



REPUBLIC OF KENYA



**Kubai v Njoroge (Civil Appeal E612 of 2022)
[2023] KEHC 1295 (KLR) (Civ) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1295 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E612 OF 2022

JK SERGON, J

FEBRUARY 24, 2023

BETWEEN

PERMINUS CHEGE KUBAI APPLICANT

AND

JOCELYNE MUTHONI NJOROGE RESPONDENT

RULING

1. This ruling is predicated on the notice of motion dated August 15, 2022 taken out by the appellant/ applicant and supported by the grounds set out on its body and the facts stated in the affidavit of Martha Mugo. The applicant sought for an order for leave to appeal out of time against the judgment delivered on May 27, 2021 in Milimani Civil Suit No E3944 of 2020 and a further order for a stay of execution of the aforementioned judgment pending the hearing and determination of the appeal.
2. The respondent put in a replying affidavit sworn on September 16, 2022 to oppose the motion.
3. The instant motion was canvassed through oral arguments whereby the parties' respective advocates chose to rely on the relevant documents filed.
4. I have considered the grounds laid out on the body of the motion; the facts deponed in the supporting affidavit; the grounds of opposition and the reiterating oral submissions.
5. The orders being sought in the motion are two-fold: first is the order seeking for enlargement of time to appeal and for leave to appeal out of time against the impugned judgment and decree.
6. Section 79G of the *Civil Procedure Act* stipulates that an appeal against the decision of a subordinate court shall be lodged within 30 days from the date of the decree or the order being appealed against. The provision further stipulates that an appeal can be admitted out of time where sufficient cause has been shown.



7. Moreover, under the provisions of section 95 of the *Civil Procedure Act* and order 50, rule 5 of the *Civil Procedure Rules*, the courts have power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
8. In the case of *Thuita Mwangi v Kenya Airways Ltd [2003] eKLR* the Court of Appeal illustrated the conditions to be met in deciding whether to extend the period for filing an appeal out of time and which I shall address hereunder.
9. Under the first condition touching on length of delay, while it is apparent from the record that no copy of the impugned judgment was availed to this court, the parties are in agreement that the impugned judgment was delivered on May 27, 2021 which is close to three (3) months prior to the filing of the motion. In my mind, while there has clearly been a delay in filing the motion, I do not find the delay to be inordinate.
10. As relates to the condition on whether or not an arguable appeal exists, it is the applicants' assertion on the one hand that they have an arguable appeal which raises serious triable issues which require a just and proper evaluation.
11. Upon my perusal of the grounds of appeal raised in the draft memorandum of appeal annexed to the motion, I note that the appeal is challenging the finding of the trial court on quantum. I am therefore satisfied that the applicants have demonstrated arguable points of law and fact in their appeal.
12. Upon my perusal of the record, it is apparent that the judgment was in favour of the respondent herein and against the applicant. It therefore follows that the respondent is lawfully entitled to enjoy the fruits of his judgment. Suffice it to say that it would not be in the interest of justice to lock out the applicant who is aggrieved by the judgment of the trial court on damages. I therefore find it reasonable for the applicant to be given the opportunity of challenging the subordinate court's assessment on damages on appeal.
13. The second prayer is for stay of execution of the decree pending appeal, for which the guiding provision is order 42, rule 6(2) of the *Civil Procedure Rules* which sets out the conditions to be satisfied for such an order to be granted.
14. The first condition being that the application must have been brought without unreasonable delay has already been addressed hereinabove.
15. The second condition touches on substantial loss to be suffered by an applicants.
16. Substantial loss is a factual issue, which must be raised in the supporting affidavit and further supported by evidence. In dealing with the issue of substantial loss, I am alive to the fact that the applicant herein ought to establish that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicants as successful parties in the appeal.
17. The applicant avers that unless a stay of execution is granted, he will suffer irreparable loss and damage and that the decretal award by the lower court in the sum of Kshs 803,650/= is quite substantive in relation to damages and injuries sustained and said award needs a proper review. The respondent is of the view that the applicant has not demonstrated by way of evidence the substantial loss they stand to suffer in the circumstances.
18. I am also alive to the reality that unless the applicant is granted an opportunity to defend its case, it stands to be condemned unheard, thereby undermining the dictates of substantive justice and violating the applicant's constitutional right to be heard on its defence in the dispute before the same is conclusively determined.



19. In the case of *Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR* in which the court reasoned that:

“The corner stone of the jurisdiction of the court under order 42 of the *Civil Procedure Rules* is that substantial loss would result to the applicant unless a stay of execution is granted... The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.”

20. In respect to the final condition on the provision of security for the due performance of such decree or order, the applicant on the one hand indicates its readiness and willingness to furnish the court with a bank guarantee as security to the court. On the other hand, the respondent is of the view that should an order for a stay of execution be granted, then the applicant should be ordered to pay three quarters of the decretal amount be paid to the respondent and the balance be deposited in an interest earning account in the joint names of the advocates on record.

21. In making an order for the provision of security, this court must balance the interest of the parties. In the present instance, it is noteworthy that the respondent has not shown any pressing need that would require payment of part of the decretal amount to him at this stage. It is also noteworthy that the respondent is not amenable to the provision of a bank guarantee.

22. Bearing in mind that the nature of the security that may be deposited is left at the discretion of the court, I hereby allow the application dated August 15, 2022 and make the following orders-

- i. The memorandum of appeal dated August 4, 2022 is hereby admitted and deemed as duly and properly filed out of time with leave of court.
- ii. There be an order for stay of execution of the judgment and decree issued on May 27, 2021 pending the hearing and determination of the intended appeal on the condition that the applicant deposits the decretal sum in an interest earning account in the joint names of the advocates an or firms of advocates within 45 days from the date of this ruling in default of which the stay order shall lapse.
- iii. Costs of the motion shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

.....

J K SERGON

JUDGE

In the presence of:

.....for the appellant/applicant.

.....for the respondent.

