



Absolute Adventures Safaris Limited & another v Nchama (Civil Miscellaneous Application E1078 of 2023) [2024] KEHC 6112 (KLR) (Civ) (24 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6112 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL MISCELLANEOUS APPLICATION E1078 OF 2023**

AN ONGERI, J

MAY 24, 2024

BETWEEN

ABSOLUTE ADVENTURES SAFARIS LIMITED 1ST APPLICANT

GODFREY WAITHAKA 2ND APPLICANT

AND

LAWRENCE MARWA NCHAMA RESPONDENT

RULING

1. The application coming for consideration in the one dated 9/11/2023 brought under Order 50 Rule 6, Order 42 Rule 6, Order 51 Rule I of the [Civil Procedure Rules](#) 2010 and Section 65 (I) (b) of the [Civil Procedure Act](#) CAP 21 Laws of Kenya seeking the following orders;
 - i. That the matter be certified urgent and ex parte orders do issue in the first instance.
 - ii. That pending the inter-partes hearing of this Application this Honourable Court be pleased to grant a temporary stay of execution of the Judgment and orders in Milimani SCCC E3841 of 2022 made by Gillian Simatwo on 25th August, 2023.
 - iii. That this honourable court be pleased to extend time to file a Memorandum of Appeal against the Judgment and orders made in Milimani SCCC E3841 of 2022.
 - iv. That pending the hearing and determination of the Applicant's Intended Appeal, this honourable court do grant a stay of execution of the judgment and orders of the subordinate court in Milimani SCCC E3841 of 2022 of 2021 delivered on 25th August, 2023
 - v. That the costs of this Application be provided for.
2. The application is based on the following grounds;



- i. That the Applicants are aggrieved by the Judgment in Milimani SCCC E3841 of 2022 of 2021 delivered on August, 2023.
 - ii. That the intended appeal is arguable and has overwhelming chances of success,
 - iii. That the Applicants are the Respondents in the recently concluded matter before the Subordinate Court Milimani SCCC 3841 OF 2022 and judgment has been obtained against them for the payment of a sum of Kshs 700,000. 00/ and further, costs of the suit.
 - iv. That the said Judgment had been scheduled to be delivered on 25th August, 2023 but the same was not delivered on the said day and instead was delivered later in the absence of any of the Party's Counsel and without notice
 - v. That counsel for the Applicants only became aware of the judgment when the Plaintiff's Advocates notified them of the same vide a letter dated 25th September, 2023.
 - vi. That by the time the Applicant's Advocates were being notified that the Judgment had been delivered the period within which to institute an appeal had long since lapsed.
 - vii. That the intended appeal shall be rendered nugatory should the Respondents execute the said decree and seek satisfaction of the Judgment.
 - viii. That the Applicants stands to suffer substantial loss in the event that the orders sought herein are not granted.
 - ix. That further to the above a refund of the judgment sum or any part thereof is paid out to the Respondent will be exceedingly difficult to obtain should the appeal be successful as the Respondent is in the business of ferrying passengers on the motor cycle and his income is not substantial enough to guarantee the availability of the sum of Kshs.700,000.00 which is the decretal sum which application is further supported by the annexed Affidavit of Caroline Kimeto and other such further grounds to be adduced at the hearing thereof.
3. The respondent opposed the application and filed a replying affidavit stating that the time the Advocates were being notified that the Judgment had been delivered, the period within which to institute an Appeal had long since lapsed.
 4. Further that it is therefore clear that the delay was inadvertent and not within the control of the Applicants and that the same is excusable.
 5. That the same was not occasioned intentionally but by the occurrence of factors beyond the Applicant's control.
 6. That upon the receipt and perusal of the said judgment, the Applicants are of the opinion that the Honourable Trial Magistrate erred in fact and in law by awarding a sum of Ksh 616,557.00 for decretal sums given the nature of the injuries sustained by the Plaintiff in *{Godfrey Wamalwa Wamba and another Vs Kyalo Wambua}* eKLR in which in the Applicant's opinion, led to the Trial Magistrate misdirecting himself on the awardable damages.
 7. That the above reasons lay the basis for the Applicants' Intended Appeal and ultimately the need for the Court to grant the Applicants leave to be able to place their case before the Honourable Court and have the same heard and determined while orders staying the execution of the Judgment are in place.
 8. The parties filed brief submissions as follows; the applicant submitted on leave to appeal that the decision in Milimani SCCC 3841 of 2023 was scheduled to be delivered on 25/8/2023 but was not



delivered on the appointed date and was instead delivered in the absence of both the Counsel for the Plaintiff and the Defendant without notice. The Counsel for the Applicants only became aware of the Judgment when the Plaintiff's Counsel notified them of the same vide a letter. By the time the Advocates were being notified that the Judgment had been delivered, the period within which to institute an Appeal had long since lapsed. The applicant submitted that if leave is granted that respondent will suffer no prejudice for the reason that the applicants are ready to deposit the decretal amount in court as ordered.

9. The applicant further contended that that appeal is arguable as the trial court awarded the sum of Kshs. 616,557 as decretal sums which was compared to those sustained by the plaintiff in *Godfrey Wamalwa Wamba and Another v. Kyalo Wambua* [2018] eKLR and led to the trial magistrate misdirecting himself. The applicant further added that in the event that the appeal is granted without the corresponding orders for stay of execution the appeal if successful will be rendered nugatory.
10. The respondent alternatively submitted that the application herein is an afterthought whereby the respondents are trying to buy time instead of settling the decretal sum. The judgement was delivered the applicant's advocate wrote to the Respondent's Advocates asking for quantification of costs and bank details but failed to keep their end of the bargain.
11. The respondent further submitted that the intended appeal does not raise triable issues with any chances of success. The applicant had further indicated readiness to settle the decree herein as per the email by Ms Ann Njoroge, Advocate dated 25/9/2023. The applicant has not provided any evidence to indicate that any substantial loss would be suffered if orders sought are not granted.
12. On the delay the respondent submitted that no evidence has been provided to explain the delay in filing the instant application. Thus there was unreasonable delay which only points to the fact that the application was an afterthought. The Applicants' Advocates were well aware of the Judgement thus necessitating their email dated 25/9/2023 which was a request for quantification of the Respondent's costs.
13. The respondent argued finally that that Kenneth Murithi who is allegedly an associate in the Claims department of BRITAM General Insurance Company lacked locus standi to swear the affidavit in support of the application as he is a stranger in this matter. That BRITAM also cannot lodge the appeal as alleged as they are not parties to this suit.
14. The sole issue for determination is whether the applicant should be granted extension of time to file a record of appeal and stay of execution pending appeal.
15. The court has discretion to grant the extension of time and stay upon certain conditions.
 1. I find that the reason for the delay has been explained and it is not in dispute the judgment was delivered in the absence of the parties.
16. The applicant is granted leave to appeal out of time.
17. The governing provision stay of execution pending appeal is Order 42 rule 6 which states as follows;

Stay in case of appeal [Order 42, rule 6]

 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 order set aside.

2. No order for stay of execution shall be made under subrule (1) unless—
 - a. 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
 - 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.
3. Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
5. An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
6. Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

18. The duty of the court is to balance the interest of the parties.
19. Since the entire decretal sum has been deposited (to confirm) I grant stay pending appeal.
20. The appeal to be fully prosecuted within 90 days of this date.
21. Failure to comply the appeal to stand automatically dismissed at the expiry of 90 days and the decretal sum to be released to the respondents.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF MAY, 2024.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent

