



REPUBLIC OF KENYA



**Muriu v Michubu (Civil Appeal E004 of 2022)  
[2023] KEHC 414 (KLR) (30 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 414 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E004 OF 2022  
EM MURIITHI, J  
JANUARY 30, 2023**

**BETWEEN**

**EARNEST MURIU ..... APPLICANT**

**AND**

**AMBROSE LIMIRI MICHUBU ..... RESPONDENT**

**RULING**

1. The court is called upon to determine a notice of motion under certificate of urgency dated January 12, 2022 by the applicant, brought under order 42 rule 6, sections 1A, 1B, 3, 3A of the Civil Procedure Act, articles 40 & 159(2) of the Constitution and all other enabling provisions of the law, seeking that:
  1. Spent
  2. Spent
  3. The honorable court be pleased to enlarge time within which to file appeal out of time against the judgment, decree and all subsequential orders made by the Senior Resident Magistrate in Maua CMCC No 127 of 2016.
  4. This honourable court be pleased to stay the execution of the rulings dated December 14, 2021 and June 8, 2021 delivered by Hon MC Nyigei (SRM) in Maua CMCC No 127 of 2016.
  5. The honorable court be pleased to issue an order reopening the respondents case in the trial court for hearing and direct the same be heard *de novo*.
  6. The costs of this application be costs in the appeal.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Ernest Muriu, the applicant herein sworn on even date. He contends that he was



sued alongside his financiers, Family Bank (K) Ltd in Maua CMCC No 127/2016 by the respondent herein, but he was never served with court documents, and he only learnt of this matter when execution proceedings had commenced. He further learnt with shock, that Family Bank had been struck out of these proceedings without his knowledge and a consent entered into by the respondent's counsel and that of the bank. After interlocutory judgment had been entered against him, the matter proceeded for formal proof, on a date that had been purportedly served upon him and an affidavit of service duly filed. The respondent obtained another date for formal proof and proceeded to have an affidavit of service filed, yet he had not been served with the said hearing notice, and the matter was logically concluded without his input. After he was served with warrants of attachment by the respondent's agents, he promptly rushed to the registry where he unearthed a worrying finding that the matter was instituted against him on the strength of false affidavits. His then advocate successfully obtained stay of execution of the judgment and decree vide an application dated November 17, 2020. When the application came up for inter partes hearing, his prayer to have the draft defence deemed as having been properly filed was allowed on condition that he pays throw away costs to the respondent. He deposited the said costs with his advocates on 10/6/2021 and he was issued with an official receipt by the said firm of Advocates. His advocate then promised to forward the said money to the respondent and to inform him when the matter was due for hearing, which promise he never kept. After he was served with a proclamation notice, he instructed another firm of advocates to file the application dated 8/11/2021 where orders were issued on 9/11/2021. Two sets of rulings on the application November 17, 2020 were delivered on 8/6/2021 and December 14, 2021, where he was punished for failing to deposit the throw away costs with the respondent or the court directly, even after explaining that he had deposited the same with his then advocate. He was surprised when the court blamed him for failing to adduce evidence on the steps he had taken in following up on the matter with his former advocates. The court further castigated him for not filing submissions to the application dated 8/11/2021, which submissions he filed on November 24, 2021. He maintains that he complied with all the court orders and apologized for the omissions of his former counsel. He avers that he stands to suffer substantial injustice if the application is not allowed as prayed.

3. The respondent, Ambrose Limiri Michubu, opposed the application through his replying affidavit sworn on 26/1/2022. He prays for the dismissal of the application as the applicant failed to take any steps to adhere to the court orders of 8/6/2021. In his view, the applicant is unworthy recipient of this court's discretionary orders he is seeking, because he has not issued any plausible reasons as to why the delay was inordinate and unreasonable. He contends that he has suffered great loss since 2016 and even when he seems to have an opportunity to execute his judgment, the applicant keeps on finding new tactics to delay and deny him his right. He accuses the applicant of coming to court with unclean hands after he went to slumber when he obtained the orders of 8/6/2021. He avers that the applicant is not a man of straw and he is advised that application does not satisfy the threshold for grant of stay as provided in order 42 rule 6 of the [Civil Procedure Rules](#).

### Submissions

4. The applicant did not file any submissions.
5. The respondent urges that application is defective as it has fallen short of meeting the required threshold of granting stay as provided under order 42 rule 6 (2) of the [Civil Procedure Rules](#), and cites [Antoine Ndaiye v African Virtual University](#) (2015) eKLR, [Stephen Wanjobi v Central Glass Industries Ltd](#), Nairobi High Court Civil Case No 6726 of 1991 and [James Wangalwa & Another v Agnes Naliaka Cheseto](#) (2012) eKLR. He urges that the applicant was accorded a fair chance to have the suit heard *denovo*, and he was indolent in complying with the conditional self-executing orders and following up on the matter with his counsel. He cites [Harnam Singh and others v Mistri](#) (1971)



EA 123, where Spry VP held that mistakes of a legal adviser may amount to sufficient cause but not inordinate delay on his part. He urges the court, in its attempt to preserve the subject matter in this dispute by granting orders of stay, to weigh the right of appeal against his success by not depriving him of the fruits of his judgment, and relies on *RWW v EKW* (2019) eKLR.

6. He submits that if the court is inclined to grant stay, it should order the applicant to furnish as security the full judgment award together with costs, or in the alternative to deposit half of the award with court, and release the other half plus full costs to him, and cites *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* (2019) eKLR, *Amal Hauliers Limited v Abdulnasir Abukar Hassan* (2017) eKLR, *Benson Ndwiga Njue & 108 Others v Central Glass Industries Limited* (2019) eKLR and *Pamela Akinyi Opundo v Barclays Bank of Kenya Ltd* (2011) eKLR. He accuses the applicant of seeking conflicting orders by praying for leave to file the appeal out of time and in the same breath seeking to have the case reopened and heard *denovo*. He prays for the dismissal of the application with costs as the applicant has not satisfied the conditions for grant of stay.

### **Analysis and Determination**

7. The issues for determination are whether leave to appeal out of time and stay should be granted.

### **Leave to appeal out of time**

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 Salat v Independent Electoral & Boundaries Commission & 7 others* (2014) eKLR.
9. The judgment sought to be appealed against was made on 29/5/2020 while the instant application was filed on 12/1/2022. The court notes that the applicant filed an application dated November 17, 2020 before the trial court. On 8/6/2021, the trial court set aside its judgment and decree on condition that the applicant pays throw away costs of Ksh 10,000 to the respondent within 21 days. The applicant did not comply with those orders, therefore he sought to have the time within which to comply with the court's orders of 8/6/2021 extended. On December 14, 2021, the trial court insisted that the applicant had deliberately failed to adhere to the self-executing orders of 8/6/2021, and proceeded to dismiss his application with costs. The applicant is now before this court seeking to have the rulings of 8/6/2021 and December 14, 2021 stayed and leave to appeal out of time.
10. The applicant contends that he paid the throw away costs as ordered by the trial court to his then advocate, who in turn was expected to forward the same to the respondent. He laments that it later turned out that his then advocate did not forward the throw away costs to the respondent, as agreed, and the execution process commenced. It is indeed factual that the applicant paid the throw away costs to his then advocate, Kiogora Mugambi & Co Advocates on 10/6/2021, as shown by the receipt from the said firm of advocates dated then.
11. On the arguability or otherwise of the intended appeal, the grounds raised in the annexed memorandum of appeal fault the trial court for proceeding *ex parte* without according the applicant an opportunity to defend himself, yet he was never served with any court pleadings. It is further alleged that the applicant was admonished for the mistakes not of his own making, which mistakes were occasioned by the omissions of his counsel.
12. This court finds that the intended appeal is indeed arguable, which is not one which must necessarily succeed and neither is it for the court to go into the merits of the intended appeal.



13. From the respondent's response to the application, no prejudice has been disclosed.
14. For the reasons set out above, this court deems it fit to enlarge time to lodge the appeal out of time.
15. The court does not have the benefit of examining the lower court record to determine whether there was service of the pleadings upon the applicant and/or whether the said service was proper. In the absence of the lower court record, and having extended the time within which to lodge the appeal, this court declines to issue prayer 5 of the application.

### **Stay of Execution**

16. 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:
  - “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.”
17. There is no doubt that the filing of this application was unreasonably delayed, but that delay is attributable to the filing and final determinations of the other applications before the trial court. Whereas the applicant contends that he stands to suffer substantially if the application is denied, the respondent maintains that he is deliberately being delayed from enjoying the fruits of his judgment, by the applicant's indolence. The court will seek to strike a balance!

### **Orders**

18. Accordingly, for the reasons set out above, this court grants the application dated 12/1/2022 on the following terms:-
  1. The applicant is granted leave to appeal out of time against the judgment and decree made in Maua CMCC No 127/2016. The memorandum of appeal shall be filed within seven (7) days.
  2. Stay of execution of the rulings of December 14, 2021 and 8/6/2021 is hereby granted on condition that the applicant pays to the respondent ½ the decretal sum being Ksh 234,015/- and deposits the balance of the decretal sum into an escrow account in the joint names of the advocates for the parties within thirty (30) days from the date hereof.
  3. The record of appeal to be filed within 60 days from the date hereof.
  4. In the event of default of any of the aforementioned conditions, the stay hereby granted shall stand as discharged, and the respondent shall be at liberty to execute.
  5. The costs of this application shall abide the outcome of the appeal.

Order accordingly.

**DATED AND DELIVERED ON THIS 30<sup>TH</sup> DAY OF JANUARY, 2023.**

**EDWARD M. MURIITHI**



## **JUDGE**

### **Appearances**

Mr. Munene Kiriimi Advocate for the Appellant.

Mr. Mutembei and Kimathi Advocate for the respondent

