



**Sonix Credit Limited v Kakuvi (Civil Appeal E1422 of 2023)
[2024] KEHC 8671 (KLR) (Civ) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8671 (KLR)

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

CIVIL

CIVIL APPEAL E1422 OF 2023

AN ONGERI, J

JUNE 27, 2024

BETWEEN

SONIX CREDIT LIMITED APPELLANT

AND

JOSEPHINE KING'OKU KAKUVI RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 24/6/2022 brought under Section 1A, 1B, 3A and 79G of the *Civil Procedure Act*, Order 42 Rule 6 and Order 50 Rules 1 and 4 of the *Civil Procedure Rules, 2012* and all other enabling provisions of the law seeking the following prayers
 - i. Spent.
 - ii. That pending hearing and determination of this Application this Honourable Court be pleased to stay execution and all proceedings pertaining to Nairobi Small Claims Court Case Number E555 of 2022.
 - iii. That pending hearing and determination of the Intended Appeal this Honourable Court be pleased to stay execution and all proceedings in Nairobi Small Claims Court Case Number E555 of 2022.
 - iv. That the Honourable Court be pleased to extend time, for such period as it may deem fit and proper, for the Intended Appellant/Applicant to lodge and serve a Memorandum of Appeal against the Judgement of the Lower Court issued on 25th May 2022 in respect of Nairobi Small Claims Court Case Number E555 of 2022
 - v. That the cost of this application be in the cause.



2. It is based on the following grounds:
 - i. Judgement was delivered in Nairobi Small Claims Court Case Number E555 2022 the Intended Appellant/Applicant on 25th May, 2022.
 - ii. The Intended Appellant/Applicant is desirous of instituting an Appeal against the Judgement and Decree of the Judgement to have the matter heard on merits and it is only just that stay of execution be granted and that the Intended Appellant/Applicant be granted leave to file the Appeal out of time.
 - iii. The Intended Appeal is highly meritorious and has high chances of success and it is further grounded on legitimate questions of law and facts.
 - iv. The Intended Appellant's/Applicant's Director has been ill and out of office hence they were unable to secure timely legal services in order to lodge the appeal.
 - v. Further, the Advocates for the Intended/Appellant experienced some delays from the registry in procuring a copy of the judgement and it is therefore necessary to grant leave for the appeal to be filed out of time.
 - vi. The learned magistrate failed to consider the facts and the pleadings filed therein and delivered a judgement allowing a counterclaim which was never filed in the case and dismissing the Intended Appellant/ Applicant's suit in totality when there was a partial admission of the claim on the part of the Respondent.
 - vii. It is necessary to stay execution pending the hearing and determination of the Intended Appellant's Appeal.
 - viii. It is in the interest of justice that this application be granted.
3. The application is supported by the affidavit of Julius Kihyo Mungwana sworn on 24/6/2022 in which he deposed as that judgement was delivered in Nairobi Small Claims Court Case Number E553 of 2022 against the Intended Appellant/Applicant on 25th May, 2022.
4. That the Intended Appellant/Applicant is desirous of Instituting an Appeal against the judgement and Decree of the Judgement to have the matter heard on merits and it is only just that stay of execution be granted and that the Intended Appellant/Applicant be granted leave to file the Appeal out of time.
5. That the Intended Appeal is highly meritorious and has high chances of success and it is further grounded on legitimate questions of law and facts.
6. That the Intended Appellant's Applicant's Director has been ill and out of office hence they were unable to secure timely legal services in order to lodge the appeal.
7. That further, the Advocates for the Intended/Appellant experienced some delays from the registry in procuring a copy of the judgement and it is therefore necessary to grant leave for the appeal to be filed out of time.
8. That the learned magistrate failed to consider the facts and the pleadings filed therein and delivered a judgement allowing a counter-claim which was never filed in the case and dismissing the Intended Appellant/ Applicant's suit in totality when there was a partial admission of the claim on the part of the Respondent.
9. That it is necessary to stay execution pending the hearing and determination of the intended appellant's appeal.



10. That it is in the interest of justice that this application be granted.
11. That the intended appellant/applicant stands to suffer extreme prejudice if this application is not heard and determined expediently.
12. The respondent opposed the application via their replying affidavit dated 16/3/2024. In it she deponed that the applicant's failure to file and prosecute the appeal within the stipulated time frame is indicative of their disregard for the due process of law. The applicant has not presented any compelling reasons or justifications for the delay in filing the appeal.
13. The respondent deponed that the applicant failure's to provide any evidence of illness or any other valid excuse for the delay further weakens their position. That further the applicant's omission to annex relevant documents, such as request letters for the judgement or typed proceedings from the executive officer and/or seek certificates of delay from the said office, is a clear violation of procedural requirements and undermines their credibility.
14. The parties filed written submissions as follows; the applicant submitted that it filed a memorandum of appeal on 30/5/2022 five days after the trial court delivered its judgement on 25/5/2022. As such the applicant acted within the proverbial confines of section 79G of the Civil Procedure Act. However, there was delay in prosecuting the application herein which was attributed to a genuine inadvertence of the Advocates on record for the Intended Appellant who through her former associates one, Ivy Wangusi lodged this instant application in the e-filing platform but unwittingly failed to make the requisite payment.
15. It followed that the application was not filed this disregarded as part of the courts records and therefore the proceedings were stalled. The applicant argued that this is an excusable mistake of counsel on record for the applicant and the same should not be visited upon the litigant.
16. The applicant further submitted that they would suffer irreparably if the orders sought in this application are not granted. This suit relates to a breach of contract whereby the applicant pursuant to a loan application by the respondent agreed to advance the respondent a loan of Kshs 214,500 sometime in October 2019. The respondent made partial payment but failed to offset the entire loan in full thereby interest continued to accrue. It was their position that the decision of the trial magistrate served great prejudice to the applicant as it shall have been condemned unheard and continue to incur monetary loss for the said arrears at the expense of a preconceived notion.
17. On the extension of time to lodge an appeal the applicant submitted that the delay was caused by a mistake of the advocate's part and that there was also delay from the court registry in supplying them with a certified copy of judgement.
18. The applicant further submitted that even though he has not attached a memorandum of appeal in this application the court can discern the grievances intended to be taken up on appeal from other supportive facts proffered by the applicant its support of the application herein. The applicant argued that every person is entitled to a right to be heard which is constitutionally enshrined under Article 50.
19. The issues for determination are as follows;
 - i. Whether the applicant should be granted stay pending appeal.
 - ii. Whether the plaintiff should be granted expansion of time to file the appeal.



20. The governing provisions for extension of time for filing the appeal is Section 79G which states as follows;

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for preparation and delivery to the appellant 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.”

21. I find that judgment was delivered on 25/5/2022 and there has been inordinate delay in prosecuting this application and this offends Article 159 of the Constitution which prohibits delay.

22. The Supreme Court of Kenya in Raila Odinga & 5 others v IEBC & others Supreme Court Petition No 3 of 2013 (UR) on the purport of Article 159 of the Constitution had this to say:

“...Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities.....The Articles simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.....”

23. I find that there is no good and sufficient cause for not filing the appeal within the required time.

24. On the issue as to whether stay of execution pending appeal should be granted, I find that the judgment being sought to be appealed against was delivered more than 2 years ago.

25. In the case of Utalii Transport Company Limited & 3 others v NIC Bank Limited & another [2014] eKLR it was held;

“Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.”

26. The delay in this case is inexcusable and inordinate and I find that the application dated 24/6/2022 lacks in merit and the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 27TH DAY OF JUNE, 2024.

.....

A. N. ONGERI

JUDGE



In the presence of:

..... for the Appellant

..... for the Respondent

