



Crown Bus Limited v Mary Nyaboke Onywondi t/a Lister Auctioneers (Miscellaneous Application E109 of 2024) [2024] KEHC 10992 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KEHC 10992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION E109 OF 2024
RN NYAKUNDI, J
SEPTEMBER 20, 2024**

BETWEEN

CROWN BUS LIMITED APPLICANT

AND

MARY NYABOKE ONYWONDI T/A LISTER AUCTIONEERS .. RESPONDENT

RULING

1. Before me for determination is a notice of motion application dated 8th February, 2024 in terms of Rules 55(4) and 5 of the [Auctioneers Rules](#) 1997, Order 49 of the [Civil Procedure Rules](#), 2010 and Section 1A, 1B and 3A of the [Civil Procedure Act](#) seeking the following substantive orders:
 - a. Spent
 - b. That the Honourable Court be pleased to extend time for lodging of a reference against the decision of the Taxing Master delivered on 29th February, 2024 in Eldoret Civil Misc Application No. E035 of 2023 – Mary Nyaboke Onywondi T/A Lister Auctioneers.
 - c. That the Draft Memorandum of Appeal dated 19th October, 2023 be deemed as properly filed upon payment of the requisite court fees.
 - d. That pending the hearing and determination of the application herein, there be a stay of execution of the decision of the Taxing master delivered on 29th February, 2024 in Eldoret Civil Misc Application No. E035 of 2023 – Mary Nyaboke Onywondi T/A Lister Auctioneers and of all subsequent orders pending the hearing and determination of the application herein.
 - e. That pending the hearing and determination of the application herein, there be a stay of execution of the decision of the Taxing master delivered on 29th February, 2024 in Eldoret Civil Misc. Application No. E035 of 2023 – Mary Nyaboke Onywondi T/A Lister Auctioneers) and of all subsequent orders pending the hearing and determination of the reference.



- f. That the costs of the present application do abide by the outcome of the reference.
2. The application is anchored on the grounds on the face of it and an affidavit in support sworn by Peter Ruto. On record I have not had sight of a response and as such the application stands unopposed.
3. I have considered the notice of motion and the affidavits in support and against the reliefs being applied for and it is all about exercise of discretion by this Court on whether in both tactical prayers, the applicant has met the criteria and the principles of law to benefit as such to extend time or grant stay of execution.

Decision

4. Being equitable reliefs, they are underpinned on well settled principles which guide the Court to decline or grant the applications in the case of *Salat v Independent Electoral & Boundaries Commission & 7 others* [2014] KLR-SCK, the Court held as follows on extension of time to file an appeal out of time:

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;

Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis;

Whether there is reasonable reason for the delay, which ought to be explained to the satisfaction of the Court;

Whether there would be any prejudices suffered by the respondents if the extension was granted;

Whether the application had been brought without undue delay; and;

Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.

5. On the other hand the law governing the granting of orders for stay of execution pending appeal is as enumerated under Order 42 Rule 6 (1) and 2 of the *Civil Procedure Rules* which stipulates as follows: -

“6.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 referred 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.”

6. Therefore, under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), an Applicant should satisfy the court that:

- a. Substantial loss may result to him unless the order is made;
- b. That the application has been made without unreasonable delay; and
- c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

7. These principles were enunciated in [Butt vs Rent Restriction Tribunal](#) [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
- b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.
- c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the [Civil Procedure Rules](#), can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

8. The limb on substantial loss requires the applicant to clearly state what loss, if any, he/she stands to suffer. This principle was enunciated in the case of [Shell Ltd vs Kibiru and Another](#) [1986] KLR 410 Platt JA set out two different circumstances when substantial loss could arise as follows: -

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the [Civil Procedure Rules](#) was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts....”



9. According to the applicant, upon preparing a reference on 6/3/2024, the same was presented at the civil registry for assessment but the online e-filing platform was experiencing a downtime hence the said reference was not assessed on the said date, hence the delay resulting in the need to seek an extension of time within which to lodge the reference. That the delay in filing the present application was not deliberate and has been explained and further the delay period of 2 days is not inordinate.
10. The Applicant expressed concern on the fact that the court did not grant any orders of stay of execution of the ruling and unless Stay of Execution is granted the Applicant's Application and consequently the intended reference/Appeal will be rendered nugatory and the applicant will suffer irreparable loss and damage. As the court remarked in *Tropical Commodities Suppliers Ltd & others vs International Bank Credit* (in liquidation) (2004) 2 EA 331;

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”(See also [James Wangalwa & Another vs. Agnes Naliaka Cheseto](#) [2012] eKLR)”

11. As observed by Justice Kimaru in [Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi](#) (Milimani) HCMCA No. 1561 of 2007 where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

12. The application is not opposed and as such it is fair to grant the applicant an opportunity to ventilate its case. I need not say much on this.
13. On the second issue of extension of time to file an appeal, the discretion to extend time in favor of a litigant or a party by the court is unfettered but it has to be exercised judiciously not on whim, sympathy or caprice. The principles in *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* 2013 eKLR observed that:

“It has been stated time and again that an application under Rule 4 of the Rules, the learned judge is called upon to exercise his discretion, which discretion is unfettered. Over the years has of course set out guidelines on what a single judge should consider when dealing with an application for extension of time. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Appeal No. 255 of 1997*. The court expressed itself as follows:

“it is now well settled that the decision whether or not to extend the time for appealing, for appealing is essentially discretionary. It is also well settled that in general the matters which this court in deciding whether to grant an extension of time are: First, the length of



the delay, secondly, the reasons for the delay, thirdly, chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice if the application is granted. See *Salat v Independent Electoral & Boundaries Commission & 7 others* (2014) KLR – SCK.”

14. It is clear from section 79 (g) of the *Civil Procedure Act* and the principles in the above cases that a judge has complete and unfettered discretion not only as to whether to grant extension of time but also to decide upon what terms should be imposed on granting the extension of time. I have taken the liberty to examine the application on both prayers of stay of execution and extension of time for the applicant to file an appeal out of time. I have come to the conclusion that the stay of execution applied for should be granted to grant both litigants a chance to prosecute their case.
15. Although the length of delay is a factor to be considered in applications of this nature, there is no principle which has been developed in the decided cases as to any particular period of time beyond which an application may not succeed. The length of the delay and reasons thereof are but some of the factors to be considered by the court in its objective of dealing fairly with the issues raised in the Notice of Motion to avoid prejudice, injustice and saving expenses to ensure cases are dealt with expeditiously as envisaged in Section 1A of the *Civil Procedure Act*. In any event, the delay in this instant case was not inordinate. While the likelihood of the success of the appeal is a factor for the court’s consideration, there is no requirement in law for an applicant to file detailed evidence to demonstrate the merits of the appeal.
16. In my judgment, having regard to all the circumstances, the notice of motion dated 8th February, 2024 be and is hereby allowed. The time for filing and serving the record of appeal is enlarged until the 2nd of October, 2024. In the same vein, stay of execution of the decree arising out of the judgment in CMCC E051 of 2021 is granted so as not to render the intended appeal nugatory. The applicant also is under duty to avail a security by way of a Bank Guarantee from family bank for the decretal sum of 406,550/=.
17. The costs of this application to abide the outcome of the appeal.

DATED AND SIGNED AT ELDORET THIS 20TH DAY OF SEPTEMBER , 2024

R. NYAKUNDI

JUDGE

In the presence of:

Mugambi for the Respondent

Choni for the Appellant

