**Gikaya & another v Mwangi (Miscellaneous Civil Case E050 of 2023) [2024] KEHC 6294 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6294 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT THIKA**

**MISCELLANEOUS CIVIL CASE E050 OF 2023**

**FN MUCHEMI, J**

**MAY 30, 2024**

**BETWEEN**

**JOSHUA MBUGUA GIKAYA ..... 1ST APPLICANT**

**DERRICK KIPRONO NGENO ..... 2ND APPLICANT**

**AND**

**THOMAS KURIA MWANGI ..... RESPONDENT**

**RULING**

## Brief Facts

1. The application dated 10th November 2023 seeks for orders for leave to file an appeal out of time against the judgment in Thika MCL&E Case No. E098 of 2021 delivered on 6th April 2023. The applicants also seek for orders of stay of execution in respect of the same judgment pending the hearing and determination of the appeal.

2. In opposition to the application, the respondent filed a Replying Affidavit sworn on 12th March 2024.

## Applicants' Case

3. The applicants state that judgment in Thika MCL&E Case No. E098 of 2021 was delivered on 6th April 2023, a date that the applicants further state that they were unaware of and came to learn of the judgment on 5th October 2023 upon being served with a Notice To Show Cause (NTSC) for committal to civil jail.

4. The applicants contend that their advocates on record did not notify them of the judgment nor did they attend court on the day of delivery of the judgment.

5. Upon receiving a notification that the said judgment and decree, the applicants contend that they instructed the firm of Michieka Mwenda LLP Advocates to lodge an appeal against the said judgment.

The applicant contend that the said Brian Mwenda of Michieka Mwenda Advocates LLP Advocates filed a Memorandum of Appeal and Notice of Motion dated 3rd October 2023. The applicants further contend that they learnt that the said Brian Mwenda was not a qualified advocate following which they made an application to the court to withdraw the said Memorandum of Appeal and Notice of Motion application dated 3rd October 2023

6. It is further deposed that the time prescribed for filing an appeal has since lapsed but the applicants are desirous of challenging the judgment delivered on 6th April 2023. The applicants state that the delay in filing the appeal was not intentional as they had made steps earlier to appeal within the stipulated time but later learnt that the person they had instructed was not an advocate. Furthermore, the applicants state that the pleadings drawn by the said masquerader have since been withdrawn.

7. The applicants are apprehensive that since they were served with the Notice To Show Cause, they are likely to be prejudiced and render the appeal nugatory if stay is not granted. Furthermore, the applicants argue that if stay of execution is not granted, they stand to suffer immeasurably as execution is imminent against them.

8. The applicants further contend that the intended appeal is arguable and has high chances of success.

**The Respondent's Case**

9. The respondent opposes the application on the premise that it is misconceived, vexatious, frivolous and an abuse of the court process. The respondent contends that the allegation made by the applicants that they instructed a quack lawyer is an afterthought since the fake lawyer Brian Mwenda purportedly acting under the firm of Michieka Mwenda Advocates only tried filing his defective pleadings in October 2023 which was over six (6) months after the delivery of the judgment.

10. The respondent states that the applicants are hiding the fact that before the Magistrate's court they were represented all along by a competent advocate from the firm of Omenke Andege Advocates, who was always served with the court documents and acknowledged receipt.

11. The respondent states that the dispute in the trial court arose out of a loan that had been given to the applicants by one Scolastica Wambui Muriithi to the tune of Kshs. 1,000,000/- which the applicants had promised to refund within 6 months at the rate of Kshs. 60,000/- per month being 6% interest which was initially honoured but eventually defaulted.

12. The respondent further states that the applicants issued a cheque dated 23/4/2019 worth Kshs. 60,000/- in the name of the company cheque number 000038 which was dishonoured upon payment. The cheque was signed by the two applicants who are the directors of the company.

13. The respondent states that the said Scolastica Murithi appointed him as an agent to follow up on her payments because she was tired of the games played by the applicants in failing to refund her monies. Since the default of payment and bouncing of cheques, the respondent states that his advocates wrote severally to the applicants who committed themselves in writing that they would pay as soon as business picked up.

14. The respondent further states that the parties had a meeting to resolve the issues raised on 3/12/2019 which culminated to an agreement where the applicants acknowledged the debt and referred to the respondent as the 2nd party and not as a director. Thus the respondent contends that the allegations by the applicants that he was a director of Tujenge Homes Limited was false.

15. The respondent contends that he moved the court through execution by way of NTSC in September 2023 and duly served the applicants. The respondent further avers that the applicants have severally

admitted that they owe Scolastica and have always made a commitment to pay but to no avail. The respondent argues that the applicants are using the court as a yard stick to run away from their duty to pay what they owe.

16. The respondent states that the applicants should be ordered to deposit the due amount of Kshs. 2,803,700/- in court in the event the application is allowed. Moreover, the respondent contends that as a successful party, he should be allowed to eat or enjoy the fruits of his judgment.

**The Applicants' Submissions**

17. The applicants rely on Section 79G of the *Civil Procedure Act* and submit that the extension of time being an equitable remedy, the applicants urge the court to exercise its discretion in their favour and grant them leave to file their appeal out of time. The applicants further rely on the cases of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR and *Nicholas Kiptoo Korir arap Salat v IEBC & 7 Others* [2014] eKLR and submit they failed to file the appeal on time as they were unaware of the trial court's judgment. The applicants blame their previous advocates on record for failing to communicate to them on the delivery of the judgment. It was at that stage that the applicants instructed the firm of Michieka Mwenda Advocates LLP to act for them in the intended appeal.

18. The applicants further rely on the case of *Kangethe Kinyanjui v Tony Keter & 5 Others* (no citation given) and submit that their intended appeal is arguable as it raises serious questions of law. The judgment in the trial court arises from a loan agreement dated 22nd June 2018 and executed between one Scolastica Wambui Muriithi and Tujenge Homes Limited. The applicants rely on the case of *Salomon v Salomon & Co.* (1897) AC 22 and argue that the trial learned magistrate failed to consider that a company is at law, different from is shareholders and it can be sued or sue in its name. The honourable magistrate failed to find that while the privilege of incorporation is not without limits, the plaintiff ought to have first applied to the court to lift the corporate entity of Tujenge Homes Limited to warrant the applicants personal liability.

19. Relying on the case of *Patrick Maina Mwangi v Waweru Peter* [2015] eKLR, the applicants submit that the respondent will not be prejudiced if leave is granted to them to file their appeal out of time as he can be compensated by way of costs. Moreover, the applicants contend that the respondent will enjoy costs and interest from the decretal amount if the appeal is dismissed.

**The Respondent's Submissions**

20. The respondent relies on the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR and submits that the applicants are being dishonest that they were not aware of the judgment in the trial court as they were always represented by competent advocates from the firm of Omenke Aandege Advocates to the conclusion of the suit. The respondent further submits that notwithstanding the non-attendance by the advocates, the applicants ought to have followed up with their advocates on the judgment or visit the law courts registry to ascertain the position of the matter. The applicants in the instant have not shown any efforts they took towards following up with the matter.

21. The respondent contends that the applicants appointed the firm of Michieka Mwenda Advocates LLP to file their Memorandum of Appeal where defective pleadings were filed 6 months after judgment was rendered by the trial court. Thus, even if the quack advocate who drafted the document was actually a qualified one, the respondent argues that 6 months is an overstretch to file an appeal where they allege to be dissatisfied or will suffer immeasurable damage due to the judgment.

22. The respondent relies on the case of Bondo PM CC No. 45 of 2020 Alfred Waga Wesonga v Nicholas Stephen Okaka & Charity Njoki Muigai and submit that the applicants ought to deposit the entire decretal amount of Kshs. 2,803,700/- in court in the event the court is inclined to grant the application.

23. Relying on the case of *RWW v EKW* (2019) eKLR, the respondent submits that the court ought to balance the interests of both the applicants and respondent as it is clear that the respondent has shown that the intended appeal is an afterthought meant to deny him his rightful proceeds of the judgment. The respondent submits that the parties herein entered into a valid contract willingly and thus they are bound by the terms of the contract. Further, the applicants have never denied that they owe one Scolastica Muriithi money as even their actions paying the loan shows that they are aware that they have an obligation further they have committed themselves in writing on their intention to clear the loan as the directors of the company. The respondent contends that he is not a director of the company as is evidenced by the agreement the parties executed referring to him as the 2nd party. Thus, the respondent contends that litigation must come to an end and he should be allowed to enjoy the fruits of his judgment.

24. The respondent relies on the case of *DGM v EWG* [2021] eKLR and submits that costs follow the event and he has demonstrated that he is deserving of costs.

**Issues for determination**

25. The two main issues for determination herein are:-

    a. Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;

    b. Whether the applicants have met the prerequisite for grant of stay of execution pending appeal;

**The Law**

**Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;**

26. Section 79G of the *Civil Procedure Act* states:-

> 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 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.

27. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicants must satisfy the court that that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

28. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

> " The underlying principles a court should consider in exercise of such discretion should include:-
>
> a. Extension of time is not a right of any 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 by 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 respondent if the extension is granted;
>
> f. Whether the application has been brought without undue delay.

29. Similarly in the case of *Paul Musili Wambua v Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

> " .....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted."

30. The applicants have faulted their advocates on record for not letting them know about the judgment of the trial court, for the delay caused in filing their appeal. I have perused the court record and noted that judgment was delivered on 6th April 2023 in the presence of the advocate of the respondent.

31. The applicants filed this application on 20th November 2023. I have perused the Memorandum of Appeal filed by the firm of Michieka Mwenda Advocates and noted that the same was filed on 3rd October 2023. The appeal was lodged 6 months after the delivery of the judgment on 6th April 2023. Although the applicants fault the previous advocates for not filing their appeal on time, the said firm of Michieka Mwenda Advocates LLP lodged the appeal 6 months after judgment was rendered. It is therefore my considered view that the applicants have not given any plausible reasons for the delay in filing the appeal.

32. I have perused the intended Memorandum of Appeal and the judgment of the trial court and noted that the appeal does not raise pertinent issues of law. In the circumstances it is my considered view that the applicant has not established to the satisfaction of the court that time for filing appeal out of time should enlarged.

**Whether the applicants have satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.**

33. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-

    1. "No appeal or second appeal shall operate as a stay of execution or proceedings 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 appellate court to have such orders 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 1st 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.

34. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:

    1. Substantial loss may result to him/her unless the order is made;

    2. That the application has been made without unreasonable delay; and

    3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

35. Substantial loss was clearly explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR:-

> "No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...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.

36. The applicants in their affidavit, contend that they stands to suffer irreparably if the respondent levy execution against them.

37. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicants are required to show how execution shall irreparably affect them or will alter the status quo to their detriment therefore rendering the appeal nugatory. It is therefore my considered view that the applicants have not demonstrated substantial loss they stand to suffer.

**Has the application has been made without unreasonable delay.**

38. Judgment was delivered on 6th April 2023 and the applicants filed the instant application on 20th November 2023. It has taken the applicant seven (7) months between the date of judgment delivered in the trial court and the time when they filed the instant application. It is therefore my considered view that a delay of 7 months is inordinate and inexcusable.

**Security of costs.**

39. The purpose of security was explained in the case of *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 the 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.

40. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicants have not offered any security for the performance of the decree.

41. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR the court stated:-

> " The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion."

42. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondent his right of enjoying his judgment. I have perused the grounds of appeal and without going into the merits of the appeal noted that they do not raise any arguable points of law. All considered, it is my considered view that the applicants have not met the threshold of granting stay of execution pending appeal.

43. Accordingly, it is my considered view that the application dated 10th November 2023 lacks merit and is hereby dismissed with costs.

44. It is hereby so ordered.

**RULING DELIVERED, DATED AND SIGNED AT THIKA THIS 30TH DAY OF MAY 2024.**

**F. MUCHEMI**

**JUDGE**