



**Muiruri v Kariuki (Miscellaneous Civil Case E116 of 2024)
[2024] KEHC 13270 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL CASE E116 OF 2024
PN GICHOHI, J
OCTOBER 30, 2024**

BETWEEN

PATRICK KIOGI MUIRURI APPLICANT

AND

ANNE NJERI KARIUKI RESPONDENT

RULING

1. Through the firm of Kimondo Gachoka & Co. Advocates, the Applicant herein filed a Notice of Motion dated 9th April 2024 under Article 159, (2) (d) of the Constitution of Kenya 2010, Section 1A, 1B, 3A, 7G, and 95 of the Procedure Act, Oder 42 Rule 6 (1) (2) & (7), Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010, seeking the following orders that: -
 1. The instant application be certified as urgent and be heard ex-parte in the first instance.
 2. This Honourable Court be pleased to grant the Applicant leave to appeal out of time in respect to judgment/ decree delivered in Nakuru SCCCNo. E 343 of 2023 by Hon. D.M. Macharia (Resident Magistrate).
 3. This Honourable Court be pleased to grant a temporary order of stay of execution of the judgment and/or decree delivered on 01/03/2024 and all consequential orders arising therefrom pending the hearing and determination of this application interpartes.
 4. This Honourable Court be pleased to grant a temporary order of stay of execution of the judgment and/or decree delivered on or about 01/03/2024 and all consequential orders arising therefrom pending the hearing and determination of the intended appeal herein.
 5. This Honourable Court be pleased to issue an Order for provision of a Bank Guarantee of the entire decretal sum awarded by the trial court of Kshs.470,610/= only as security pending hearing and determination of the intended appeal.



6. This Honourable Court be pleased to issue any other Order as it may deem just, appropriate and expedient in the interest of justice.
7. Costs of this application be provided for.
2. The grounds are on the face of the application supported by the Affidavit sworn by Audrey Mwira on 9/04/2024 in her capacity as the Advocate from the firm Kimondo Gachoka & Co. Advocates and in conduct of the matter for the Applicant herein.
3. It is deponed that the judgment dated 01/03/2024 in Nakuru SCCC E 343 of 2023 was entered in favour of the Plaintiff/ Respondent as against the Defendant/Applicant at liability in the ratio of 90:10, general damages of Kshs. 450,000/= and special damages of Kshs.20,610/= plus costs and interest. It is further stated that the court also granted stay of execution for 30 days.
4. Counsel further depones that time allowed for filing the appeal has run out and that the delay was inadvertent and excusable due to the delay in receiving instructions from their clients. That they informed their instructing client Directline Assurance Ltd the terms of the judgment for further instructions or forwarding the payment to the Plaintiff/Respondent but the claims officer who received the terms left employment of Directline Assurance Ltd before issuing further instructions.
5. Further, the deponent states that she followed up later with their instructing client on payment of the claim but client instructed that it was dissatisfied with the judgment and therefore instructed that they file and appeal. That by then, the time for lodging the appeal had since lapsed but the deponent believes that the appeal raises numerous triable issues and points of law and has high chances of success but the Applicant is apprehensive that the Respondent will commence execution proceedings against the Applicant to his detriment. That the judgment sum herein is substantial and the Respondent's ability to refund the decretal sum is unknown. That in the circumstances, the Applicant stands to suffer irreparable loss and prejudice as his right to appeal will have been curtailed if orders sought are not granted.
6. Lastly, it is deponed that the Applicant is ready and willing to furnish a Bank guarantee for the entire decretal sum pending hearing and of the intended appeal as a condition for allowing this application for leave to appeal out of time and stay of execution pending appeal.
7. In opposition, the Respondent filed a Replying Affidavit sworn by Anne Njeri Kariuki on 13/06/2024 and filed through the firm of Fransisca & Chelangat Advocates sought that the application be dismissed with costs to her for being incompetent, misconceived, made in bad faith and solely meant to deny her the opportunity to enjoy the fruits of her judgment.
8. She depones that the application lacks merit as the Applicant has already filed a similar application dated 16/04/2024 before the trial court and the same has not been heard and determined. That stay of execution of judgment delivered on 01/03/2024 was granted pending hearing and determination of the said application and these orders are still in force as the application is still pending before the trial court.
9. It is further deponed that similar to the current application, the said application was seeking, among other orders, stay of execution of the judgment delivered by the trial court on 01/03/2024 pending hearing and determination of the appeal being Nakuru HCCA E068 of 2024 and the trial court is yet to issue an order on this prayer as the application has not been heard.
10. Further, it is deponed that the prayer herein for leave to file an appeal out of time is untenable and an abuse of court process as there is already an appeal being Nakuru HCCA No. E068 of 2024 which has been filed by the Applicant herein as per the application dated 16/04/2024.



Determination

11. This application is being disposed of through the Affidavits and the annexures thereto. The issues for determination are: -
 1. Whether the Applicant should be granted stay of execution of the trial court's judgment delivered on 01/03/2024 pending appeal.
 2. Whether the Applicant should be allowed to appeal out of time.
 3. Who should bear the costs of the application.

Whether the Applicant should be granted stay of execution of the trial court's judgment delivered on 01/03/2024 pending appeal.

12. The conditions to be satisfied on this issue are well settled that is: -
 1. The application must be brought without unreasonable delay.
 2. The Applicant must demonstrate that they will suffer substantial loss unless the order sought is granted.
 3. The Applicant must furnish 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. This application was brought on 09/04/2024 which is about 38 days after the judgment was delivered and therefore, a delay of 8 days cannot be considered as undue delay. There is also no doubt that he has offered security in form of a bank guarantee thus satisfying the 3rd condition.
14. On the second condition, it is not sufficient for the Applicant to state that he will suffer substantial loss as the Respondent may not be able to refund the decretal sum as his means of income remains unknown. He has failed to lay a basis for that statement and more so, why he is apprehensive that the Respondent may not be in a position to refund the decretal sum of Kshs. 470,610 /=. He has failed to demonstrate that he will suffer any substantial loss.
15. Further to the above, the Applicant has not disputed that he filed before the trial court the Notice of Motion dated 16/04/2024 under a certificate of urgency seeking orders: -
 1. That this Honourable Court be pleased to certify this application as urgent and be heard ex-parte in the first instance.
 2. That this Honourable Court be pleased to order interim stay of execution of the judgment/decree delivered by this court on 1st March 2024 pending hearing and determination of appeal Nakuru HCCA E068 of 2024.
 3. That the application be heard inter-partes on such a date and time as this court may direct.
 4. That as a condition for stay of execution pending hearing and determination of this appeal, the Applicant /Appellant be and is hereby ordered to provide /issue security for the entire decretal sum/amount in the form of a Bank Guarantee to be issued by family Bank Limited.
 5. That the costs of this application abide the outcome of the Appeal.
16. According to the Orders dated and published by the trial court on 03/05/2024, prayer No. 1 and 2 of that application were issued pending inter- partes hearing on 13/05/2024.



17. Filing that application while the application before this Court was pending is untenable. It is a move that can easily be construed as forum shopping having failed to obtain any ex-parte orders before this Court. That is a gross abuse of Court process.
18. From the annexures availed by the Respondent, the Applicant also filed a Memorandum of Appeal being HCCA No. 68 of 2024 in regard to the same judgment. It is therefore not factual for the Applicant to purport to refer this Court to a Draft Memorandum of Appeal and proceed to annex the alleged Draft as AM-2 to the Affidavit in support of this application.

Whether the Applicant should be allowed to appeal out of time.

19. On this Section 79G of the *Civil Procedure Act* provides that: -

“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.”

20. However, going by the prayers sought in the application before the trial court, there is already an appeal being Nakuru HCCA No. E068 of 2024 and confirmed by the Memorandum of Appeal dated 16/03/2024 against the judgment delivered on 01/03/2024. That makes the Applicant’s prayer herein for leave to appeal out of time untenable.
21. From the foregoing, and in conclusion, the application dated 09/04/2024 is not only lacking merit but also incompetent. It is therefore dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 30TH DAY OF OCTOBER, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Chemtai for Ms Mwira for Applicant

Ms Chelagat for Respondent

Ruto- Court Assistant

