



Gachau & another v Odhiambo alias Hilver (Miscellaneous Application E074 of 2023) [2024] KEHC 477 (KLR) (16 January 2024) (Ruling)

Neutral citation: [2024] KEHC 477 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
MISCELLANEOUS APPLICATION E074 OF 2023
SN MUTUKU, J
JANUARY 16, 2024**

BETWEEN

JIMUNA CHIIRA GACHAU 1ST APPLICANT

ROBINSON MASUA 2ND APPLICANT

AND

HILVA AOKO ODHIAMBO ALIAS HILVER RESPONDENT

RULING

1. The Applicant has moved this court through a Notice of Motion dated 27th July, 2023 brought under Section 1A, 3A, and 79G of the [Civil Procedure Act](#), Order 42 Rule 6, Order 51 Rule 1 of the [Civil Procedure Rules](#) and Article 151 of [the Constitution](#), and all other enabling provisions of the law seeking the following orders:
 - a. Spent.
 - b. That the Honourable Court be pleased to order stay of execution in Kajiado Chief Magistrate Court No. E040 of 2023 *Hilva Aoko Odhiambo alias Hilver -vs- Jimuna Chiira Gachau and Robinson Masua*, pending the interpartes hearing and determination of this application.
 - c. That the Honourable Court may be pleased to grant leave to the Applicants to file appeal out of time against the judgement of Honourable L.L Gicheha in Kajiado CMCC No. E040 of 2023 delivered on 13th June, 2023 against the Respondents.
 - d. That the Honourable Court may be pleased upon granting leave to file the appeal out of time to order stay of execution in Kajiado CMCC No. E040 of 2023 pending the hearing and determination of the intended appeal.
 - e. That the costs of this application be provided for.



2. The Application is supported by the grounds on the face of it and on the supporting affidavit dated 27th July, 2023 and sworn by Moses Kavisi, Legal Officer at CIC Group Insurance Ltd, the Applicants' insurer. He has stated that the Applicants were Defendants in the lower court suit Kajiado CMCC E040 of 2023 based on a cause of action arising out of an accident that happened on or about 17th June, 2022. That the Insurance Company defended the Applicants in that suit. That the parties to the lower court case consented to liability at 80:20%.
3. He further deposed that the Judgement was set to be delivered on 8th June, 2023 but she was delayed due to the transfer of the magistrate. That the said judgement was delivered on 13th June, 2023 awarding the Plaintiff a total of Kshs. 2,786,041.60. That Applicants were granted 30 days stay which lapsed on 12th July, 2023. It was their case that the movement of the file from Nairobi to Kajiado and the typing of the handwritten Judgement caused delay in filing the appeal. It is deposed that if the orders sought are not granted, they stand to suffer substantial loss for the reason that they may not be able to recover any amount paid to the Respondent and that the appeal shall be rendered nugatory. It is argued that the Insurer is a reputable Insurance Company and is in a position to pay the decretal amount to the Respondent if they are successful in the appeal.
4. The Respondent opposed the application by filing a Replying Affidavit dated 22nd August, 2023 in which she has deposed that the deponent to the supporting affidavit is a stranger to these proceedings and therefore the application is incurably defective, incompetent and bad in law. That the prescribed time to file an appeal as per section 79G of the *Civil Procedure Act* has since lapsed. That no explanation has been given for the delay and that the explanation offered was from the insurer who is not a party to the suit and that the threshold for granting leave out of time has not been met.
5. The Applicant filed a further affidavit dated 25th August, 2023 in which he reiterated that CIC Group was the instructing client in this matter by virtue of the insurance policy and under the doctrine of subrogation. That having taken up the matter they became interested in the outcome of the suit as they would become affected by the decision made in the suit on payment. That when the stay period lapsed the Respondent filed a declaratory suit against the Company. That this action demonstrates that the Respondent recognizes that the Company is the one responsible for settling the decretal sum. That the entire decretal sum was deposited in court and therefore it cannot be said that the company is a stranger to these proceedings and that under Order 19 Rule 6 an affidavit can only be struck out if it is scandalous, irrelevant or oppressive and that their affidavit does not fall under the said category.

Applicants' Submissions

6. This court directed that the application be canvassed through written submissions. The Applicants' submissions were filed on 30th August, 2023. The Applicants have identified 4 grounds for determination:
 - a. Whether the Applicants have sufficient cause for not filing the appeal in time?
 - b. Whether the delay in filing the current application is inordinate and/or the delay has been explained.
 - c. Whether the Applicants have an arguable appeal?
 - d. Whether the Affidavit sworn by Moses Kavisi for the Insurer is admissible.
7. It was submitted in respect of the first and second issue that the law that section 79G of the *Civil Procedure Act* gives the court discretion to extend time upon sufficient grounds. The Applicants reiterated the reasons for the delay as deposed in the affidavit in support of the application and stated



that the delay was not due to their fault or doing but that of the lower court and political unrest at the time.

8. It is their case that this application was filed on 31st July, 2023 and that the Judgement was delivered on 13th June 2023, a delay of about 10 days and that this was not inordinate. They relied on [Mutabi Kiranga -vs- Margaret Wangari & Another](#) (2016) eKLR where it was held in reference to Section 79G of the [Civil Procedure Act](#) that:

“The provision of the above section are clear. The applicants are required to satisfy to the court that they had a good and sufficient cause. What does the term sufficient cause mean? The Court of Appeal of Tanzania in the case of the *Registered Trustees of the Archdiocese of Dar es salam -vs The Chairman Bunju Village Government & 3 others* discussing what constitutes sufficient cause had this to say:

“It is difficult to define the meaning of the words “sufficient cause”. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bonafides is imputed to the appellant. “

In *Daphne Parry vs. Murray Alexander Carson* [1963] EA 546 that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy.....”

9. On the third issue the Applicants argued that they have an arguable appeal as shown in the Memorandum of Appeal and cited [Christine Mwigina Akonya-vs- Samuel Kairu Chege](#) [2017] eKLR, to emphasize the point that they have an arguable appeal.
10. On the fourth issue they relied on Order 19 rule 3(1) of the [Civil Procedure Rules](#) and argued that the deponent as the legal officer of the Insurance Company is privy to the information deposed to in the supporting affidavit. That the Company took over the defence of the primary suit and had been provided by the statement of defence and the judgement delivered in the trial court. That under section 10 of the [Insurance \(Motor Vehicles Third Party Risks\) Act](#) they have a legal duty to satisfy a judgement entered in favour of a 3rd party. That section 10(2) of the said [Act](#) grants a Legal Officer authority to swear an affidavit where they are seized with information pertaining to the suit.
11. They relied on [Obonyo Walter Oneya & Another -vs- Jackline Anyango Ogude \(Suing as the Administrator of the Estate of Fredrick Odhiambo Sewe \(Deceased\)\)](#) [2018] eKLR to support their submissions.
12. They submitted that the Respondent issued a Statutory Notice to the Applicant’s insurer and further instituted a declaratory suit dated 24th July, 2023. That this demonstrated that the Respondent appreciated the interests of the said insurer in the proceedings. They cited [Njuguna Ngugi -vs- Godfrey Adhiambo Oyoo](#) [2021] eKLR where it was held that:

“The applicant was insured by an insurance company where Pauline Waruhiu works. The respondent must have served a statutory notice upon the insurance company before filing the case in compliance with Chapter 405 Laws of Kenya. Further, upon service of summons the applicant (insured) must have taken the summons to his insurers. The insurers legal Department where Pauline Waruhiu works must have appointed an advocate to represent the company’s insured. All along Pauline Waruhiu has been aware of the matter. Counsel



for the respondent dealt with the issue of subrogation but in my view the insurer is not seeking any compensation from the respondent. All what the insurer is doing is to safeguard its interest so that exorbitant awards are not made against its insured clients which awards will ultimately be forwarded to the insurance company for settlement. Even if the insurance company is not a party to the suit, it has a legally recognized interest in the matter and I see no good reason why its staff who have knowledge about the dispute cannot swear affidavits in relation to the case. Should the applicant fail to settle the decretal sum, the respondent has the leeway of filing a declaratory suit against the insurer. It cannot be held that the insurer should remain silent until when involved in a declaratory suit or in a subrogation claim. Pauline Waruhiu has averred about what she knows about the dispute and what she has been informed by the counsel on record for the insured. She can be summoned for cross-examination and in my view she is competent to swear the affidavit in support of the application. I do find that the application is properly supported by two affidavits.”

13. It was their case that the balance of convenience tilts in their favour as they have already deposited security as directed on 2nd August, 2023 and that this court should disregard technicalities so that substantive justice can be rendered to the applicants.

Respondent’s submissions

14. The Respondent’s submissions are dated 22nd August, 2023. Three issues for determination have been raised as follows:
 - a. Whether the Applicant’s insurer has capacity to swear the Supporting Affidavit in the application dated 27th July, 2023?
 - b. Whether the Applicants should be granted leave to file appeal out of time?
 - c. Whether leave for stay of execution pending appeal should be granted and on what terms?
15. On the first issue it was submitted that the deponent to the supporting affidavit lacked capacity as CIC Insurance is not a party to these proceedings. That what was required was an express authorization from the Applicants. The Respondent relied on *Njuguna Ngugi -vs- Godfrey Adhiambo Oyoo* [2021] eKLR where the court relied on the case of *M.M Private Safaris -vs- Kevin Ijatia* (2006) eKLR in which the court stated as follows:

“To that extent, the Supplementary Affidavit of Lydia W. Gutu, filed on 24/3/06, is not truthful in that it is sworn on behalf of the applicant when in reality she is not the counsel for the applicant, but counsel for the insurer. The insurer is not a party to the proceedings herein. Hence, the Affidavit is sworn by a stranger to the proceedings both at this appellate level and at the subordinate court’s level. The insurance sector clearly misleads the insured, to believe that he/it, the insured is represented by a counsel, which counsel is not answerable to the insured.”

16. On the second issue it was submitted that the period for filing an appeal under section 79G of the *Civil Procedure Act* had already lapsed. That the criteria for consideration in applications seeking



extension of time to file appeals was discussed in the case of *Omar Shurie -vs- Marian Rashe Yafar* (Civil Application No. 107 of 2020) that:

“The length of the delay, the reason for the delay; 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.”

17. It was the Respondent’s case that the Applicants did not give reasons for the delay and as such they did not meet the requirements to be granted the orders sought.

18. On the third issue the Respondent reiterated the contents of the Replying Affidavit and Submitted that the Respondent would need to have the metal implants removed and asked that the Court orders half of the decretal sum be released to the Respondent. The Respondent relied on *Gemstar Importers & Another -vs- Edward Nthiwa Mutiso (Sued as a Legal Representative of the Estate of the Charles Nzikok Nthiwa (Deceased))* [2019] where it was held as follows:

“While in this case, it is not contended that the applicant’s insurers are likely to fold up, the amount herein was awarded to an estate of the deceased. However, in light of the consent order on liability, the intended appeal can only succeed, if at all on quantum and it is clear from the memorandum of appeal, that the appeal is restricted to quantum. There is therefore a realisation that at the end of the day some amount is likely to be awarded to the Respondent.

In the premises, there will be a stay of execution pending this appeal on condition that the Applicants remit to the Respondents half of the decretal sum and deposit the other half in a joint interest earning account.....”

19. It was submitted that the Respondent is entitled to the fruits of the judgement and if the application is allowed, they stand to suffer great prejudice.

Analysis and Determination

20. I have considered the application and the grounds in support of the same as well as the grounds in opposition contained in the Replying Affidavit and the rival submissions. In my view, the following form the issues in this matter:

- a. Whether the supporting Affidavit dated 27th July 2023 is properly before this court?
- b. Whether the Applicants have satisfied this court that they should be granted leave to file appeal out of time?
- c. Whether leave for stay of execution pending appeal should be granted?

21. On the first issue: whether the supporting Affidavit dated 27th July 2023 is properly before this court, I have considered the explanation offered by the Applicants in their submissions that the interest of the insurance company by virtue of section 10 (2) of the *Insurance (Motor Vehicles Third Party Risks) Act*, a legal officer or an authorized officer of the insurer seized with the information pertaining to a suit has capacity to swear an affidavit. I have also considered *Obonyo Walter Oneya & another v. Jackline Anyango Agude (Suing as the Administrator of the Estate of Frederick Odhiambo Sewe (Deceased))* [2018] eKLR that:

“The fact that an insurer is required to be notified of the proceedings giving rise to the judgment and to satisfy the judgment obtained against its insured leaves no doubt that the



insurer has an interest in the proceedings leading to the judgment and in any appeal against that judgment and consequently, it is my view that a legal officer or any authorized officer of the insurer would be seized of information pertaining to the proceedings in the primary suit and any appeal lodged against the decision or decree arising therefrom and has capacity to swear an affidavit in either the suit or the appeal. In any case, there is no law that provides that only co-litigants can swear an affidavit in a matter. In my view, any person with information relevant to an action and who is duly authorized can swear an affidavit in the action.”

22. Further Order 19 Rule 7 of the [Civil Procedure Rules](#) which provides that “The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality” as well as the fact that the Insurance Company has already satisfied the decree by depositing the decretal sum as security for costs and I am satisfied that the Supporting Affidavit to this application is properly before this court.
23. On the 2nd issue, whether the Applicants have satisfied this court that they should be granted leave to file appeal out of time, I have considered rival arguments on the issue. The Applicants have explained the reasons behind the delay of filing the appeal within time and I find the explanation plausible. I have noted that this application was filed on 31st July, 2023 and that the Judgement was delivered on 13th June 2023. The delay was for about 10 days. This period of delay is excusable under the circumstances as explained by the Applicants.
24. The Applicants are raising issues on quantum in their Memorandum of Appeal and I am satisfied with the arguments that the appeal is meritorious, in my view and the Applicants deserve a chance to argue the ventilate it.
25. On whether leave for stay of execution pending appeal should be granted, I have considered this issue. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the [Civil Procedure Rules](#), the relevant part of which states as follows:
 - (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 preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under sub rule (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)
 - (4)
 - (5)



- (6) Notwithstanding anything contained in sub rule (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.
22. The court, in *RWW vs. EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
- Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
23. Further, in *Visbram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 42 Rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
24. I have read the Memorandum of Appeal and the grounds raised in it. I have considered the grounds in support of the appeal and the submissions of the Applicants. I am satisfied that the Applicants have met the threshold for grant of stay pending the appeal. They have already provided security for due performance of the decree. This court has already granted the Applicants stay of execution pending the determination of this application and security has been provided for. It is only fair and just to grant stay of execution pending the determination of the appeal.
25. In conclusion, it is my considered view that the Applicants have argued their case to the satisfaction of this court. Consequently, the Notice of Motion dated 27th July 2023 is hereby allowed with costs in the cause.
26. The Appellant shall prepare, file, and serve a Record of Appeal within 60 days from the date of this Ruling to pave the way for directions of this court.
27. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF JANUARY 2024.

S. N. MUTUKU

JUDGE

