



**Njogu v Maganda (Miscellaneous Civil Application  
E006 of 2024) [2024] KEHC 9253 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9253 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
MISCELLANEOUS CIVIL APPLICATION E006 OF 2024  
LM NJUGUNA, J  
JULY 31, 2024**

**BETWEEN**

**VERONICAH WANJIRU NJOGU ..... APPLICANT**

**AND**

**PHIDES RUGURU MAGANDA ..... RESPONDENT**

**RULING**

1. The applicant filed a notice of motion dated 26<sup>th</sup> January 2024, which is supported by the grounds set out on its face and the facts deposed in the supporting affidavit. The orders sought are as follows:
  1. Spent;
  2. Spent;
  3. That this court be pleased to grant the applicant leave to appeal out of time against the judgment in Siakago PMCC No. E008 of 2020;
  4. That this honourable court be pleased to issue an order of stay of execution of the judgment entered and delivered herein against the applicant on 08<sup>th</sup> November 2023 pending hearing and determination of the intended appeal;
  5. That the honourable court be pleased to issue any other orders it deems fit and just in the circumstances; and
  6. The costs of and incidental to this application be costs in the intended appeal.
2. The applicant deposed that she desires to appeal against the decision of the trial court and she will suffer substantial loss if she is denied an opportunity to do so. She avers that she will suffer irreparable harm if the respondent is left to execute as she pursues the appeal as the same will be rendered nugatory. She stated that the delay in filing the appeal was caused by a delay in extracting a copy of the judgment which



was to be served upon her insurers for settlement of the decretal sum and this denied her adequate time to discuss the judgment with her insurer. That when a copy of the judgment was availed to her and the insurer, time within which to appeal had lapsed. That the mistakes of her former advocates should not be visited on her and that she has appointed another advocate. That the appeal raises an arguable case and the delay was not inordinate. That it is necessary for execution to be stayed to enable her argue her appeal which may otherwise be rendered nugatory.

3. The respondent filed grounds of opposition, stating that the applicant is a stranger to the proceedings thus rendering the application a non-starter. That no orders are sustainable in the circumstances since the application does not fall under Order 22 Rule 22 or Order 42 Rule 6 of the *Civil Procedure Rules*.
4. The application was canvassed by way of written submissions and both parties filed their submissions in compliance with the Court's directions.
5. The applicant submitted that the grounds of opposition lacks merit since the same are crafted so as to raise a preliminary objection on points of law. She relied on the case of Independent Electoral & Boundaries Commission v. Jane Cheperenger & 2 Others (2015) eKLR and stated that the points of law raised in the grounds of opposition should be proved. That the respondent seems to insinuate that the applicant's advocate at trial ought to have consented to the applicant's new advocate before filing the application herein as required under Order 9 Rule 5. She relied on the case of *Tobias M. Wafubwa v. Ben Butali* (2017) eKLR and urged the court to strike out the grounds of opposition. She urged the court to grant her leave to appeal out of time in line with section 79G of the *Civil Procedure Act*. She relied on the case of *Thuita Mwangi v. Kenya Airways Limited* (2003) eKLR. She also urged the court to grant stay of execution to enable her prosecute the intended appeal.
6. The respondent submitted that the applicant failed to substantiate her explanation for the delay but only stated that her former advocate delayed in obtaining a copy of the judgment. That there is no correspondence showing that the applicant requested for the said document. He urged the court to dismiss the application
7. The issue for determination is whether the application has merit.
8. The applicant has sought stay of execution pending appeal as well as leave to appeal out of time. Stay of execution orders may be granted when the court is satisfied of the parameters set out in Order 42 Rule 6(2) of the *Civil Procedure Rules 2010* as follows:
  - (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.
9. The court may also grant leave to appeal out of time if there is a satisfactory explanation for the delay. Section 79G of the *Civil Procedure Act* provides as follows:

“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 a good and sufficient cause for not filing the appeal in time.”



10. For both orders to be granted, the court has to determine whether the delay is ordinate and if so, if it is sufficiently explained. The applicant stated that the delay in filing the appeal resulted from her advocate's delay in obtaining a copy of the judgment and by the time the same was made available, the time for appealing had already lapsed thus necessitating the application. That if an order for stay of execution is not granted and the respondent is left to execute, the appeal will be rendered nugatory
11. The grounds of opposition are based on Order 9 Rule 9 of the *Civil Procedure Rules*. This being a miscellaneous application, the issue of change of advocate has not been raised herein by the applicant. The most that has been said is that the advocate was indolent thus the delay and that her current advocate has been properly appointed. The applicant stated that the issue has been raised within grounds of opposition and not through a preliminary objection where the point of law should be interrogated. Order 9 Rule 9 of the *Civil Procedure Rules* provides:
- “When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
12. Order 9 Rule 10 provides that where a question arises under Rule 9, the same should be determined first, whether or not the same is raised alongside other prayers. In this case, the applicant has not moved the court for the relevant orders under rule 9 but has admitted to having appointed another advocate, aside from the previous advocate. The respondent has raised the issue in his grounds of opposition. In my view that is a pertinent issue that should be determined first, even though it is not raised as a preliminary objection.
13. Paragraph 9 of the supporting affidavit to the application indicates that the applicant's insurer has appointed the firm of Kiruki & Kayika Advocates to seek the orders sought for through the application. In the same affidavit, the applicant states that she is deserving of the orders sought because the delay was caused by the action or inaction of her former advocates. In the case of *Kazungu Ngari Yaa v Mistry v. Naran Mulji & Co.* [2014] eKLR, the court in considering Order 9 Rule 9 held as below:
- “The provision envisage two different scenarios and the only commonalities are that, there has been a judgment and there was advocate on record previously. In first scenario under (a), the new advocate or the party in person makes a formal application to the Court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but the party must give notice to the other parties and then satisfy the Court to grant leave. In the second scenario under (b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the scenario under (b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court.”
14. It would be imprudent to consider the prayers sought herein given that the applicant has changed advocates without the necessary leave of court or consent from the former advocate. The application will not be entertained until such time as the issue of representation of the applicant has been aligned according to Order 9 Rule 9 of the Civil Procedure Rules.



15. Therefore, the application is hereby struck out with costs to the respondent.

16. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 31<sup>ST</sup> DAY OF JULY, 2024.**

**L. NJUGUNA**

**JUDGE**

..... for the Applicant

..... for the Respondent

