



Cherangani Hills Limited & another v Wephikhulu & another (Suing as the Legal Representatives of the Estate of the Late Petr Nyongesa) (Miscellaneous Civil Application E002 of 2022) [2024] KEHC 8965 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8965 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
MISCELLANEOUS CIVIL APPLICATION E002 OF 2022**

AC MRIMA, J

JULY 25, 2024

BETWEEN

CHERANGANI HILLS LIMITED 1ST APPLICANT

DAVID MUSUNGU 2ND APPLICANT

AND

PAULINA CHEMOSONG WEPHIKHULU 1ST RESPONDENT

BETTY NASIMIYU WAMONO 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
PETR NYONGESA**

RULING

Background:

1. This ruling is in respect of an application by way of a Notice of Motion dated 18th July, 2022. It was filed by the Applicants herein.
2. The application yielded from the decision in Kitale CMCC No 270 of 2014 between the parties herein (hereinafter referred to as ‘the Civil Suit’) which decision was allegedly rendered on 3rd August, 2021.
3. The civil suit was in respect of compensation due to the death of one Peter Nyongesa [hereinafter referred to as ‘the Deceased’] in South Sudan.
4. The Applicants are now challenging the said decision and have, in the instant application, sought for leave to appeal out of time and a stay of the execution of the impugned decision.
5. The application was vehemently opposed. The Respondents filed a Replying Affidavit sworn on 17th February 2023 by the 1st Respondent.



6. The application was disposed of by way of written submissions. Both parties filed comprehensive submissions and referred to several decisions. This Court remains grateful to Counsel. An in-depth reference to the submissions and the decisions is covered under the rubrics of leave to appeal and stay of execution in this ruling.
7. Given the nature of the application, this Court will consider the two limbs, that is the prayer for leave to appeal out of time and a stay of the execution, separately; and as hereunder.

Leave to appeal:

8. The power of the High Court to inter alia extend time for filing an appeal from a judgment of a subordinate Court is donated by Section 79G of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya.

9. The provision states as follows: -

79G. Time for filing appeals from subordinate courts:

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.

10. Courts have over time developed the legal principles guiding the issue of extension of time.
11. The Court of Appeal in *Thuita Mwangi v Kenya Airways* [2003] eKLR stated as follows in respect to the matter: -

Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), 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 generally the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted [the arguability test]; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

12. And, in *Velji Shahmad v Shamji Bros. and Popatlal Karman & Co.* [1957] EA 438, the High Court expressed itself as follows: -

In the interests of the public the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgement has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgement which ought, except under very special circumstances, to be made effectual. And the Legislature intended that appeals from judgements should be brought within the prescribed time and no extension of time should be granted except under very special circumstances.”



13. The guiding law on extension of time was finally settled by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR. The Apex Court derived the following underlying principles which a Court should consider: -
- i. 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;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
14. Having restated the law, this Court will now apply it to the circumstances of this case.
15. One of the cardinal legal factors discussed above is the arguability of the appeal. In *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* [2018] eKLR, the Court had the following to say about the said factor: -
16. Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is not required to persuade the appellate Court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal; a demonstration that the Applicant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict.....
16. This Court has intently relooked into the Draft Memorandum of Appeal annexed to the application. The Applicants intend to vehemently challenge the impugned judgment on several grounds including that the trial Court lacked the jurisdiction over the civil case.
17. Further, the Applicants gave the reason as to why could not lodge an appeal within the statutory timeline. They averred that the impugned judgement was scheduled for delivery on 27th July 2021 before Hon. M. Kesse (Principal Magistrate), but it was deferred and was to be delivered on notice. That, the judgement was eventually delivered on 3rd August, 2021 without notice to the Applicants.
18. That was, however, not all. The Applicants further averred that when their Counsel learnt of the delivery of the judgment, he rushed to Court to peruse the Court and confirm as much, but the Court file was not available. The Advocates formally wrote to the Court to request for the Court file vide their letter dated 26th May, 2022 which was received on 27th May, 2022.
19. The Court seem to have been found sometimes in June 2022 when the Court Administrator responded to the Applicants' Counsel letter informing them of the availability of the file. The Court's letter was dated 14th June, 2022. The Applicants then filed the instant application.
20. The sequence of events as narrated by the Applicants were not opposed to by the Respondents.



21. Therefore, in consideration of the nature and the circumstances of the case in light of the above legal guidance, this Court finds that the Applicants are deserving of the opportunity to lodge and pursue their appeal.

Stay of Execution:

22. Order 42, Rule 6 of the [Civil Procedure Rules](#) provides that an Applicant must satisfy the following conjunctive requirements for the grant of stay of execution pending appeal; that is to say: -
- i. The application has been made without unreasonable delay;
 - ii. Substantial loss may result to the Applicant unless the order is made; and
 - iii. That the Applicant is willing to furnish such security as the court order for the due performance of such decree.
23. It is not lost that the purpose of stay pending appeal as held in the case of [RWW v EKW](#) [2019] eKLR, is as follows: -

... 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.

24. The application shall, hence, be determined under the three parameters captioned above.

Whether the application was filed timeously:

25. This can be determined from the transpirations in the matter.
26. Judgment before the trial Court was delivered on 3rd August, 2021. Thereafter, the instant application was filed around 18th July, 2022. That was a period of close to one year.
27. The inability by the Applicants to file the appeal within time has already been captured above. The reasons are sound and that is why this Court has already granted the Applicants leave to appeal out of time.
28. The first condition, therefore, favours the Applicants.

Whether the Applicants will suffer substantial loss:

29. The aspect of substantial loss was discussed in [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR as follows: -

... 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.

30. The principal contention by the Applicants is that the trial Court had no jurisdiction and that the sums, despite being colossal, stand to be irrecoverable from the Respondents in the event the appeal succeeds since the Respondents have no known assets and their financial ability is also unknown.
31. On their part, the Respondents surprisingly did not respond to the above averment. Therefore, such is uncontroverted and remains the position at hand.
32. Therefore, in such a scenario, the Applicants truly stand to suffer irreparable loss in the event the stay orders are not issued.

Furnishing of security:

33. Both parties tendered their positions on the issue. Whereas the Applicants expressed their willingness to abide by any condition precedent to the grant of the order of stay, the Respondents urged for payment of three-quarters of the decretal sum. The judgement amount in the civil suit stood at Kshs. 2,735,550/=.
34. Given the manner in which the impugned judgment was delivered and the subsequent disappearance of the Court file to close to a year, the Applicants suffered a great deal as they chased the whereabouts of the file amid the possibility of execution. Further, the Court did not render any explanation to the disappearance of the Court file.
35. In such circumstances, this Court finds that a security of part of the decretal sum in the form of a Bank Guarantee will suffice.

Disposition:

36. As I come to the end of this ruling, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.
37. Deriving from the above, the following final orders do hereby issue: -
 - a. Leave is hereby granted to the Applicants to lodge an appeal out of time against the judgment in Kitale CMCC No 270 of 2014.
 - b. The Applicants to file and serve a Memorandum of Appeal within 14 days of this ruling.
 - c. The execution of the judgment and decree in Kitale CMCC No 270 of 2014 is hereby stayed pending the filing and determination of the intended appeal on condition that the Applicants shall file a Bank Guarantee in the Appeal file for the sum of Kshs 1,500,000/= [Read: Kenya Shillings One Million Five Hundred Thousand Only] within 30 days of this order.
38. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF JULY, 2024.



A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Miss Ngeiwo , Learned Counsel for the Applicants.

No appearance for Miss. Oganga, Learned Counsel for the Respondents.

Chemosop/Duke – Court Assistant.

