



**Muchoki v Wambugu (Miscellaneous Application E032 of 2022)  
[2023] KEHC 107 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 107 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
MISCELLANEOUS APPLICATION E032 OF 2022  
RB NGETICH, J  
JANUARY 19, 2023**

**BETWEEN**

**ALFRED MUCHOKI ..... APPLICANT**

**AND**

**ALOISE NJERU WAMBUGU ..... RESPONDENT**

**RULING**

1. This is a ruling on Notice of Motion dated February 17, 2022 seeking a stay of execution orders and leave to appeal out of time.
2. The grounds on the face of the application are that judgments were delivered on November 25, 2021 in the following suits Thika CMCC No 864 and 865 of 2018, Thika CMCC No 300 and 301 of 2017, in the absence of the parties and copies of the judgment sent to the parties' Advocates on January 17, 2022. By the time the copies of the judgments were received, the period to appeal had lapsed.
3. Reason given for delay is time taken to get instructions to appeal from the instructing clients. The applicant is dissatisfied with the trial court's award on liability and general damages and is desirous of filing an appeal.
4. The appellant's argument is that the appeal raises serious arguable issues with high chances of success, the delay to file the intended appeal was not deliberate and the application will not occasion any prejudice to the Respondent. The applicant is willing to deposit security.
5. The application is supported by the annexed affidavit sworn on February 17, 2022 by Mathew K Itonga counsel on record for the applicant. He deposes that judgment was to be delivered on November 25, 2021 in the absence of the Applicant's counsel and copies of the judgments were to be sent to the advocate's email but the same took a long time to be sent.



6. In response, the Respondent filed Replying Affidavit sworn by David Nyaga Njeru on June 7, 2022. He deposes that a copy of the judgment sent by the court was received on November 26, 2021. He averred that the application is an afterthought aimed at delaying and denying the Respondent the fruits of their judgment and argued that delay of five (5) months is unreasonable and the applicant has accepted liability of 50% in the trial court and it is only fair and just that the amounts be paid to the Respondent awaiting the determination of the appeal.
7. Directions were given for the application to proceed by way of written submissions.

#### **APPLICANT'S SUBMISSIONS**

8. Mr Miya counsel for the Applicant filed submissions on July 14, 2022. He submitted that the delay in filing the appeal was occasioned by the delay in obtaining instructions to appeal and the application to appeal out of time was brought timely after receiving instructions from the client.
9. He further submitted that the Applicant will be prejudiced if the doors of justice are shut because of an excusable human error and urged the court to exercise its discretion and extend the time within which to file the intended appeal.
10. He cited the case of *Emmanuel Ngade Nyoka vs kidheka Mutisya Ngata* Momabsa Civil Application No 17 of 2016 where the Court of Appeal exercised its discretion in favor of the applicant and allowed an application for leave to appeal out of time.
11. He further submitted that the delay of two (2) weeks in filing appeal has been explained and the applicant is aggrieved by the trial court's award of 100% liability and the award of general damages. He urged this court to grant the prayers sought.

#### **RESPONDENT'S SUBMISSIONS**

12. Mr. Nyaga counsel for the Respondent filed submissions on September 2, 2022 and submitted that the delay of 5 months in filing the current application is inordinate and unjustifiable; and urged the court to decline to grant an extension of time to file the appeal.
13. On the issue of stay of execution pending appeal, counsel submitted that the applicant has failed to satisfy the conditions set under Order 42 Rule 6 of the *Civil Procedure Code*; that the applicant has not established any substantial loss to be suffered if the stay is not granted, neither has the applicant offered security as a condition for the stay.
14. Counsel further submitted that the trial court granted a stay of execution of 45 days which lapsed on January 15, 2022 and the applicant did not apply to seek an extension of stay and submitted that the overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other.
15. In conclusion, counsel submitted that the applicant has not opposed the conditions set in the replying affidavit if the court opines to grant a stay of execution.

#### **ANALYSIS AND DETERMINATION**

16. I have considered the application, the affidavit in response and the submissions in support and against the application. The issue for determination is whether the Applicant has explained delay in filing appeal and whether the applicant has met threshold for grant of stay of execution pending appeal.



17. On prayer for leave to appeal out of time, Section 75G of the Civil Procedure Act provides as follows: -

“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.”

18. In the instant case, judgments in the trial court were delivered on November 25, 2021. The current application was filed on February 17, 2022. A period of two (2) months had lapsed since the judgment was delivered. Section 75 allows a litigant thirty (30) days to file an appeal. Counsel for the applicant attributes the delay in filing the appeal to the time taken before obtaining instruction from the client and time taken to obtain a copy of the judgment.

19. Counsel for the Respondent disputes that copies of the judgment were sent on January 17 and the delay of five (5) months has not been sufficiently explained.

20. I have computed the time that has elapsed since the judgments were delivered and confirm that the delay is for one (1) month. This period cannot be said to be long to occasion any prejudice against the Respondent.

21. In the circumstance I find the reasons advanced for the delay in filing the appeal to be sufficient and I accordingly allow the prayer to file appeal out of time.

22. In respect stay of execution pending appeal, Order 42 Rule 6 of the Civil Procedure Rules provides as follows:-

1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on the application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside”.

2. 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.

23. The court has wide discretion to stay the execution of decrees pending appeal. The trial court issued the applicant with 45 days stay of execution which has since lapsed and the applicant has approached this court for extension of stay orders.

24. In RWW v EKW (2019) eKLR the court of Appeal observed as follows:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted



right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for a stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the Appellant with those of the Respondent.”

25. From the foregoing, this court has discretion to grant stay of execution pending appeal upon considering whether failure to allow the application will render appeal nugatory and also balance interest of both parties by ensuring that the grant of stay of execution pending appeal will not occasion prejudice to the respondent/decretal holder; and further consider security to be deposited by the applicant.
26. I note that the applicant has indicated he is willing to pay security if the stay of execution is allowed. The respondent’s prayer is for court to order release of 50% decretal amount which is undisputed if stay is granted.
27. From the foregoing I see merit in the two prayers sought and will allow both prayers with condition in respect to prayer for stay pending appeal

**FINAL ORDERS: -**

1. Applicant is allowed to file appeal out of time.
2. Appeal to be filed within seven (7) days from the date of this ruling.
3. Stay of execution do issue pending appeal on condition that half the decretal amount is paid to the respondent within 30 days from the date of this ruling.
4. Failure to comply with orders 2 and 3 above, the orders to remain discharged.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 19<sup>TH</sup> DAY OF JANUARY, 2023.**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Martin – Court Assistant

Mr. Wahome for the Applicant

Mr. Nyaga for Respondent

