



**Manjari & another v Mwaura (Civil Miscellaneous Application
E286 of 2022) [2023] KEHC 19120 (KLR) (Civ) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19120 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL MISCELLANEOUS APPLICATION E286 OF 2022**

AN ONGERI, J

JUNE 27, 2023

BETWEEN

JOSEPH UNO MANJARI 1ST APPLICANT

PETER LAURENCE OMONGI 2ND APPLICANT

AND

LELAH WAIRIMU MWAURA RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated May 12, 2022 seeking the following orders:
 - i. THAT this application be certified as urgent and be heard ex parte in the first instance.
 - ii. THAT this honourable court be pleased to grant leave to the applicants to appeal out of time against the judgment of the Honourable E Wanjala Principal Magistrate Milimani Commercial Courts CMCC No 656 of 2020 delivered on December 17, 2021.
 - iii. THAT this honourable court be pleased to stay execution of the judgment and decree in Milimani Commercial Courts CMCC No 656 of 2020 delivered on December 17, 2021 pending the hearing and determination of the application herein.
 - iv. THAT this honourable court be pleased to stay execution of the judgment and decree in Milimani Commercial Courts CMCC No 656 of 2020 delivered on



December 17, 2021 pending the hearing and determination of the intended appeal.

- v. THAT the costs of this application abide the outcome of the intended appeal.
2. The application is supported on the grounds on the face of it and supported by the affidavit by the 1st applicant sworn on May 12, 2022 in which it is deposed that, on December 17, 2021 judgement in Milimani Commercial Courts CMCC No 656 of 2021 was delivered against the Applicants herein in which the Applicants were held 100% liable and ordered to pay the Plaintiff Kshs 252,050 plus costs and interest at court rates.
3. His advocates tried to trace a copy of the judgement but could not trace it. They called the court assistants and further followed up with a text in effort to have the file traced with no success. The file was finally traced on March 27, 2022 and upon perusal of the same they found that judgement had been entered.
4. Being aggrieved and dissatisfied with the said whole judgement, they have instructed M/S Kimondo Gachoka & Company Advocates to appeal against the said judgement. That the intended appeal is merited, arguable and it raises pertinent points of law and therefore has overwhelming chances of success. That further his insurer Directline Assurance is ready, able and willing to furnish such reasonable security in form of a bank guarantee from Family Bank. That of the orders sought are not granted he stands to suffer prejudice and irreparable substantial loss as there is a likelihood he will not recover the decretal amount.
5. The respondent filed ground of opposition to the application as follows
 - i. THAT the application is frivolous, vexatious and an abuse of the process of the law.
 - ii. THAT this application is fundamentally defective, a nullity in law and should be dismissed.
 - iii. THAT the application offends the mandatory provisions of the Civil Procedure Rules.
6. The parties filed written submissions as follows; the respondent submitted that the judgement in issue herein was delivered by Honourable E Wanjala on December 17, 2021 with the Defendant/Applicant filing this Application for leave to file an Appeal out of time on May 14, 2022 being five (5) months after the date of delivery of judgement and outside the legally stipulated time within which they ought to have filed an appeal.
7. That the Applicants were represented by their Advocates on December 17, 2021 when judgement in this matter was delivered by Honourable E Wanjala hence they were aware from the onset of the award of the Honourable Court and their need to Appeal the same within 30 days of its delivery if dissatisfied with the Court's decision but they failed to do so. the Applicants through their Advocates were again notified of the judgement delivered in this matter via letter from the Respondent's Advocates dated January 18, 2022 which was received by them on January 21, 2022 but they still did not file an Appeal against the Court's decision.
8. It was argued that in light of the above we submit that the Applicants not only knowingly slept on their rights of timely appeal in this matter but deliberately and frivolously failed to file Appeal on the same hence should be denied leave to appeal out of time and should not be granted any stay of execution.



9. The issues for determination in this application are as follows
- i. Whether the appellant should be granted leave to appeal out of time.
 - ii. Whether the appellant should be granted stay of execution pending appeal.
10. On the issue as to whether the appellant should be granted leave to appeal out of time, I find that the governing provisions are provided by Section 79G of the [Civil Procedure Act](#) as follows:
- ' 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 a good and sufficient cause for not filing the appeal in time.'
11. I find that the conditions for grant were discussed by the Court of Appeal in [Thuita Mwangi v Kenya Airways Ltd \[2002\] eKLR](#). They include the following:
- i) The period of delay;
 - ii) The reason for the delay;
 - iii) The arguability of the appeal;
 - iv) The degree of prejudice which could be suffered by the Respondent if the extension is granted;
 - v) The importance of compliance with time limits to the particular litigation or issue; and
 - vi) The effect if any on the administration of justice or public interest if any is involved.
12. There has been inordinate delay. The judgment was delivered on December 17, 2021 and this application was filed on May 12, 2021 about 5 months later.
13. I find that the appellant is not entitled to leave to appeal out of time.
14. On the issue of stay of execution pending appeal, I find that governing provision is Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:
- ' No order for stay of execution shall be made under subrule (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.
15. I find that leave to appeal having been declined, there is no point in granting stay of execution pending appeal.
16. The application dated May 12, 2022 be and is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 27TH DAY OF JUNE, 2023.

A. N. ONGERI



JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent

