether the application has been brought without undue delay, as held by the Supreme Court in *County Executive of Kisumu v County Government of Kisumu and 8 others* (2017) eKLR.
9. It was submitted that the appeal was filed late due to system failure on the side of the judiciary as a result of which the memorandum of appeal was filed 3 days after expiry of 30 days hence there was no unreasonable delay.
10. On the 2<sup>nd</sup> issue, it was submitted that the principles guiding the grant of execution pending appeal are as established in order 42 rule 6(2) of the *Civil Procedure Rules*. That stay can only be granted where sufficient cause has been established and that owing to the overriding Objectives under sections 1A and 1B of the *Civil Procedure Act* stay is not limited to order 42 rule 6 of the *Civil Procedure Rules*.



11. It was further submitted that the appellant stands to suffer substantial loss of over Kes 414, 772.00/= as well as costs and interest if stay of execution is not granted. That the respondent has not demonstrated that he is able to refund the sums should the appeal succeed.

### **Respondent's Submissions**

12. The respondent opposed the application and argued that the applicant had not provided any other sufficient reason aside from the system issue. It was submitted that the delay was caused by indolence on the part of the appellant and therefore that there is no sufficient reason to merit the discretion of this Court.
13. Counsel submitted that the nature of security being offered is not specific and one cannot offer security blindly. Reliance was placed in the case of *Mwaura Karuga T/A Limit Enterprise v Kenya Bus Service Ltd & 4 others* (2015) eKLR to buttress that a security must be one which will achieve due performance of the decree which might ultimately be binding on the applicant. It was submitted that there is no evidence to show that the respondent is not a man of means.
14. The respondent submitted that the application is a decoy meant to frustrate the respondent from enjoying the fruits of his judgment.

### **Analysis and Determination**

15. Order 42, rule 6 (2) states:

“No order for stay of execution shall be made under sub-rule (1) unless: -

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

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.”

16. In *Hamisi Juma Mbaya v Amakecho Mbaya* [2018] eKLR it was held:-

“The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

- a. Substantial loss may result to the applicant unless the order is made.
- b. The application has been made without unreasonable delay, and
- c. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.”

17. The applicant herein was obligated to demonstrate the above conditions if his application is to succeed.

18. The court in *James Wangalwa & another v Agnes Naliaka Cheseto* Misc. Application No 42 of 2011 [2012] eKLR stated as follows regarding what amounts to substantial loss.

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”



19. In the present case, the applicant has demonstrated that he stands to lose the sum of Kshs. 414, 772.00/ = should the appeal proceed and becomes successful. I find that this is a substantial amount that the applicant may have difficulty in recovering should the applicant's appeal turn out to be successful.
20. On the question of delay, it was not disputed that the judgment giving rise to the appeal was delivered on September 22, 2022. The instant application was filed on 25<sup>th</sup> October 2022 which was three (3) days after the statutory period of 30 days had lapsed. I find that there has been no unreasonable delay in filing the instant application. The explanation given for the delay is reasonable.
21. As regards security, the court in *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, observed as follows: -

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

22. In *Arun C Sharma v Ashana Raikundalia t/a Raikundalia & 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..... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

23. The applicant herein has proposed a bank guarantee for security. This court takes note that there is no evidence that the said guarantee is for the benefit of this matter specifically. Moreover, there is no evidence that as at the time of this ruling the same had been renewed. In the premises I find that the said bank guarantee is not viable for this matter.



24. In an application for stay of execution, the court is required to exercise its discretion judicially whilst balancing the interests of the parties. While the respondent is entitled to enjoy the fruits of his judgment, the applicant is similarly entitled to his right of appeal subject to fulfilling the conditions set under order 42 rule 6. The applicant herein did not meet all the conditions for the grant of orders for stay.
25. I am inclined to allowing the instant application on the following conditions: -
- a. The Memorandum of appeal filed herein is deemed to be properly on record.
  - b. The applicant shall, within 30 days from the date of this ruling, deposit security in the sum of Kshs 414, 772/= in a joint interest earning account to be opened in the names of the advocates for the parties herein in a bank to be agreed upon by the said advocates.
  - c. In the event of failure to comply with condition (b) the stay of execution orders to automatically lapse and the respondent will be at liberty to proceed with the execution.
  - d. Since the fault was on the part of the court, I order the costs of the application to abide by the outcome of the appeal.
26. Orders accordingly.

**Delivered, dated and signed at NAIROBI this 31<sup>st</sup> day of May, 2024**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Miss Gakii for Appellant/Applicant

Miss Kioko for Respondent

Court Assistant – Amina

30 days Right of Appeal.

