



Ndumia & another v M’Mugwika (Suing as the legal representative of the Estate of Fridah Wanja Mwirigi - Deceased & 2 others (Civil Appeal E057 of 2022) [2023] KEHC 2555 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2555 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E057 OF 2022
EM MURIITHI, J
MARCH 28, 2023**

BETWEEN

CHARLES NDERITU NDUMIA 1ST APPLICANT

CHARLES MUTHUI KARIUKI 2ND APPLICANT

AND

JOHN MWIRIGI M’MUGWIKI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF FRIDAH WANJA MWIRIGI - DECEASED) 1ST RESPONDENT

GERALD KIREMA 2ND RESPONDENT

SILVANUS KIZITO 3RD RESPONDENT

(Being an application for leave to file an appeal out of time against the judgment and decree of the Honorable TM Mwangi SPM in Meru CMCC No 25 of 2020 delivered on August 30, 2022.)

RULING

1. By a notice of motion under certificate of urgency dated September 19, 2022 by the applicants, brought under order 21 rule 1b, order 22 rule 22, order 42 rule 6, order 50 rule 6 and order 51 rule 1 and 3 of the *Civil Procedure Rules*, article 159(2)(a) & (d) of the *Constitution* and all other enabling provisions of the law, the applicants seek that:
 1. Spent
 2. This honorable court be pleased to grant leave to the applicants to lodge an appeal and file a memorandum of appeal out of time against the judgment and



decree of the Honorable TM Mwangi SPM against the applicants on March 18, 2022 in Meru CMCC 25 of 2020.

3. This honorable court be pleased to grant a stay of execution of the judgment and/or decree issued by Honorable TM Mwangi SPM against the applicants on August 30, 2022 pending the hearing and determination of this Application.
 4. This honorable court be pleased to grant a stay of execution of the judgment and/or decree issued by Honorable TM Mwangi SPM against the Applicants on March 18, 2022 pending the hearing and determination of the intended appeal.
 5. This honorable court allows the applicants' security to the court be in the form of a bank guarantee from the Family Bank.
 6. The application be heard inter partes on such date and time as this honorable court may direct.
 7. The costs of this application abide the outcome of the appeal.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Charles Muthui Kariuki, the 2nd applicant herein, sworn on even date. On 18/3/2022, the judgment was delivered against the Applicants wherein the 1st Respondent was awarded general damages of Kshs 2,300,000, special damages of Kshs 140,000 plus costs and interests of the suit. The Advocates on record received instructions from the Applicants after the lapse of 30 days to appeal the said judgment. The Advocates delayed in lodging the memorandum of appeal as they were in the middle of obtaining a copy of the judgment and have him peruse the said judgment for directions. He delayed in communicating to his advocates about appealing the judgment because he was away dealing with family issues. He is apprehensive that if stay is not granted, the appeal will be rendered nugatory and the Applicants will suffer irreparable loss and damage, as the 1st Respondent may levy execution against them. He is informed that their appeal has high chances of success as the quantum awarded to the 1st Respondent was too high as compared to the injuries suffered. He is fearful that if the decretal sum is paid to the 1st Respondent, who has not disclosed his financial standing, he would not be in a position to refund the same if the appeal is successful. He avers that his insurer, Directline Assurance Company Limited is ready, willing and able to furnish the court with a Bank Guarantee from Family Bank as security to the court. He avers that the application has been made in good faith and the same will not occasion any prejudice to the Respondents.
3. The 1st Respondent has opposed the application vide his replying affidavit sworn on 27/9/2022. He avers that the application is an epitome of an abuse of the court process, incurably and fatally defective as the same seeks to derail the progress of this matter that was concluded over 6 months ago. He is advised that the Applicants have not given any good or sufficient cause for the delay in filing the appeal within the time provided under section 79G of the Civil Procedure Act and the court cannot exercise its discretion in their favour. He avers that he will suffer great prejudice if an extension to file the appeal is granted, and urges the court to bring the litigation herein to an end by dismissing the application. He has been advised that the appeal is mischievous and contemptuous as it is not compliant with the prevailing law. He avers that he has been rendered financially hopeless and useless as his children cannot afford basic education due to financial burden on his shoulders, and he urges the court to allow the award stand unfettered with no further ado and waste of court's time.
4. The court on 20/9/2022 issued an order for the status quo to be maintained.



Analysis and Determination

5. The issues for determination are whether leave to appeal out of time and stay of execution should issue.

Leave to appeal out of time

6. The principles for consideration on an application for extension of time to appeal out of time are that, the power is discretionary but the applicants must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay are plausible, that the appeal is arguable and not frivolous and that the respondent will not be unduly prejudiced by the order being made. See *Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others* (2014) eKLR.
7. The judgment sought to be appealed against was made on 18/3/2022 while the instant application is dated 19/9/2022. That delay of approximately 6 months cannot be termed to be inordinate and inexcusable.
8. The reason for that delay is attributed to the 2nd Applicant's inability to communicate to his counsel with regards to lodging the appeal as he was away dealing with family issues. It is further said that counsel was amidst obtaining a copy of the judgment and having the client peruse the same in order to give instructions. This court finds that the reason for the delay has been satisfactorily explained.
9. On the arguability or otherwise of the intended appeal, the grounds raised in the draft memorandum faulting the trial court for apportioning liability at 100% and awarding excessive general damages cannot be said to be frivolous. For the reasons set out above, this court deems it fit to enlarge time to lodge the appeal out of time.

Stay of Execution

10. The law concerning applications for stay of execution of a judgment and/or Ruling is well espoused in the provisions of order 42 rule 6 of the *Civil Procedure Rules*, 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 appeal case of 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 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 unreasonable delay.

- 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.”

Substantial loss

11. The cornerstone consideration for granting stay is substantial loss, which has been espoused by the Court of Appeal (Platt, AG JA) in *Kenya Shell Limited v Kibiru another* (1986) eKLR as follows: -

“.....If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”

12. The Applicants contend that they will suffer substantially by losing the decretal sum if the same is paid out to the 1st Respondent, whose financial standing to refund the same in the event the appeal succeeds, has not been disclosed. On the other hand, the 1st Respondent contends that he will suffer great prejudice if the orders sought are granted, as he has been rendered financially hopeless.
13. The court notes from the grounds of appeal as raised in the Applicants’ memorandum of appeal, that the appeal is indeed arguable, which is not one which must necessarily succeed and neither is it for the court to go into the merits of the intended appeal.
14. The court is minded that the 1st Respondent, as the successful litigant, is entitled to enjoy the fruits of his judgment, and the Applicants, as the aggrieved parties, have an undoubted right to appeal against the trial court’s decision.

Delay

15. The judgment sought to be appealed against was delivered on 18/3/2022 while the instant application is presumed to have been filed on 19/9/2022, as it is dated then. The Applicants have attributed the delay in lodging the appeal in time to the 2nd Applicant’s inability to communicate to his counsel with regards to lodging the appeal as he was away dealing with family issues and the procurement of copy of the judgment. This court finds that the delay of approximately 6 months does not constitute unreasonable delay.

Security

16. The court has looked at the Bank Guarantee offered by the Applicants as security for the due performance of the decree.

Orders

17. Accordingly, for the reasons set out above, the court allows the Applicants’ application dated 19/9/2022 in the following terms:

1. The Applicants are hereby granted leave to appeal out of time.



2. An order for stay of execution of the Judgment and Decree in Meru CMCC No 25 of 2020 pending the hearing and determination of this appeal is hereby issued.
3. The record of appeal to be filed within 60 days from the date hereof.
4. The Applicants shall within thirty days (30) days from the date hereof pay to the 1st Respondent the sum of Kshs 1,000,000/= and deposit with the Court a Bank Guarantee for the payment of the balance of Ksh.1,300,000/=.
5. In the event of default of the aforementioned conditions, the stay of execution shall lapse and be of no effect.
6. The costs of the application shall abide the outcome of the appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 28TH DAY OF MARCH, 2023.

EDWARD M MURIITHI

JUDGE

Appearances:

M/S Kimondo Gachoka & Co. Advocates for the Appellant

M/S Mutuma Gichuru & Associates Advocates for the Respondent.

