



REPUBLIC OF KENYA



KENYA LAW
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Cosy Travel Ltd & another v Mutemio (Civil Miscellaneous Application E620 of 2023) [2024] KEHC 6128 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6128 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL MISCELLANEOUS APPLICATION E620 OF 2023**

AN ONGERI, J

MAY 24, 2024

BETWEEN

COSY TRAVEL LTD 1ST APPLICANT

CHARLES MURIUKI 2ND APPLICANT

AND

DENNIS MUTEMIO RESPONDENT

RULING

1. The application coming for consideration is the one dated 31/7/2023 brought under section 1A, 1B, 3A, 3B of the [Civil Procedure Act](#) Cap 21 and the High Court (Practice & Procedure Rule 3 of Part 1), the Inherent Jurisdiction of the Court and all enabling provisions of the law seeking the following orders;
 - i. That this Application be certified urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.
 - ii. That this Honourable Court be pleased to grant interim stay of execution of Judgment delivered by the Honourable Principal Magistrate M.W. Murage {Ms} delivered on 9th May 2023 in Milimani in Civil Suit No.CMCC E10178 of 2021 pending the hearing and determination of this Application.
 - iii. That the Applicant be granted leave to appeal out of time.
 - iv. That this Honourable Court allow the Applicants/ Appellants provide a bank guarantee from a very reputable and well known bank in the Republic of Kenya.
 - v. That the Application be heard inter partes on such date and time as this Honourable Court may direct.



- vi. That this Honourable Court be pleased to issue any other order and/or direction it deem fit to grant in the circumstances,
- vii. That The costs of this Application abide the outcome of the Appeal.

2. It is based on the following grounds;

- i. The Appellant/ Applicant being dissatisfied with the said Judgment failed to appeal timeously
- ii. The Respondent may proceed to execute against the Applicants herein.
- iii. The Applicant's intended Appeal has high chances of success, as the Rules of evidence are clear on production of documents and exemptions to the same.
- iv. The Appellant's Insurance is ready, willing and able to furnish the Court with a Bank Guarantee from a reputable Bank, as security to the court.
- v. This Application is made in good faith.
- vi. The Respondent will not be prejudiced in any way if the application is allowed.
- vii. If the stay of execution of the ex-parte Judgment is not granted and/or the same is not set aside, the Appellants/Applicants will suffered great injustice and prejudice.

3. It is supported by the supporting affidavit sworn on 31/7/2023 as follows;

That I am an advocate of the High Court of Kenya and practicing as such with the firm of Kimondo Gachoka & Company Advocates with the conduct of this suit on behalf of the Appellant/ Applicant herein and hence competent to swear this affidavit in support of the certificate of urgency

That this Application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance

That the application seeks a stay of execution of the judgment of honourable Magistrate M. W. Murage (Ms) delivered on 9th May 2023 in Milimani Civil Suit No. E10178 of 2021.

That the application also seeks for orders that the memorandum of appeal filed herein be deemed as duly filed.

That I make and swear this affidavit in solemn support of the certificate of urgency herein praying that the application be certified urgent.

That what is deponed herein above is true and within the best of my knowledge save as to matters depend to on information sources whereof have been disclosed and matters deponed to on belief whereupon the grounds have been given.

4. The respondent filed grounds of opposition as follows;

- i. That the application is frivolous, vexatious and an abuse of the process of the law.
- ii. That this application is fundamentally defective, a nullity in law and should be dismissed.



- iii. That the application offends the mandatory provisions of the Civil Procedure Rules.
5. The parties filed written submissions which I have duly considered.
 6. The issues for determination are as follows;
 - i. Whether the applicant should be granted leave to appeal out of time.
 - ii. Whether the applicant should be granted stay pending appeal.
 7. The court has discretion to grant leave to appeal out of time.
 8. In *County Government v Kenya Ferry Services & Anor* [2019] eKLR, at paragraph 25 the Supreme Court held that;

“25] Concerning extension of time, this Court has already set the guiding principles in the Nick Salat Case as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

 1. 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;
 2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents, if extension is granted;
 6. whether the application has been brought without undue delay; and

7. whether in certain cases, like election petitions, public interest should be a consideration for extending time”
 9. The applicant is granted leave to appeal out of time.
 10. On the issue as to whether the applicant should be granted stay of execution pending appeal, the governing provision is Order 42 rule 6.
 11. I grant stay pending appeal on condition that the entire decretal sum is deposited in court within 45 days of this date.
 12. The appeal to be prosecuted within 90 days of this date.



13. Failure to execute the appeal within that period the same to stand automatically dismissed with costs to the respondent.

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

NAIROBI HIGH COURT CIVIL MISC. APPL. NO. E620 OF 2023	0
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