



Munyao (Legal Representative of the Estate of Jackson Mwandikwa Maluki - Deceased) v Hassan & another (Miscellaneous Application 38 of 2022) [2023] KEHC 1492 (KLR) (22 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1492 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION 38 OF 2022
SM GITHINJI, J
FEBRUARY 22, 2023**

BETWEEN

MARY MWIKALI MUNYAO (LEGAL REPRESENTATIVE OF THE ESTATE OF JACKSON MWANDIKWA MALUKI - DECEASED) PLAINTIFF

AND

MANSOUR AWADH HASSAN 1ST DEFENDANT

NANCY DEBORA MWACHIA 2ND DEFENDANT

RULING

1. The Applicant herein has filed a Notice of Motion application brought under Sections 3A, 75G and 95 of the *Civil Procedure Act*, Order 22 rule 22, Order 42 Rule 6, Order 50 Rule 5 & Order 51 Rules 1 and 3 of the *Civil Procedure Rules* under Certificate of Urgency dated the 9th day of June, 2022 seeking the following orders:
 1. Spent.
 2. That this Honourable Court be pleased to grant the Defendants/Applicants leave to appeal out of time against the Judgment of Hon. S. D. Sitati in Kilifi PMCC No. E28 of 2020 delivered on 4th April, 2022.
 3. That this Honourable Court be pleased to issue an order for stay of execution of the Judgment and Decree issued in Kilifi PMCC No. E28 of 2020 pending hearing and determination of this Application.
 4. That this Honourable Court be pleased to issue an order for stay of execution of the Judgment and Decree issued in Kilifi PMCC No. E28 of 2020 pending the hearing and determination of the intended Appeal.



5. That costs of this application be in the cause.
2. The application is supported by the grounds on its face and a supporting affidavit sworn by Kittu L. George on 9th June, 2022. He deponed that he has through several correspondences requested to be supplied with certified copies of the Judgment and typed proceedings but in vain. That he only managed to get a copy of the Judgment on 9th May, 2022 and by this time the period within which to lodge an appeal had already lapsed.
3. He also deponed that the delay was occasioned on the part of the Defendants/Applicants' Advocates obtaining a certified copy of the Judgment late and that they have since been served with a copy of the Plaintiff/Respondent Judgment Notice dated 7th April, 2022 requesting them to settle the decretal sum within 30 days. Further that there is an impending threat of execution against the Defendants/Applicants and as such, substantial and irreparable loss shall result to the Defendants/Applicants should the Plaintiff/Respondent proceed with execution of the said Judgment in view of the substantial decretal amount. He further asserted that unless the order for stay of execution is granted, the Defendants/Applicants' would suffer substantial loss and the decretal sum if paid to the Plaintiff/ Respondent would be outside the Defendants/Applicants' reach thereby rendering the intended Appeal nugatory.
4. In response to the application, the Respondent filed a Replying Affidavit sworn by Geoffrey Kilonzo on 28th day of June, 2022. He deposed that upon Judgment being delivered on 4.4.2022 the applicant was granted 30 days stay of execution which expired on 5.5.2022 and that the current application was filed on 9.6.2022 and according to him, the 60 days delay is an act of indolence and an abuse of the court process. He also deposed that for an application for leave to appeal out of time to succeed, the applicant must satisfy the court that he had good and sufficient cause for not filing the Appeal on time.
5. He asserted that the appellant has equally not met the conditions warranting stay as on the limb of substantial loss, the applicants must clearly state what loss, if any, they stand to suffer and according to him, it is not indicated what loss will be suffered should the orders for stay fail to be granted. He as well contends that the Respondent's right to execute has accrued and as such he should not be denied from enjoying the fruits of his Judgment and that the Respondent will be greatly prejudiced if this court grants the orders sought for reason that this case is not a statistic as it involves human life.
6. The application was canvassed by way of written submissions. The applicant through the firm of Madzayo Mrima & Jadi Advocates filed submissions on the 17th day of November, 2022. Counsel identified two issues for determination; whether court should exercise its jurisdiction and grant the Defendants leave to appeal out of time and whether an order for stay of execution pending appeal should issue. On the first issue the counsel submitted that appeals from the subordinate courts to the High Court are to be filed within a period of thirty (30) days from the date of the Judgment sought to be challenged, relying on Section 79G of the *Civil Procedure Act*. Counsel further relied on the case of *Edith Gichungu Koine vs Stephen Njagi Thoithi* (2014) eKLR and that of *Charles N. Ngugi vs ASL Credit Limited* (2022) eKLR which reiterated the factors court should consider in exercising the discretion whether to extend time to file an appeal out of time on the basis of; the period of delay, the reason for the delay, the arguability of the appeal and the degree of prejudice which could be suffered if the extension is granted.
7. Counsel as well submitted that the Judgment having been delivered on 4th April, 2022, the Defendants/ Applicants had until 4th May 2022 to file their appeal thereby the delay of 35 days which has been explained as not intentional should be excused. On the 2nd issue for determination, counsel submitted that courts are granted the unfettered discretion to enlarge time under Order 50 Rule 6 of the *Civil*



Procedure Rules. He also relied on Order 42 rule 6 (2) on the principles guiding the grant of a stay of execution pending appeal.

8. On whether the applicants would suffer substantial loss, he submitted that the execution of the judgment shall cause substantial loss to the Defendants since Plaintiff has not demonstrated to this court her means to allow the court assess her financial capabilities. According to him, the Plaintiff may not be in a position to refund the decretal sum if the Defendants/ Applicant's appeal succeeds. Finally, it was his submission that the applicants are willing to offer security as the court may deem fit pending the outcome of the intended appeal.
9. The Respondent on the other hand filed submission through her advocate Wambua Kilonzo & Co. Advocates on the 30th day of November, 2022. Counsel submitted that the present application is meant to delay the Respondents from enjoying the fruits of her judgment and that the same is an abuse of the court process. He relied on the case of Nairobi HCCC No. 380 of 2013 Kenya Commercial Bank vs Suntra Investment Bank Ltd (2015) eKLR.
10. On whether to extend time to file the appeal, he relied on the case of Thuita Mwangi vs Kenya Airways Ltd (2003) eKLR stating 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 favour of the applicant. That this is a case of mere inaction and the same ought not to be visited upon the Respondent.
11. According to him, the applicants have failed to disclose a reasonable cause for the delay and that the proposed attached memorandum of appeal has no likelihood of success. Finally, he submitted that the applicant has not met the conditions warranting stay, that it is not indicated or explained what loss (if any) will be suffered should the orders for stay fail to be granted. That the Respondent will be greatly prejudiced if this court grants the orders sought for reason that this case involves loss to a family that solely depended on the deceased as the breadwinner.

Analysis and Determination

12. I have considered the application, grounds, affidavits, submissions and authorities cited by counsels. The applicant seeks leave to file appeal out of time and stay of execution of the judgment and decree pending the hearing of the intended appeal.
13. Section 79G of the Civil Procedure Act provides:

“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.”
14. It is not disputed that Judgment in this matter was delivered on 4th April, 2022 with a 30 days stay of execution. The applicants asserted that they made several correspondences requesting to be supplied with certified copies and only obtained the said judgment on 9th May, 2022. This is however far from the truth; the applicant has not disputed having being served with the Judgment Notice by the Respondent which was received in their office on 6th April, 2022 which Notice made them aware of the said Judgment.
15. The applicants' plea to file an appeal out of time can only be allowed if it satisfies the court that it had good and sufficient cause for not filing the appeal in time. The supreme court of Kenya sitting at



Kisumu in the case of *County Executive of Kisumu vs County Government of Kisumu & others* (2017) eKLR while relying on its decision in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others* Application No. 16 of 2014 (2014) eKLR, the Hon. Judges reiterated the considerations to be made in such a case as follows:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
16. This court has considered the period of delay from 4th April 2022 to the filing of the application which was about 5 weeks noting that the court had granted the Defendants 30 days stay of execution. Further, from the time they were served with the judgment notice, there is no sufficient cause advanced as to why there was a delay in filing the appeal. They obtained the certified copies on 6th May 2022 while the instant application was filed on 9th June 2022. The delay herein has not been sufficiently explained.
17. On the issue of stay of execution, Order 42 Rule 6(2) of the *Civil Procedure Rules* provides:
- “(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.”
18. In the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 the court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:
1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision.



3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

19. Stay of execution is granted to facilitate a pending deserved legal action. This court having observed that the application for leave to appeal out of time is unmerited, the application for stay of execution pending appeal lacks legs on which to stand on and must fail.

20. I accordingly find the application unmerited and is dismissed with costs to the Respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 22ND DAY OF FEBRUARY, 2023.

S.M. GITHINJI

JUDGE

In the Presence of: -

1. Miss Nyambuto for the Respondent
2. Miss Muranji for Defendant/Applicant

