



**Nyaga v Mwachilungo (Miscellaneous Civil Application
E025 of 2022) [2023] KEHC 20948 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20948 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
MISCELLANEOUS CIVIL APPLICATION E025 OF 2022**

GMA DULU, J

JULY 26, 2023

BETWEEN

EMILIO NYAGA APPLICANT

AND

JOHN MGANDI MWACHILUNGO RESPONDENT

(Application for leave to appeal out of time and stay of execution of the judgment of the Hon Magistrate AM Obura (Chief Magistrate) in Voi Chief Magistrate's Court Civil Suit No E161 of 2021 and judgment delivered on July 4, 2021.)

RULING

1. Before me is an application by way of Notice of Motion dated September 12, 2022 filed by Emilio Nyaga through Counsel Kimondo Gachoka & Company Advocates.
2. The application was filed under Section 1A, 1B, 3, and 3A, 75G and 95 of the *Civil Procedure Act* (Cap 21) and Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6, and Order 51 Rules 1 & 2 of the *Civil Procedure Rules 2010*, and seeks the following orders:-
 1. (Spent).
 2. (Spent).
 3. That the court be pleased to grant leave to the applicant/intended appellant to appeal out of time against the judgment of the Hon Magistrate AM Obura (Chief Magistrate) in Voi Chief Magistrate's Court Civil Suit No E161 of 2021 and judgment delivered on July 4, 2021.
 4. That the court be pleased to stay execution of the judgment and decree in Voi CMC Civil Suit No E161 of 2021 pending the hearing and determination of this application and the intended appeal herein.



5. That the costs of this application abide the outcome of the intended appeal.
3. The application was filed with a supporting affidavit sworn by Nannungi Mariat Advocate for the applicant on September 12, 2022 in which it was deponed that judgment was delivered on July 4, 2022 for Kshs 302,130/= in favour of the respondent, that appeal was to be filed by August 4, 2022, that the initial stay of execution granted had lapsed, that the applicant intends to appeal, that execution will render the intended appeal nugatory, and that the applicant is willing to provide a bank guarantee as security.
4. The application has been opposed through a replying affidavit sworn on November 9, 2022 by the Respondent in which it was deponed that judgment was read with notice to the parties and delivered to the applicant's advocates on July 6, 2022, that a bill of costs was then filed and served, that the applicant had not explained reasons for the delay in filing appeal or the application, that there was thus no justifiable reason for grant of stay of the judgment.
5. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Kimondo Gachoka & Company Advocates for the applicant, and Njoroge Mwangi & Company Advocates for the respondent.
6. This is an application for enlargement of time to appeal, and also an application for stay of execution of judgment or decree pending appeal.
7. The period within which an appeal from a subordinate court is required to be filed in the High Court is governed by the provisions of Section 79G of the *Civil Procedure Act* (Cap.21), under which an appeal is to be filed within 30 days, but the court may for sufficient cause extend the period.
8. The burden is on an applicant to persuade the court through sufficient reasons, for the court to exercise its discretion in his or her favour to enlarge the time for filing an appeal.
9. The applicant herein has explained in the supporting affidavit that the delay in filing the appeal was due to receiving judgment late, as well as the process of obtaining instructions by the advocate from the client.
10. In my view, the applicant should have given the date when they requested for, and received the judgment. They should also have explained or indicated the date the applicant's counsel received instructions.
11. That said however, the initial stay of execution orders lapsed on August 4, 2022 and this application was filed on September 23, 2022. With the current constitutional imperative requiring courts to dispense justice based more on substantive considerations rather than technical considerations as codified under Article 159(2) of the *Constitution*, I will extend the time to appeal, in order to avail an opportunity for a decision to be made on merits of the intended appeal.
12. I now turn to the request for stay of execution of judgment or decree. Stay of execution of decree or judgment is governed by Order 42 Rule 6 of the *Civil Procedure Rules*, especially Rule 6(2), which provides as follows:-
 6.
 - (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's 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.
13. In my view, the application herein was filed without unreasonable delay, having been filed within a month of the lapse of the initial stay orders.
14. In my view also, if the stay orders requested herein are not granted, the applicant will stand to suffer substantial loss, if the money paid to the respondent is not recovered. However, this being a money decree, and the appeal being on quantum of damages, in my view, stay orders can only be justified if the applicant pays part of the decretal amount. I will thus grant stay orders, subject to the applicant paying the respondent Kshs 150,000/=
15. As for the requirement of the applicant providing security in my view the part payment of the decretal amount to the respondent, satisfies that element. Consequently, I allow the application and order as follows:-
- i. I extend time to file appeal. The appeal will be filed within thirty (30) days from today.**
 - ii. I grant stay of execution of judgment or decree pending appeal, provided the applicant pays the respondent through counsel part of the decretal amount Kshs 150,000/= within 45 days from today.
 - iii. In default of either (i) or (ii) above, the stay orders herein granted will automatically lapse and have no effect.
 - iv. The costs of the application will abide the results of the intended appeal, but in default of (i) or (ii) above, the costs of the application will be borne by the applicant.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF JULY 2023 AT VOI IN OPEN COURT VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Ms. Nannungi for applicant

No appearance for the respondent

Mr. Otolu court assistant

