



REPUBLIC OF KENYA



**Orieny & another v National Bank of Kenya (Commercial Case
6B of 2022) [2023] KEHC 101 (KLR) (18 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 101 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE 6B OF 2022
RE ABURILI, J
JANUARY 18, 2023**

BETWEEN

MESHACK ORIENY 1ST APPLICANT

JOYCE ORIENY 2ND APPLICANT

AND

NATIONAL BANK OF KENYA RESPONDENT

RULING

1. Vide their Notice of Motion dated March 11, 2022, the applicants herein seek the following orders:
 - a. Pending the inter parties hearing of this application, the court be pleased to stay the execution of the judgement delivered on July 5, 2021.
 - b. The honourable court be pleased to stay the execution of the judgement delivered on July 5, 2021 pending the hearing and determination of the appeal.
 - c. The honourable court be pleased to grant the applicant leave to lodge an appeal out of time against the decision delivered on July 5, 2021 by the Hon J N Wambilyanga in Kisumu ELC 48 of 2018.
 - d. Upon grant of leave to appeal out of time, the memorandum and record of appeal lodged herein be deemed duly filed.
 - e. Costs of the application be in the cause.
 - f. The honourable court be pleased to issue any orders it deems mete and just in the circumstances.
 - g. Costs of the application do abide the outcome of the appeal.



2. The application is supported by the 2nd applicant's affidavit sworn on March 28, 2022 wherein she deposes that the 1st applicant who was her husband died on October 31, 2020. That she learnt that judgement had been entered against them on July 5, 2021 without notice to her advocates and that it only came to her advocate's attention in the course of looking for the file at the registry.
3. She deposes that on December 9, 2021, she received a notice informing her of the respondent's intention to sell the charged property yet she has appealed against the decision. She is now apprehensive that the respondent may commence the process of execution to her detriment and render the appeal nugatory. That the intended appeal raises serious legal points with high chances of success.
4. The application is opposed through the replying affidavit sworn by Mike Gorbachev Ojiwa, the respondent's Credit Manager who deposes that he was aware of the 1st applicant's death but an inordinately lengthy period of about 8 months lapsed before the current application was instituted. He denies that the respondent extracted the decree in the trial court matter. He further deposes that the applicants filed an application in Civil Suit no 154 of 2011 but that the same was dismissed by Kimaru J and to date, no appeal against the decision has been made and that therefore the instant application seeking injunctive orders is an attempt through the back door.
5. The parties subsequently filed and exchanged written submissions to canvass the application.
6. The applicant identified the following issues for determination: whether the court can issue an order of stay pending hearing and determination of the appeal and, whether the applicant has made out a case for the grant of an order for leave to appeal out of time.
7. Arguing on the first issue, the applicant submitted that when determining the substantial loss to be suffered, the same is to be assessed by the totality of consequences which an applicant is likely to suffer if stay is not granted and therefore forced to pay the decretal sum. In such circumstances therefore, the court is to balance the right of appeal against the success of a litigant who ought to enjoy his fruits of the judgement. That in the instant scenario, the respondent is likely to sell the charged security being the two parcels of land charged as security.
8. In buttressing this line of argument, the applicant relied on the cases of: [*Daniel Chebutul Rotich & 2 others v Emirates Airlines*](#) Civil Case no 368 of 2001, [*James Wangalwa & another v Agnes Naliaka Cheseto*](#) [2012]eKLR and [*Century Oil Trading Company Limited v Kenya Shell Limited Nairobi*](#) [2008]eKLR as well as the provisions of order 42 rule 6 of the Civil Procedure Rules.
9. On security for costs, it was submitted that the applicant is ready to furnish such security as the court may direct. Reliance was placed on the case of [*Arun Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others*](#) [2014]eKLR.
10. On the second issue, it was submitted that when the court is exercising its discretion under section 75G of the [*Civil Procedure Act*](#), it is entitled to consider the length of the delay, the chances of appeal succeeding and the decree of prejudice to the respondent. On the length of the delay, it was submitted that judgement was delivered on July 5, 2021 and the application was filed on March 28, 2022. That before filing the application, the applicant's husband had passed on in 2020 and that she had not known that judgement had been entered against them. Reliance was placed on the cases of [*Thuita Mwangi v Kenya Airways Limited*](#) [2003]eKLR. Further, that if the order of extension of time is granted, the respondent will not be prejudiced.
11. The respondent on its part submitted and raised the following issues: whether or not the orders of stay of execution orders should issue; whether this matter is *res judicata* and whether leave to lodge appeal out of time should be allowed.



12. On the first issue, it was submitted that for one to be granted orders of stay, the party must satisfy all the conditions set under order 42 rule 6 of the Civil Procedure Rules and that examining the application, the applicant has not demonstrated how it stands to suffer loss. That furthermore, no decree for execution has been extracted. It was submitted that the conditions under order 42 have not been established. Reliance was placed on the cases of James Wangalwa (*supra*) and [*Nganga Kabae v Kabunyo Kimani*](#) H C C A no 182 of 1999, Nairobi.
13. On the second issue, it was submitted that the application should be dismissed on the ground that the parties had litigated over the matter in Kisumu HCCC no 154 of 2011 Meshack Orieny & Joyce Orieny v National Bank of Kenya wherein the applicant's case was dismissed. On this limb, the respondents were guided by the provisions of section 7 of the [*Civil Procedure Act*](#) and the authorities in [*The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*](#) [2017] eKLR and [*John Kwayeli Olaka v Lawrence M. Olaka & 2 others*](#) Kisumu HCCC. App No. 4 of 2012.
14. On the third issue, it was the respondent's contention that the application is misleading, brought in bad faith and ought to be dismissed with costs as the intended appeal have no chance of success and that it would be vain and unjust to grant orders of stay of execution.

Analysis and determination

15. Having summarized the respective parties' rival positions,' I find the issues for determination to be: whether the application is *res judicata*, whether the applicant is entitled to orders of stay pending the hearing and determination of the intended appeal, whether the 2nd applicant is entitled to orders of extension of time within which to lodge her appeal and finally what conditions should the court attach to such leave and stay if granted.
16. On the issue of *res judicata*, section 7 of the [*Civil Procedure Act*](#) provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
17. The conditions to be met are; the former suit was between the same parties, the parties were litigating under the same title; the issues in the former suit have been subsequently raised, and; the issues in the former suit have been heard and finally decided by such court of competent jurisdiction.
18. My analysis of the application shows that these conditions have been met except the last issue which deals with the similarity of issues in the former and the instant suit. As stated by the respondent, the initial application sought a restraining relief pending determination of a suit. The instant application seeks an order of stay pending an intended appeal to this court. The outcome of the suit has not been disclosed to this court. The two applications similarly sought different reliefs under distinct legal provisions. I am fortified by the Court of Appeal decision in [*Suleiman Said Shabbal v Independent Electoral & Boundaries Commission & 3 Others*](#) [2014] eKLR where it was held that:

“To constitute *res judicata*, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”
19. I find that the issues in the former suit and the instant suit are not similar and the element of *res judicata* does not therefore arise.



20. On whether I should grant leave to appeal out of time, section 75G of the Civil Procedure Rules stipulates that appeals from the subordinate courts in civil cases to the High Court shall be filed within 30 days of the date of order or decree. The proviso to the said section accords one a window to appeal out of time subject to that party advancing sufficient reasons for the delay. The section provides thus:
- “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 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 in time.”
21. This section was given effect in the case of *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR where the Supreme Court held that:
- “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; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
22. In *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* - Civil Application No Nai 255 of 1997 UR), the court expressed itself thus:
- “It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”
23. The applicant has explained the delay in lodging her appeal as having been occasioned by the death of her husband. The respondent strongly contests this position and states the delay is inordinate.
24. The ingredients the applicant needs to satisfy to be granted this order have been explained in the succeeding paragraphs and the only ingredient pending is that of the appeal having a likelihood of succeeding. I am alive to the fact that the merits of an appeal lies within the province of the appellate court and what the court at this stage ought to consider is the likelihood of the appeal being successful ultimately.
25. I am cognizant of the centrality of the right to fair hearing and the importance of upholding it. Every party to a dispute before a court of law is entitled to this right as guaranteed under article 50(1) of the *Constitution*. I have perused the draft memorandum of appeal and one of the grounds raised therein is the alleged negation of this right by the trial magistrate. I do not find the intended appeal to be frivolous on the face of it.
26. Balancing the right of appeal against the prejudice to be suffered by the respondent, find that greater harm will be suffered by the applicant if the order is declined. In any event, the respondent still holds onto the security charged and will eventually realize the security if the appeal ultimately fails.



27. Turning to the issue of stay pending appeal, the law governing the grant of stay pending appeal is found in order 42 rule 6 of the [Civil Procedure Rules](#) which provides that:

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;
 - i. 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;
 - ii. 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.

28. From the above provision, the following conditions must be established by the applicant; if the order for stay is not granted, he might suffer substantial loss, the application has been filed without unreasonable delay, and; the applicant has offered security for the due performance of any decree or order that may be binding on him.

29. Another condition that seems to lay a bearing on the mind of the court when deciding on such an application is the one stated by Odunga J in [Michael Ntouthi Mitheu v Abraham Kivondo Musau](#) [2021] eKLR where the learned Judge observed that:

“... To the foregoing, I would add that the stay may only be granted for sufficient cause and that the court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to section 1A(2) of the *Civil Procedure Act*.”

30. The first element to be satisfied is a demonstration of the loss that the applicant stands to suffer if the order of stay is not granted. From the affidavit in support of the application, the application mentions that should the order be declined, she stands to suffer serious losses and irreparable damage that cannot be compensated by way of damages. The respondent on the other hand strongly argues that the applicant has not demonstrated the loss to warrant the grant of the orders.



31. Whatever is meant by substantial loss for purposes of order 42 rule 6 of the Civil Procedure Rules was discussed in [*James Wangalwa & Another v Agnes Naliaka Cheseto*](#) (2012) eKLR, that:

“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.”

32. Having considered the application vis-à-vis the response thereto, I am of the considered view that the applicant has demonstrated that she will suffer substantial loss if stay is not granted for reasons that the subject matter of the suit in the court below is an immovable property which is land and if sold, then it will be an onerous task to recover the same, should the appeal ultimately be successful.

33. The second limb demands that the application be filed without unreasonable delay. It is not in dispute that judgement was delivered in the matter on July 5, 2021 and the instant application was filed on March 28, 2022 clearly out of the window permissible for appeal and close to eight months from the date of judgment. The applicant however explains that she had no knowledge of the judgement after the death of her husband in 2020 until the same was brought to her attention by her advocates on record. There is no contrary evidence to this assertion on oath.

34. The factors to be considered in deciding whether a delay is inordinate were discussed in [*Agip \(Kenya\) Limited v Highlands Tyres Ltd*](#) [2001] eKLR where it was held that:

“Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the Court should be lenient and allow the plaintiff an opportunity to have his case determined on merit. Finally the Court must consider whether the defendant has been prejudiced by the delay. To achieve justice, the Court must also consider the possible loss likely to be sustained by the plaintiff if his case is terminated summarily for a procedural default.

35. In the above Agip (K) Ltd case, the court considered the holding in [*Ngwambu Ivita v Akton Mutua Kyumbu*](#) HCCC No 340 of 1971 (unreported) where it was held that:

“So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too ... The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for



the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed.”

36. In light of the applicant’s explanation for the delay and considering the fact that this is a court of justice, I am inclined to find that the explanation for the delay is plausible and excusable.
37. The third limb is provision of security for the due performance of the decree. In the instant application, the applicant has not offered any security. She however submits that she is ready to abide by any conditions that may be imposed by the court. The question is what conditions as to security should this court make?
38. I observe that the subject matter of the dispute is land which is charged with the Respondent and should the appeal be unsuccessful, the respondent shall not suffer any loss as it can sell the land in question and recover all the monies due to it pursuant to the charge instrument and costs of this suit and incidental costs. I therefore find it not necessary to make any orders on depositing of security for costs for the due performance of decree.
39. From my analysis of the application, I find the application for stay of execution pending the filing, hearing and determination of the intended appeal to this court is merited.
40. In the circumstances, I hereby allow the application as prayed and make the following orders:
 - a. Leave be and is hereby granted to the second applicant Joyce Orieny to file an appeal out of time from the judgment and decree of Hon J.N.Wambilyanga, SRM in Kisumu Chief Magistrate’s Court Civil Suit No. 48 of 2018 [ELC]. The memorandum of appeal shall be filed and served within fourteen (14) days from the date of this ruling.
 - b. The leave so granted shall operate as stay of execution of decree in the lower court pending the filing, hearing and determination of the intended appeal.
 - c. The appeal shall be filed and paid for in a separate and new file.
 - d. Costs of this application shall abide the outcome of the intended appeal.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 18TH DAY OF JANUARY, 2023

R E ABURILI

JUDGE

