



REPUBLIC OF KENYA



**Abdalla & another v Charo (Miscellaneous Application E051 of 2022)  
[2023] KEHC 1799 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1799 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS APPLICATION E051 OF 2022  
SM GITHINJI, J  
FEBRUARY 23, 2023**

**BETWEEN**

**IBRAHIM SAID ABDALLA ..... 1<sup>ST</sup> APPELLANT**

**SHABAN JUMA SHABAN ..... 2<sup>ND</sup> APPELLANT**

**AND**

**EUNICE DAMA CHARO ..... RESPONDENT**

**RULING**

1. The Applicant herein has filed a Notice of Motion application brought under Order 22 rule 22, Order 42 Rules 4 and 6, Order 51 Rules 1 and 3 of the [Civil Procedure Rules](#) under Certificate of Urgency dated July 18, 2022 seeking the following orders:
  1. Spent.
  2. That this Honourable Court be pleased to order a stay of execution of the Judgment of Honourable Julie Oseko delivered on March 3, 2022 in Civil Suit No. E46 of 2020 Malindi Magistrate Court pending the hearing and determination of this application and the intended appeal.
  3. That the Honourable Court be pleased to grant the applicant leave to file appeal against the judgment of Honourable Julie Oseko delivered on March 3, 2022 in Civil Suit No E36 of 2020 Malindi Magistrate Court out of time.
  4. That the attached Memorandum of Appeal be deemed as duly filed upon payment of Court fees.
  5. That the application be heard inter parties on such date and time as this Honourable Court may direct.



6. That the costs of this application abide the outcome of the appeal.
2. The application is supported by the grounds on the face of it and the supporting affidavit of Kelvin Ngunjiri sworn on July 18, 2022. In his affidavit, he deponed that the applicants only managed to obtain a copy of Judgment on July 06, 2022 as Hon Oseko was in the process of retiring thereby making tracing of the physical file hard. He also deponed that judgment was delivered on March 3, 2022 in favour of the Plaintiff with 100% liability in favour of the Plaintiff and Kshs. 250,000/- being an award for damages plus costs and interest at court rates. He asserted that they have since lodged an appeal out of time against the Judgment which appeal he asserted has a high chance of success.
3. The Respondent in response filed a Replying Affidavit sworn by Geoffrey Kilonzo on July 27, 2022. He stated that on March 11, 2022 he sent a letter forwarding the Judgment and tabulating costs which was duly received by the Applicant's Advocate on the same day. That the above facts show that the Applicant was aware of the Judgment and hence has not shown sufficient cause for the delay. He deposed that the Applicant was granted 30 days stay of execution which expired on April 3, 2022 while the current application was filed on July 19, 2022 and according to him, this amounts to an act of indolence and an abuse of the court process. He also deponed that the file was always available at the Registry after judgment was delivered and if at all the file was missing, the applicant should have attached a letter addressed to the Registry about that concern.
4. He asserted that the applicant is seeking the court's discretion for leave to appeal out of time of which is fettered and it is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in his favour. According to him, this application and the intended appeal are a reaction to the declaratory suit that was filed on June 9, 2022 and the intention is to frustrate the said declaratory suit. He also asserted that this application is an afterthought meant to enable the applicants obtain a further stay of execution to the detriment of the Respondent.
5. The application was canvassed by way of written submissions but the applicants did not file their submissions despite the fact that the court granted them the opportunity to do so on December 6, 2022. The Respondent through the firm of Wambua Kilonzo & Co. Advocates filed submissions on November 30, 2022. Counsel submitted that judgment was delivered on March 3, 2022 and served upon the parties through email on the same day and that the Respondent further served the applicant with a letter indicating costs on March 11, 2022. He also submitted that there is no provision requiring the appellant to first obtain copies of judgment in order to file a Memorandum of Appeal. It was therefore not true that the applicant was not aware of the Judgment as has been alleged. Counsel also submitted that the applicant has not shown sufficient cause for not filing the appeal on time and as such, the provisions of Section 79G of the Civil Procedure Act have not been met.
6. He relied on the case of Thuita Mwangi vs Kenya Airways Ltd (2003) eKLR submitting that it is incumbent upon the applicant to explain whether there are any extenuating circumstances that can enable the court to exercise its discretion in his favour. It was also his submission that this is a case of mere inaction and the same ought not to be visited upon the Respondent relying on the case of Dilpack Kenya Limited vs William Muthama Kitonyi (2018) eKLR.
7. He as well submitted that Article 159 of the Constitution is clear that justice ought to be administered without undue delay as was held in the case of Dickson Miriti Kamonde vs Kenya Commercial Bank Ltd (2006) eKLR. That under Order 42 rule 6, no stay ought to be granted where there is no appeal hence the prayer for stay pending appeal is incompetent and bad in law.



## Disposition

8. I have considered the application filed by the Applicant, the response as well as the submissions by counsel for the Respondent.
9. The applicants filed the present application seeking stay of execution in the lower court matter pending the hearing and determination of this application and the intended appeal. The applicants also sought to be granted leave to file an appeal out of time which is what this court will determine.
10. The principles upon which the above prayer can be allowed are now well settled by the authorities of this court and as well by the other superior courts. Generally, stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:
  - “6(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 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 appealed from whose decision the Appeal is preferred may apply to the appellate Court to have such order 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 undue 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.”
11. I have had an opportunity to peruse the attached draft Memorandum of Appeal that the applicants have sought to depend on to convince this court to allow the application but the same does not apply to the suit herein. The attached Memorandum of appeal relates to a Judgment of Hon. Kituku in a land case in Kilifi. The applicants have equally not addressed this court as to the substantial loss they are likely to suffer if stay is not granted. In my view, the applicants have not placed before this court any relevant material that would persuade it to grant the prayers sought. I find this application misconceived and incompetent in the manner in which it has been filed.
12. On the issue of leave to file the appeal out of time, the applicable provision is Section 79G of the [Civil Procedure Act](#) which expresses that appeals must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section, however, allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so. The applicants have not sufficiently shown that they were not aware of the Judgment that was delivered on March 3, 2022 and that they had applied for proceedings or decree after judgment. The application is an afterthought, and must have been triggered by the execution process. I note that the Respondent



notified the applicants of the said Judgment on March 11, 2022 and this was a sufficient notice for them to move this court appropriately.

13. I therefore find that the applicants have not satisfied the conditions necessary for grant of orders of stay of execution, as well as leave to appeal out of time as prayed under prayer (2) and (3) of the Application dated July 18, 2022.
14. In the end, I find that the application dated July 18, 2022 is in want of merit and the same is dismissed with costs to the respondent.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2023.**

.....

**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

Mr Kilonzo for the Respondent

Mr Nyabero for the Applicant (absent)

