



**Njoroge & another v Waithera (Suing through the Next Friend Judy Waithera Njoroge) (Miscellaneous Civil Application E099 of 2023) [2024] KEHC 16604 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16604 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
MISCELLANEOUS CIVIL APPLICATION E099 OF 2023  
CW GITHUA, J  
NOVEMBER 28, 2024**

**BETWEEN**

**JAMES THUMBI NJOROGE ..... 1<sup>ST</sup> APPLICANT**

**NELSON KIRINYA KINYAMU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MAXWELL NJOROGE WAITHERA ..... RESPONDENT**

**SUING THROUGH THE NEXT FRIEND JUDY WAITHERA NJOROGE**

**RULING**

1. In the Notice of Motion dated 14<sup>th</sup> November 2023, the applicants prayed for three substantive orders. They prayed that they be granted leave to file their intended appeal against the judgment and decree issued in Kandara PMCC No.78 of 2019 dated 30<sup>th</sup> August 2023 out of time and that if leave was granted, they be at liberty to file the appeal within 14 days.
2. The applicants also sought orders of stay of execution of the impugned judgement pending hearing and conclusion of the intended appeal and that orders be made that costs of the application shall abide outcome of the intended appeal.
3. In the grounds anchoring the Motion and in their supporting affidavit, the applicants contended that they were aggrieved by the trial court’s decision in which the respondent was awarded Kshs. 600,000 in general damages as compensation for personal injuries sustained in a road traffic accident; that they were unable to file an appeal as days limited for that purpose had expired. They claimed that the delay in filing the intended appeal was not deliberate but was caused by the trial court’s failure to supply them with a typed copy of the judgement for onward transmission to their advocates for perusal and advice on whether or not to lodge an appeal.



4. The applicants further asserted that their intended appeal raised pertinent issues of law and in the interest of justice, the application should be allowed; that in any event, the respondent was not likely to suffer any prejudice if the application was allowed.
5. Lastly, the applicants invited this court to note that the decretal amount was substantial and stay of execution pending hearing of the intended appeal was necessary in order to safeguard their property; that they were willing and ready to provide security for the decretal amount in the forms of a bank guarantee.
6. The application was opposed through grounds of opposition dated 5<sup>th</sup> February 2024. In the grounds of opposition, the respondent mainly contested the application on grounds that it lacked merit as the applicants had failed to satisfactorily explain the delay in failing to file their intended appeal on time; that they were thus not entitled to exercise of the court's discretion in their favour.
7. On the prayer for stay of execution, the respondent avowed that the applicants had failed to establish that they would suffer irreparable damage if the orders were not issued.
8. The application was prosecuted by way of written submissions which both parties duly filed and which I have carefully considered. I note that although the applicants had sought orders for grant of leave to file their intended appeal out of time, both parties in their written submissions concentrated on the prayer for orders of stay of execution of the trial court's decree disregarding what was in my view the predominant prayer for leave to file an appeal out of time.
9. Having considered the application, the supporting affidavit, the grounds of opposition filed by the respondent alongside the submissions filed by both parties, I find that the only issue arising for my determination is whether the applicants had demonstrated that they were deserving of the orders sought.
10. In addressing the above issue, I have chosen to first address the applicants' prayer for leave to file their intended appeal out of time since its outcome will determine the fate of the prayer for stay of execution of the trial court's decision.
11. The law governing filing of appeals to the High Court is set out in Section 79G of the [Civil Procedure Act](#) (CPA). The provision limits the period of filing appeals to the High Court from subordinate courts to 30 days. The proviso thereof however gives this court wide and unfettered discretion to extend the aforesaid time or to admit an appeal out of time if the appellant satisfied the court that he/she had good and sufficient cause for failing to file the appeal on time.
12. Needless to say, the discretion donated to the court in deciding whether or not to extend time to file an appeal, just like all other judicial discretions, must be exercised judiciously in accordance with established legal principles. It should not be exercised whimsically or capriciously.
13. The principles that guide courts in exercising their discretion in an application such as the one before me have been discussed in a long line of authorities which I need not rehash here. It will suffice to cite the case of *Thuita Mwangi vs Kenya Airways Limited* (2003) eKLR in which the Court of Appeal enumerated the aforesaid principles 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 in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the



appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted....”

14. In this case, it is not disputed that the impugned judgement was delivered on 30<sup>th</sup> August 2023. This means that the statutory period within which the appeal should have been filed expired on or about 30<sup>th</sup> September 2023. The instant application was filed on 16<sup>th</sup> November 2023. The period of delay was thus about one and a half months.
15. Being aggrieved by the trial court’s decision, the applicants had a constitutional and statutory right to challenge that decision on appeal but they cannot do so now given that the time prescribed by law for filing of appeals has expired. But was the delay prolonged and inordinate as to cause prejudice to the respondent if the application was allowed?
16. My answer to the above question is that the delay was for about 42 days and in my view, though it was not satisfactorily explained, the delay was not inordinate or inexcusable. It is not the kind of delay that would cause prejudice to the respondent which cannot be ameliorated by an award of costs if the application was allowed. It is noteworthy that in this case, the respondent has not claimed that he was likely to suffer any prejudice if the application was allowed.
17. Balancing the rights and interests of both parties, I am persuaded to find that the scales of justice tilts more in favour of allowing the applicant’s prayer for grant of leave to file their appeal out of time. I say so because, if the prayer is not granted, the doors of justice may be shut on the applicants faces thus denying them an opportunity to ventilate their grievances on appeal in line with their constitutional right to a fair trial enshrined in Article 50 (1) of *the Constitution*. On the other hand, if the prayer was granted, the respondents will not suffer any prejudice that cannot be compensated by an award of costs.
18. For the above reasons, Prayer 3 of the Motion is hereby allowed on terms that the intended appeal shall be filed and served within the next 14 days. In default of compliance, the leave granted shall automatically lapse.
19. Turning now to the prayer for stay of execution pending conclusion of the intended appeal, a reading of Order 42 Rule 6 (1) of the Civil Procedure Rules which enumerates the parameters within which orders of stay of execution pending appeals should be issued leaves no doubt that it applies to instances where an appeal had been filed and was awaiting determination. Strictly speaking, it does not apply to intended appeals which were yet to be filed.
20. However, in the exercise of its inherent power to make any orders that further the cause of justice, this court has power and discretion to grant orders of stay of execution pending filing of an intended appeal in appropriate cases in order to avoid a miscarriage of justice. Such cases would be, for instance, where leave was granted to file an appeal out of time and the execution process had commenced. In such a scenario, granting orders of stay of execution would be necessary in order to preserve the substratum of the intended appeal.
21. In this case, the applicants have not availed any evidence to demonstrate that execution was imminent. In the premises, I do not find any basis for issuing the orders of stay of execution as sought.
22. In the end, the Notice of Motion dated 14<sup>th</sup> November 2023 partially succeeds to the extent that the applicants are granted leave to file their intended appeal within next 14 days. The prayer for stay of execution pending hearing of the intended appeal is dismissed.
23. Costs follow the event and are at the discretion of the court. The respondent is awarded costs of the application.



24. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 28<sup>TH</sup> DAY OF NOVEMBER 2024.**

**HON. C.W. GITHUA**

**JUDGE**

In the presence of:

No appearance for the Applicants.

No Appearance for the Respondent

Ms. Susan Waiganjo, Court Assistant

