



Eden Park Country Garden v Wakaridi & another (Civil Miscellaneous Application E042 of 2024) [2024] KEHC 13511 (KLR) (Civ) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13511 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL MISCELLANEOUS APPLICATION E042 OF 2024
AN ONGERI, J
OCTOBER 31, 2024**

BETWEEN

EDEN PARK COUNTRY GARDEN APPLICANT

AND

LAZARUS NGUNYI WAKARIDI 1ST RESPONDENT

**MARTIN G ANDREW T/A NDAMENE AGENCIES AUCTIONEERS 2ND
RESPONDENT**

RULING

1. The application dated 22/1/2024 is seeking the following orders;
 - i. This application be certified urgent and be heard on a priority basis dispensing of with service in the first instance.
 - ii. That Pending the hearing and determination of this application inter-parties there be a stay of execution of the warrants of attachment dated 19th of December 2023 and ALL consequential orders in favor of the 1st and 2nd Respondents.
 - iii. That Pending the hearing and determination of the main appeal there be a stay of execution of the warrants of attachment dated 19th December 2023.
 - iv. That this Honorable Court be pleased to grant the applicant leave to appeal out of time against the judgment delivered by the Adjudicator of the Small Claims Court Hon. C. A. OKUMU on the 18th of August 2023 pending the hearing and determination of the intended appeal.



2. The application is supported by the affidavit of Joseph Thuo Njoroge, the director of the applicant company in which he stated as follows;

The 1st Respondent sued the Applicant company in the Small Claims Court and judgement was entered in his favour. He has taken out a warrant for sale of movable property in execution of the decree for money and instructed the 2nd Respondent to execute. The 2nd Respondent has already proclaimed the applicant's properties and given it 7 days to settle the decretal sum.

The issues in the small claims court pertained to title and possession of land.

The Applicant wishes to challenge the decree of the small claims court but the time has lapsed while the applicant was in the process of processing the Title Deed. The intended appeal is meritorious and with a high chance of success.

If the application is not allowed, the applicant will suffer substantial loss and damage, having already processed the title for the 1st Respondent and undertaking the conveyancing.

There is good and sufficient reason for the Court to allow the Applicant to Appeal out of time, as four months is not inordinate.

3. The respondent did not file a reply.
4. The parties filed written submissions as follows;
5. Counsel for the Applicant submitted that on 9/5/2024, the Court directed the Applicant to deposit half the decretal sum awarded to the 1st Respondent in SCCOMM/E3169/2023 in court as security which it did.
6. The Respondents were given time by the court to file their response. Counsel thus submitted that the application is unopposed and should be allowed as prayed, and there be a stay of execution of the judgement from the Small Claims Court, pending the hearing and determination of the Appeal.
7. He further submitted that the delay in filing the appeal was not intentional as the applicant was processing the title deed which he was to hand over to the 1st Respondent.
8. He also submitted that the intended appeal is arguable and meritorious with a high probability of success and if the application is allowed, the Applicant will be denied the right to be heard and in turn suffer substantial loss having already processed the title for the 1st Respondent.
9. He also urged the court to give directions for the preparation of the Record of Appeal and the expeditious disposal of the same.
10. The issues for determination are as follows;
 - i. Whether the applicant should be granted leave to appeal out of time.
 - ii. Whether the applicant should be granted stay of execution pending appeal.
11. On the issue as to whether the applicant should be granted leave to appeal out of time, the governing provision is Section 79G of the [Civil Procedure Act](#) which provides 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.

12. I find that the court has discretion to grant leave to appeal out of time.
13. In the case of *Mutiso v Mwangi* [1997] KLR 630 the court held as follows;

“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; and fourthly, the degree of prejudice to the Respondent of the application is granted.”
14. I have considered the factors stated above and I grant leave to appeal out of time.
15. On the issue of stay of execution pending appeal, the governing provision is Order 42 Rule 6 which states as follows;

Stay in case of appeal [Order 42, rule 6]

- (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—
 - (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) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.



- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (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.

16. I find that the applicant has deposited security for the due performance of the decree.

17. The applicant is granted stay of execution pending appeal.

18. I allow the application dated 22/1/2024 as prayed.

19. The costs to abide the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF OCTOBER, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent

