



**Warui v University of Nairobi (Civil Appeal 337 of 2018)
[2023] KEHC 21468 (KLR) (Civ) (14 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21468 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 337 OF 2018

AN ONGERI, J

AUGUST 14, 2023

BETWEEN

JOSEPH CHRISTOPHER WARUI APPELLANT

AND

UNIVERSITY OF NAIROBI RESPONDENT

(Justice J K Sergon on June 17, 22.)

RULING

1. The application coming for consideration in this ruling is dated 15/12/2022 brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 42, Rule 6, Order 50 Rule 6, Order 51, Rule 1 of the [Civil Procedure Rules](#) and all other enabling provisions seeking for the following orders;
 - i. That this application be certified urgent, service of the same be dispensed with and it be heard *ex-parte* in the first instance owing to its urgency.(SPENT)
 - ii. That the honourable court be pleased to grant leave to file an appeal out of time against the whole judgment and decree issued by Justice J K Sergon on June 17, 22.
 - iii. That the notice of appeal filed and request for proceedings annexed in this application be deemed to be properly filed upon grant of leave.
 - iv. That this court be pleased to order stay of execution of the judgment and/or decree resulting from the decision of Justice J K Sergon on June 17, 22 pending the hearing and determination of this application.



- v. That this court be pleased to order stay of execution of the judgment and/or decree resulting from the decision of Justice J K Sergon on June 17, 22 pending the hearing and final determination of the intended appeal.
 - vi. That this honourable court be pleased to make such further orders to meet the end of justice.
 - vii. That costs of this application be in the intended appeal.
2. The application is supported by the affidavit of Donald B. Kipkorir sworn on December 15, 2022 that impugned judgment was delivered on 17th June in the absence of the parties and further that the appeal has high chances of succeeding as the Applicant has an arguable appeal.
 3. The Applicant also deposed that he is ready to deposit security for costs.
 4. The respondents opposed the application by the replying affidavit sworn by Joseph Christopher Warui on March 7 2023 in which he deposed that it is not true that the judgment was delivered in the absence of the parties and that the current Application is made in bad faith and meant to frustrate the process of execution.
 5. The parties filed written submissions which I have duly considered. I find that the record clearly shows that the Applicant was not present when the Judgment was delivered on June 17, 2022.
 6. The issues for determination are as follows;
 - i. Whether the applicant should be granted leave to appeal out of time.
 - ii. Whether stay of execution should be granted pending appeal.
 7. On the issue as to whether the Applicant should be granted leave to file the appeal out of time, the conditions for grant of leave to appeal out of time are contained in Section 79G of the [Civil Procedure Act](#) which provides as follows;

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for 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.”
 8. I find that the applicant did not know when the judgment was delivered.
 9. I grant him an opportunity to exercise his right of appeal.

On the issue as to whether stay should be granted pending appeal, the governing provision is Order 42 Rule six which states as follows;

- “(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 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 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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

10. The duty of this court is to balance the interests of the parties. The applicant is entitled to exercise his right of appeal while the respondent has a right to enjoy the fruit of his judgment.

11. I allow the application dated December 15, 2022 on the following terms;

- i. That the notice of appeal be filed within 30 days of this date.
- ii. That stay of execution is granted on condition that the decretal sum is deposited in court within 45 days of this date.
- iii. The costs of the application to abide the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 14TH DAY OF AUGUST, 2023.

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A. N. ONGERI

JUDGE

