



**Macharia & 2 others v Gichwili (Miscellaneous Application E708 of 2022)  
[2023] KEHC 1249 (KLR) (Civ) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1249 (KLR)

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

**MISCELLANEOUS APPLICATION E708 OF 2022**

**JK SERGON, J**

**FEBRUARY 24, 2023**

**BETWEEN**

**DAVID MAINA MACHARIA ..... 1<sup>ST</sup> APPLICANT**

**GEOFFREY MAINGI MUTUNGA ..... 2<sup>ND</sup> APPLICANT**

**JAMES MAINA WANJOHI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**JUDAH KALUNGE GICHWILI ..... RESPONDENT**

**RULING**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants brought the notice of motion dated November 16, 2022 supported by the grounds laid out on its face and the facts stated in the affidavit of Advocate Kiage Millicent. Here, the applicants sought for an order for leave to appeal out of time against the ruling delivered on May 30, 2022 in Milimani CMCC No 3711 of 2019 and a further order for a stay of execution of the judgment delivered on July 15, 2022 in the abovementioned suit pending the hearing and determination of the appeal. The applicants also sought for an order staying all the proceedings in the lower court pending the hearing and determination of the appeal. Furthermore, the applicants also sought for an order allowing them to furnish security for the decree by way of a bank guarantee from a well-known and reputable bank in Kenya.
2. To oppose the said motion, Advocate Nelson Kaburu Felix swore a replying affidavit on November 28, 2022 on behalf of the respondent.
3. At the interparties hearing thereof, the parties' respective advocates urged this court to consider the material on record.



4. I have considered the grounds laid out on the body of the motion; and the facts deponed to in the supporting and replying affidavits.
5. The substantive orders being sought in the motion are essentially three-fold in nature. Concerning the first order/prayer sought for a stay of proceedings, upon my perusal of the record, it is apparent that final judgment was entered in the suit which was before the trial court. Consequently, there is nothing more to be stayed in the suit. This prayer therefore fails.
6. The second order is seeking for enlargement of time to appeal and for leave to appeal out of time against the impugned ruling.
7. From the record, I note that Nelson Kaburu Felix; counsel for the respondent; states by way of his replying affidavit that the appeal sought constitutes an academic exercise since there is a final judgment in place and which judgment has not been appealed against.
8. Upon my study of the record, it is apparent that the impugned ruling preceded the final judgment and hence a determination of the ruling on appeal; if leave to appeal is granted; will determine the outcome on the judgment.
9. In view of the foregoing circumstances, I disagree with the above argument made by the counsel.
10. 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.
11. Under the provisions of section 95 of the *Civil Procedure Act* and order 50, rule 6 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.
12. The Court of Appeal in the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR listed the conditions to be met in deciding whether to extend the period for filing an appeal out of time and which shall guide my reasoning and findings hereunder.
13. Under the first condition touching on length of delay, the applicants state that the delay in bringing the instant motion is not so inordinate as to be deemed inexcusable. The respondent terms the delay as inordinate.
14. While it is apparent from the record that no copy of the impugned ruling was availed to this court, it is not in dispute that the ruling was delivered on May 30, 2022 followed by final judgment delivered on July 15, 2022; while the motion was brought close to six (6) months later. In my mind, while it clear that there has been a prolonged delay in bringing the instant motion, I do not find the delay to be inordinate in the circumstances.
15. Concerning the reasons for the delay, the applicants explained that the delay was occasioned by the fact that the advocate who had conduct of the matter on behalf of the applicants left the firm without having undertaken a proper handover and that the lower court file had gone missing from the registry.
16. The respondent through his advocate states that the applicants have not given any detailed or reasonable explanation for the delay.
17. Upon considering the explanation given by the applicants, I find the same to be reasonable in the circumstances.



18. Relating to the condition on whether or not an arguable appeal exists, it is the applicants' assertion that they have an arguable appeal which raises valid points of law and fact. The respondent did not address me on this condition.
19. From my study of the grounds of appeal raised in the draft memorandum of appeal annexed to the motion, I note that the appeal is challenging the decision by the trial court declining the applicants' request to re-open the defence case to enable them call in witnesses. I am therefore satisfied that the applicants have demonstrated arguable points of law and fact in their intended appeal.
20. In addressing the final condition on prejudice, the applicants state that the respondent does not stand to be prejudiced in a manner that cannot be adequately compensated by way of an award on costs.
21. Upon my perusal of the record, it is apparent that the impugned ruling and consequent judgment was in favour of the respondent herein and against the applicants. It therefore follows that the respondent is lawfully entitled to enjoy the fruits of his judgment.
22. Suffice it to say that I am of the view that it would not be in the interest of justice to lock out the applicants who are aggrieved by the ruling by the trial court in respect to their defence case, and which ruling resulted in the final judgment. I therefore find it reasonable for the applicants to be given the opportunity of challenging the subordinate court's decision.
23. The third order sought is for a stay of execution of the decree pending appeal, provided for under 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.
24. The first condition being that the application must have been brought without unreasonable delay has already been discussed hereinabove.
25. The second condition touches on substantial loss to be suffered by the applicants.
26. The applicants are apprehensive that if the order for a stay of execution is denied, the respondent is likely to proceed to execute the decree, thereby rendering the appeal nugatory and resulting in irreparable loss to the applicants.
27. The respondent is of the view that the applicants have not demonstrated by way of evidence the substantial loss they stand to suffer in the circumstances.
28. Upon weighing and taking into account the competing interests of the parties, and upon considering the unique circumstances of the matter and intended appeal in the manner set out hereinabove, I am satisfied that the applicants have reasonably demonstrated the substantial loss likely to be suffered if the order for a stay of execution is not granted.
29. Under the final condition which is the provision of security for the due performance of the decree or order, the applicants state that they are ready and willing to provide security by way of a bank guarantee. The respondent did not touch on this subject.
30. Upon my study of the record and my consideration of the circumstances of the matter, I am of the view that the provision of a bank guarantee may not constitute the most suitable form of security in the circumstances.
31. The upshot therefore is that the notice of motion dated November 16, 2022 is partially allowed thus giving rise to the following orders:
  - i. The applicants are given leave of 14 days from today's date to file an appeal out of time.



- ii. There be an order for stay of execution of the judgment and decree issued on July 15, 2022 in Milimani CMCC No 3711 of 2019 pending the hearing and determination of the intended appeal on the condition that the applicants deposit the entire decretal sum in an interest earning account in the joint names of the advocates and or firms of advocates within 45 days from the date of this ruling. In default, the order for stay shall automatically lapse.
- iii. Costs of the motion shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2023.**

.....

**J. K. SERGON**

**JUDGE**

**In the presence of:**

..... **for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants/Applicants**

..... **for the Respondent**

