



**Mogusu & another v Kaheni (Civil Miscellaneous Application
E1084 of 2023) [2024] KEHC 13324 (KLR) (Civ) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13324 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL MISCELLANEOUS APPLICATION E1084 OF 2023
AN ONGERI, J
OCTOBER 29, 2024**

BETWEEN

SAMUEL MOGUSU 1ST APPLICANT

LEVS TRADING COMPANY LIMITED 2ND APPLICANT

AND

ROSEMARY NDUTA KAHENI RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 14/11/2023 brought under the provision of Section 1A, 1B, Section 3A and Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and Article 159 of the Constitution of Kenya seeking the following orders;
 - i. That this application be certified as urgent and service be dispensed with in the first instance and be heard ex parte.
 - ii. That Applicant be granted leave to file an appeal out of time against the whole judgment delivered on 11th October, 2023 in Milimani 9540 of 2023.
 - iii. That there be an interim stay of execution of enforcing the whole Judgment delivered on 11th October, 2023 in Milimani CMCC 119540 of 2023 pending the hearing and determination of this application.
 - iv. That the draft memorandum of Appeal annexed hereto be deemed as duly tiled and served.



- v. That there be an interim stay of execution of enforcing the whole Judgment delivered on 11th October, 2023 in Milimani CMCC E9540 of 2023 pending the hearing and determination of this application.
- vi. That there be a stay of execution of enforcing the whole Judgment delivered on 11th October, 2023 in Milimani CMCC E9540 of 2023 pending the hearing and determination of this application.
- vii. That there be a stay of execution and or enforcement of the judgment delivered on I October, 2023 in Milimani CMCC E9540 of 2023 pending the hearing and determination of the Applicant's intended appeal by the Applicant.
- viii. The costs of the application be in the cause.

2. The application is based on the following grounds;

- i. That Judgment delivered on 11th October, 2023 in Milimani CMCC E9540 of 2023.
- ii. That we intend to challenge the entirety of the award granted in 11th October, 2023 in Milimani CMCC E9540 of 2023
- iii. That if the execution proceedings commence the Applicant will suffer substantial irreparable loss and damage.
- iv. That if the execution proceedings commence the Applicant will suffer substantial irreparable loss and damage.
- v. That the Applicant intends to file an Appeal Out of Time against the Judgment in Milimani CMCC E9540 of 2023.
- vi. That the Applicant has an arguable Appeal for the following reasons:
 - a. "That the Learned Magistrate erred in Law and in fact in awarding Kshs.100,000.00 for General damages for Pain & Suffering which award was excessively high and unwarranted in light of the evidence adduced.
 - b. That the Learned Magistrate erred in Law and in fact in awarding Kshs.3,691,584/= for loss of Dependency was excessive and unwarranted in light of the evidence adduced.
 - c. That the Learned Magistrate erred in Law and in fact in not taking into account entirely the Defendant's written submissions.
 - d. That the Learned Magistrate's finding and decision were against the weight of the evidence adduced.
- vii. That there shall be no prejudice to any party if this application is allowed as prayed.
- viii. That if stay of execution is not granted to the Applicant, he is likely to suffer substantial loss and their intended appeal will be rendered nugatory.
- ix. That the Applicant is willing to abide by any orders that this Honourable court may deem fit and expedient to order.
- x. That this application has been brought without undue delay.

3. The application is supported by the affidavit of Kenneth Muriithi Mwiti in which he deposed as follows;



- i. That I am the Legal Officer serving in the Claims Department of the Insurer of the Defendant thus competent to swear this affidavit.
 - ii. That I am informed by our Advocates on record that judgment in Milimani CMCC E9540 of 2023 was delivered on 11th October, 2023 in which an of a sum of Ksh.3,891,584/= plus and interest made. Annexed herewith and marked as "A 1" is copy of a letter dated 10/11/2023 from T. J. Michael & Co. Advocates addressed to Advocates informing them of the judgment.
 - iii. That I am informed by our Advocates on record which information I verily believe to be true that the Amounts awarded are indeed excessive in light of the Evidence adduced by the defendants through our written Submissions.
 - iv. That Defendants intend to appeal against the judgment in Milimani CMCC E9540 of 2023 and I have been genuine grounds since the award is excessively high. Annexed herewith and marked as "A 2" is a copy of a letter dated 14th November requesting certified proceedings and Judgment
 - v. That having spoken to my advocates on I am convinced that my appeal if allowed to proceed to full conclusion has very high chances Of success due to the errors of law and fact committed by the subordinate court. The grounds of my appeal include the following
 - a. That the Learned Magistrate erred in law and in fact in apportioning liability at 100% against the Appellant and holding the Appellants jointly and severally liable in total disregard of Appellant's submissions.
 - b. That the Learned Magistrate erred in law and in fact in awarding the claim of Loss of dependency at Kshs.3,691,584/= which award was excessive, unwarranted and not commensurate in light of the evidence adduced.
 - vi. That the Learned magistrate erred in law and in fact in awarding General Damages for Pain and Suffering at Kshs.100,000/= which award was not proved and was excessive and unwarranted in light of the evidence adduced.
 - vii. That in Appealing the Applicant is not snatching the fruits of Judgment from the 1st Respondent but exercising his legal right to Appeal.
 - viii. That if a stay of execution pending hearing and determination of this application is not granted, then the Defendants will substantial and irreparable loss.
 - ix. That in the foregoing circumstances, it is in the interest of justice that the orders sought herein be granted as prayed.
 - x. That this application has been brought without any delay.
 - xi. That we are willing to comply with any conditions as per our policy terms that this Honourable court shall impose on us.
4. The respondent filed grounds of opposition (GOO) as follows;
- i. That the application is misconceived in law and is not anchored on a main suit.
 - ii. That the applicants have not demonstrated that they have good and sufficient cause for not filing the appeal in time.



- iii. That the grounds advanced by the applicant are not in support of its application for extension of time, but are merely grounds for appeal.
 - iv. That the Application is an afterthought as it was only filed upon demand for payment of the decretal sum.
 - v. That the application has not met the mandatory requirements of order 46 rule 6(2) of the Civil Procedure Rules 2010 for failure to provide security for due performance of the decree.
 - vi. That the application is a scheme to buy time and to prevent the Respondent from enjoying the fruits of the judgement in the lower court.
 - vii. That the application is without any merits and is an abuse of the process of the honourable court.
5. The parties filed submissions as follows; the applicants submitted they will suffer substantial loss if the stay is not granted as it is unlikely that the money given to the respondent will be recovered. The respondent has not sworn an affidavit of means to confirm that she has means of raising the said sums of money should it be paid to her and if the appeal is successful.
 6. The applicants indicated that the application was made without unreasonable delay and therefore the applicant has not taken an inordinate time to file the application herein. The applicants further argued that the intended appeal is premised on 4 grounds. It is the applicants' position that the intended appeal has high chances of success. The applicant is covered under an insurance policy under a reputable financially stable company that will be able to pay the respondent if the appeal lodged is unsuccessful.
 7. On leave to appeal out of time the applicants submitted that the application herein was filed 3 days out of the 30 days stipulated In Section 79G of the Civil Procedure Act. It was argued that Article 48 of the Constitution guarantees every person access to justice, in addition, under Article 50(1) of the Constitution, every person has the right to have any dispute that can be resolved by the application of law decided in affair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
 8. The respondent alternatively submitted that there has been an inordinate delay in bringing this instant appeal as the judgement being appeal was delivered on 11/10/2023 and the instant application was filed 34 days later on 14/11/2023.
 9. The respondent further argued that she stand to suffer extreme prejudice if the extension is granted as her rights are likely to be infringed. A party who has a Judgment in his favour and from which no appeal has been preferred has a right to enjoy the benefits of his Judgment. That right can only be taken away from the party for good and sufficient cause.
 10. On stay of execution the respondent submitted that the intended appellants have not demonstrated how irreparably they are likely to suffer if execution proceeds against them. They have not put forward a quantifiable loss they are likely to suffer and neither have they demonstrated the implication of succeeding and/failing in their appeal.
 11. The respondent argued that there was unreasonable delay in filing the application herein and therefore the court ought not to exercise its discretion since no good and sufficient explanation for the delay has been given by the applicants. The respondent argued that applicants are attempting to circumvent the course of justice.
 12. The issues for determination in this application are as follows;



- i. Whether the applicant should be granted leave to appeal out of time.
 - ii. Whether stay of execution should be granted pending appeal.
13. On the issue of leave to appeal out of time, Section 79G states as follows;
- “Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for 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.”
14. The court has a discretion to grant leave taking into account the following factors;
- i) The period of delay;
 - ii) The reason for the delay;
 - iii) The arguability of the appeal;
 - iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
 - v) The importance of compliance with time limits to the particular litigation or issue; and
 - vi) The effect if any on the administration of justice or public interest if any is involved.
15. I find there is good reason to grant the applicant leave to appeal out of time.
16. Stay of execution pending appeal is governed by Order 42 Rule 6(2) which states as follows;
- “No order for stay of execution shall be made under sub rule (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.”
17. The duty of the court is to balance the interests of the parties. The applicant has a right to appeal while the respondent has a right to enjoy the fruits of the judgment.
18. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:-
- “The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”
19. I allow the application dated 14/11/2023 on the following grounds;



- i. That stay of execution is granted pending appeal on condition that the entire decretal sum is deposited in court within 30 days of this date.
- ii. That the appeal be filed within 30 days of this date.
- iii. That the costs of the application to abide the appeal.
- iv. In default the orders to lapse and execution to issue.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF OCTOBER, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent

