



**Instrumentation Engineering (EA) Ltd v Aboka (Civil Miscellaneous Application
E746 of 2023) [2024] KEHC 6148 (KLR) (Civ) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6148 (KLR)

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

CIVIL

CIVIL MISCELLANEOUS APPLICATION E746 OF 2023

AN ONGERI, J

MAY 24, 2024

BETWEEN

INSTRUMENTATION ENGINEERING (EA) LTD APPLICANT

AND

LUMOSI ABOKA RESPONDENT

RULING

1. The application coming for consideration is the one dated 30/8/2023 brought under Sections 1A, 1B, 3A and 79G of the *Civil Procedure Act* and Order 22 Rule 2 and 50 Rule 5 of the *Civil Procedure Rules* 2010 seeking the following orders;
 - i. That the application be certified urgent and be heard *ex parte* in the first instance.
 - ii. That the Honourable Court be pleased to make temporary order of stay of execution pending hearing and determination of this application.
 - iii. That the Honourable Court be pleased to make an order for leave to file an appeal to the High Court out of time.
 - iv. That costs of this application be provided.
2. The application is based on the following grounds;
 - i. The suit was heard interparties by way of Section 30 of the Small Claims Act and submissions filed by the respective parties.
 - ii. The matter was reserved for judgment on the 28th April 2023, when the same was not delivered and no fresh date was given for the judgment.



- iii. The subsequent follow-ups were not possible either as no notice was issued.
 - iv. The applicant wrote to the Executive Officer of the Court on the 10th July 2023 inquiring on the position of the judgment and the date when it will be delivered. The court has never replied or given notice of the delivery of judgment.
 - v. The same letter to the court was forwarded to the advocates for the claimant on the 11th July 2023.
 - vi. The applicant's advocates M/S Ombachi Moriasi & Co. Advocates did receive a letter from the advocates for the claimant Ms Heyi & Associates Advocates dated 12th July 2023 informing them that judgment was delivered on the 2nd June 2023 for the sum of Kshs.849,634.84 with interest and costs,
 - vii. The applicant's effort to obtain the copy of the judgment did not bear fruit until the 18th July 2023 when they got uncertified copy for information and to seek instructions on the way forward,
 - viii. The judgment is very clear that the same was delivered on the 2nd June 2023 in the absence of the parties without any indication of whether any notice was given to the said parties.
 - ix. That respondent is desirous of appealing against the said judgment in its entirety and because it is beyond the 30 days limit for filing the appeal it has only one option of applying for leave to appeal out of time in line with Section 79C and Order 42 of the Civil Procedure Act and Rules.
 - x. The claimant has already given the notice of entry of judgment and is in the process of obtaining the decree and warrant of attachment hence the applicant is at risk of being executed against.
3. The application is supported by the affidavit of the applicant which reiterates the grounds stated above.
 4. The respondent filed an affidavit of means in which he states as follows

That I am a male adult of sound mind and disposition the Respondent herein and therefore competent to swear this affidavit.

That I am an engineer by profession trading as Johari Solutions which is an engineering firm offering project consultancy and management services in Kenya and abroad.

That Johari solutions was established in the year 2005 and the firm has never been in distress.

That the financial position of Johari Solutions is sound and we have always met all our financial, legal and tax obligations.(Annexed and marked "LA1 " is a copy of a bank statement of one of my accounts)

That this year, Johari Solutions is currently undertaking performance for contracts worth over, ksh.2000,000/= which will be completed in December,2023.(Annexed and marked "LA-2 (a)- (r) are copies of the Local Purchase Orders)

That Johari Solutions will be in a position to fully refund the Applicant the decretal sum in the event a successful appeal is lodged against the decision of the trial court.
 5. The parties filed brief written submissions which I have 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 but on certain conditions.
8. In the case of *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. I find that the judgment was delivered in the absence of the parties.
10. The applicant filed the application upon discovery of the judgment 29 days after delivery.
11. I grant the applicant leave to file the appeal out of time.



12. On the issue of stay the governing provision 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”.
13. The duty of the court is to balance the interest of the parties.
14. The appellant has a right to exercise his right of appeal while the respondent has the right to enjoy the fruits of his judgment.
15. I grant the stay pending appeal on condition that the entire decretal sum is deposited in court within 45 days of this date.
16. The applicant is granted 90 days to fully prosecute the appeal failure to which this appeal to stand automatically dismissed and the decretal sum to be released to the respondent.



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

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent

