



**Kaaria v Gituma (Miscellaneous Civil Application E085 of 2024)  
[2024] KEHC 13186 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13186 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
MISCELLANEOUS CIVIL APPLICATION E085 OF 2024  
EM MURIITHI, J  
OCTOBER 31, 2024**

**BETWEEN**

**MWENDA KAARIA ..... APPLICANT**

**AND**

**PETER GITUMA ..... RESPONDENT**

**RULING**

1. By a certificate of urgency dated 24/6/2024 pursuant to Order 21 Rule 1B, Order 22 Rule 22, Order 40 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the Civil Procedure Act, Article 159 (2) (a) & (d) of the Constitution and all other enabling provisions of the law, the Applicant seeks that:
  1. Spent
  2. The lower court file and proceedings be forwarded or availed to the High Court for the purposes of this application for stay of execution pending the intended appeal or appeal.
  3. spent
  4. This Honorable Court be pleased to stay execution of the ex-parte judgment, the decree arising therefrom and the subsequent ruling delivered on 08/02/2023, and costs in Meru CMCC No. E0389 of 2021 pending hearing and determination of the intended appeal and/or appeal.
  5. Leave be granted to the Applicant herein to lodge an Appeal against the ruling of 08/12/2023 in Meru CMCC No. E0389 of 2021 out of time.
  6. The judgment or decretal sum of Kshs. 1,012,550 in Meru CMCC No. E0389 of 2021 remain deposited in court until further orders of this court as to its disposal and/or pending hearing and determination of the intended appeal and/or appeal.



7. This Honorable Court be pleased to issue any other order and/or direction it deem fit to grant in the circumstances.
  8. Costs of this Application abide the outcome of the Intended Appeal.
2. The application is premised on the grounds on the face of it and supporting affidavit of Mwenda Kaaria, the Applicant herein sworn on even date. He avers that the Respondent has initiated the process of execution by filing an application seeking release of the funds in court, which application is slated for mention on 25/6/2024. His then advocate on record made an oral application seeking extension the time within which he was to comply with order 3 of the ruling of 12/7/2023, on the ground that it was not a condition in the application to set aside. The ruling of the said oral application was reserved for delivery on notice, which ruling was never delivered. His counsel, without knowledge of the said ruling filed a statement of defence, list of documents and list of witnesses on 12/2/2024. It is only after ruling of the Bill of Costs on 22/3/2024 that he duly became aware that the ruling on the oral application had been delivered on 8/12/2023, striking out his defence and pre-trial documents. He maintains that he has satisfied the grounds for the order to file a statement of defence and compliance documents and the Respondent will not suffer any prejudice in the event extension of time is granted. Aggrieved by the decision of the trial court, he wishes to challenge the ruling therein because he was denied a chance to be heard on merit. The delay was occasioned by difficulties in obtaining typed proceedings and/or copy of the impugned ruling and the court file being in chambers between 13/2/2024 to April or thereabout. His time to appeal against the ruling lapsed on 30/1/2024, and he has an arguable appeal with a high chance of success. He has an inalienable right which cannot be taken away and he stands to suffer irreparable loss and damage as the entire object of this application will be defeated and rendered nugatory should execution proceed. The application was filed without inordinate or deliberate delay and it is only just that he is granted an opportunity to litigate and ventilate his case.
  3. The Applicant swore a supplementary affidavit on 13/8/2024 in support of his application. He avers that his efforts to comply with the orders of 12/7/2023 were thwarted by the Respondent's counsel who orchestrated a plan to deny the said orders by declining to supply the said pleadings. The delay to be supplied with typed ruling became inordinate and contributed to the failure to file the application herein.
  4. The Respondent has opposed the application vide his replying affidavit sworn on 4/7/2024. He avers that he filed Meru CMCC No. 389/2021 against the Applicant on 21/9/2021 and duly served summons to enter appearance on 24/9/2021. After the Applicant failed to file a defence within the requisite time, a judgment in default was entered and the matter was formally proved. He served the Applicant with a notice of entry of judgment and filed a bill which was taxed at Ksh. 121,400. The Applicant was jolted from his deep slumber by the service of the bill of costs when he filed the application dated 31/3/2021 to set aside the exparte judgment. The trial court, vide its ruling of 12/7/2023 conditionally allowed the application of 31/3/2021, but the Applicant failed to comply with order 3 thereof which rendered the default judgment executable forthwith. The Applicant then applied to be allowed to comply with the ruling of 12/7/2023, but he failed to prosecute the application and the same was dismissed. The ruling of the court for setting aside the default judgment did not impose a condition on him to serve the Applicant with summons or the proceedings since he already had them. Since there was nothing pending in the matter, his advocate applied to have the decretal sum deposited in court released, which application the Applicant opposed. The failure to disclose the contents of the ruling sought to be appealed against dated 8/12/2023 renders the application incurably defective and the alleged statement of defence together with the pretrial documents filed on 12/2/2024, clearly out of time had to be struck out. The intended appeal is not arguable and it is meant to deny him the fruits of his judgment. The conduct of the Applicant shows that he has been totally indolent,



and it is only fair that the court dismisses the application, as it is based on the Applicant's violation of the court ruling.

### **Submissions**

5. The Applicant urges that his apprehension that the Respondent will not be in a position to refund the decretal sum in the event that the appeal was to succeed is substantial loss, and cites *Matata & Another v Rono & Another (Civil Appeal E034 of 2024)* [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling) and *NCBA Bank Limited v WYSS Logistics Limited (Civil Appeal E277 of 2023)* [2024] KEHC 1613 (KLR) (14 February 2024) (Ruling). He urges that the delay in filing the appeal was caused by the court, and cites *Otieno James Ayuko v Paul Osoo Warega & 4 Others (2022)* eKLR. He submits that the decretal sum of Ksh. 1,012,550 has already been deposited in court and prays for the same to so remain until further orders of this court as to its disposal and/or pending the hearing and determination of the appeal.
6. The Respondent urges that the order sought to be appealed against is unknown to this court because it has not been annexed. He urges that there is no explanation for the delay in filing the intended appeal, and cites *Njoroge v Kimani (Civil application Nai E049/2022 KECA 1188 (KLR))*. He urges that the Applicant has been an indolent party who does not deserve the orders sought, and prays for the dismissal of the application with costs.

### **Determination**

7. The issues for determination are whether leave to appeal out of time and stay of execution are justified.

### **Leave to Appeal**

8. The principles for consideration on an application for extension of time to appeal out of time are that, the power is discretionary but the applicants must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay are plausible, that the appeal is arguable and not frivolous and that the respondent will not be unduly prejudiced by the order being made. See *Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others (2014)* eKLR.
9. The ruling sought to be appealed against, which this court does not have the benefit of examining because it has not been adduced, is said to have been made on 8/12/2023 while the instant application was filed on 24/6/2024. The delay in filing this application is attributed to the difficulties in obtaining the typed proceedings and/or copy of the ruling. The Applicant assiduously followed up on the proceedings as he has adduced a letter dated 13/2/2024 to that effect. The court thus finds that the delay, albeit inordinate, has been satisfactorily explained.
10. On the arguability or otherwise of the intended appeal, the grounds raised in the annexed memorandum of appeal fault the trial court for inter alia failing to take into account the Applicant's oral application of 24/10/2024 and submissions therein, infringing his right to be heard hence denying him justice and striking out his statement of defence, list of witnesses and list of documents. Whether those are good grounds with overwhelming chances of success is for the court sitting on appeal to decide. It is not for this court at this stage, to go into the merits of the Appeal. In *Omar Shurie v Marian Rashe Yafar (2020)* eKLR, the Court of Appeal expressed itself thus:

“As regards the chances of success of the intended appeal, it is not my role to determine definitively the merits of the intended appeal. That is for the full court if and when it



is ultimately presented with the appeal. In *Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015* this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

11. For the above reasons, firstly that the explanation for the delay herein has been satisfactory, and secondly, that there are arguable points to be canvassed on appeal, this court will allow the application for extension of time.

### **Stay of Execution**

12. Order 42 Rule 6 of the Civil Procedure Rules empowers a court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided under Rule 6 (2) as follows:

“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.”

13. The ex parte judgment herein, according to the Notice of Entry of Judgment dated 21/2/2023, was entered on 8/2/2021. The court notes that the Applicant swiftly moved the trial court to have the ex parte judgment set aside, which application was allowed subject to fulfillment of some conditions. The Applicant partially complied with the conditions for setting aside the ex parte judgment, which rendered the judgment executable. He subsequently sought extension of time within which he was to comply with order 3 of the ruling of 12/7/2023, which application is said to have been dismissed vide the ruling of 8/12/2023 where his defence and compliance documents were struck off.
14. The reason for the inordinate delay herein, has been satisfactorily explained.
15. Whereas the Applicant contends that he stands to suffer irreparable loss should execution proceed, the Respondent maintains that the intended appeal, which is not arguable, is meant to deny him the fruits of his judgment.
16. 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, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. 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. This is what substantial loss would entail and I respectfully agree with Gikonyo, J. in *James Wangalwa & anor v Agnes Naliaka Cheseto* (2012) eKLR).
17. The court is minded that the Respondent, as the successful litigant, is entitled to enjoy the fruits of his judgment, and the Applicant, being aggrieved by the judgment has an undoubted right to appeal against the trial court’s decision.



## Orders

18. Accordingly, for the reasons set out above, the court finds merit in the application dated 24/6/2024, which is allowed in terms of prayers 4, 5 and 6 thereof as follows:-
1. The Applicant is granted leave to appeal out of time against the ruling of 8/2/2023 in Meru CMCC No. E0389 of 2021.
  2. Stay of execution of the ex parte judgment, the decree arising therefrom and the subsequent ruling of 8/2/2023 and costs in Meru CMCC No. E0389 of 2021 is hereby issued pending the hearing and determination of the appeal.
  3. The decretal sum of Kshs.1,012,550 in Meru CMCC No. E0389 of 2021 shall remain deposited in court until further orders of this court as to its disposal and/or pending hearing and determination of the appeal.
  4. The Record of Appeal to be filed within 60 days from the date hereof.
  5. In the event of default of any of the aforementioned conditions, the stay hereby granted shall lapse and be of no effect.
19. In terms of Order 50 rule 6 of the Civil Procedure Rules the costs of this application shall be paid by the applicant to the Respondent.

Order accordingly.

**DATED AND DELIVERED THIS 31<sup>ST</sup> DAY OF OCTOBER, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Wambua for the Applicant.

Mr. Ayub Anampiu for the Respondent.

