



**Njeru v Musili (Miscellaneous Civil Application 19 of 2023)
[2023] KEHC 21820 (KLR) (9 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21820 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CIVIL APPLICATION 19 OF 2023
LM NJUGUNA, J
AUGUST 9, 2023**

BETWEEN

PETER MURIITHI NJERU APPELLANT

AND

STEPHEN MALUKI MUSILI RESPONDENT

RULING

1. The appellant/applicant filed chamber summons dated May 24, 2023 seeking orders that:
 - i. Spent;
 - ii. The Honourable court be pleased to admit the appellant's appeal for hearing after the expiry of the statutory period;
 - iii. A stay of execution in Siakago Civil Case E11 of 2022 be granted pending hearing and determination of this application;
 - iv. The court be pleased to grant leave to the applicant to appeal out of time against the ruling made by Hon. Stephen Ngii on April 20, 2023 in Siakago Civil Case E11 of 2022;
 - v. The said leave to operate as stay of all proceedings;
 - vi. The costs of this application be provided for; and
 - vii. Any other order that meets the ends of justice.
2. The application is premised on the grounds set out on the face of the application and in the supporting affidavit.
3. The applicant's case is that judgment was entered against him in Siakago Civil Case E11 of 2022 on April 20, 2023. That the ruling was served via email to the wrong email address causing the applicant



- to delay in filing his appeal. That the delay was also caused by failure by the applicant's former counsel in the matter who did not communicate the finding of the court in good time. That he has produced proof to show that he has paid a substantial amount of the decretal sum. That he seeks leave of court to file an appeal out of time which he prays will be heard on its merits.
4. The respondent filed a replying affidavit wherein he stated that the applicant's reasons for the delay in appealing are not viable. That he has options for recourse against his former counsel for the misdeeds and the issue should not be entertained by this court. On his claim that the ruling was sent to the wrong email address, the respondent stated that the applicant had the option of visiting the Siakago Court registry for directions on the matter but there is no evidence that this was attempted.
 5. It was the respondent's averment that the money paid to him by the applicant was not meant to go towards satisfying the decretal sum in the Siakago Civil Case E11 of 2022 and that no amount from the decretal sum has in fact been paid. That the intended appeal by the applicant is a waste of the court's time and is meant to deny the respondent a chance to enjoy the fruits of the decree in Siakago Civil Case E11 of 2022.
 6. The parties agreed to canvass the application by way of written submissions.
 7. The applicant in his submissions stated that from the decretal sum of Ksh. 1,320,700/= he has already paid Ksh. 1,064,600/= even though he had been denied the chance to be heard de novo on the premise of technicalities. He relied on section 79G of the [Civil Procedure Act](#) to reiterate the power of the court to grant him leave to file appeal out of time. That following the guidelines in section 16(7) of the Practice Directions on Electronic Case Management the court was right in sending the ruling to the applicant via email, even though the ruling was sent to the wrong email address for his counsel. It is his case that the apparent error should not be visited on either him or his counsel. In giving his reasons for the delay, he relied on the case of [Mombasa County Government Vs. Kenya Ferry Services & Another](#) (2019) eKLR, where the court stated that the reasons for delay in meeting the court's timelines must be explained. That the delay was caused by human error in executing the electronic case management system requirements and that the court should indulge him.
 8. On the issue of stay of execution, the applicant fell back on Order 22 Rule 1 of the [Civil Procedure Rules 2010](#) which provides for stay of execution of a decree. He stated that he has paid a substantial part of the decretal amount and produced proof of the same and if the order for stay is not allowed then the applicant is bound to lose the amount already paid as the contractual amount and his property. On this, he also cited Order 42 Rule 6 of the [Civil Procedure Rules 2010](#) and the case of [RWW Vs. EKW](#) (2019) eKLR. That if this relief is not granted, the applicant is apprehensive that, the respondent will not refund the amount already paid to him.
 9. The applicant also submitted that the court ought to exercise its supervisory jurisdiction in this matter as provided under Rule 20(2) of the High Court (Organization and Administration) (General) Rules, 2016. He relied on the case of [Mandeep Chauhan Vs. Kenyatta National Hospital & 2 others](#) (2013) eKLR to make his case that a party should not be condemned unheard. In conclusion, he submitted that the draft memorandum of appeal raises questions of both fact and law and should be admitted.
 10. The respondent in his submissions stated that the applicant has not provided sufficient reasons for delay in filing the appeal and that for him to blame his former counsel is not weighty. On this, he relied on the case of [Rajesh Rughani Vs. Fifty Investments Limited & Another](#) (2016) eKLR where the court stated that it is paramount that a litigant does not participate in causing the delay. In reinforcing his case that there is no sufficient cause for the delay, he stated that it was due to the applicant's indolence. He relied on order 42 Rule 6 in arguing his case on stay pending appeal and added that in the trial court, judgment was entered on February 1, 2023 for Ksh. 1,320,700/= plus interest. That



the applicant alleges that the money paid to him was not for offsetting the decretal amount as the statements produced show that the payments were made earlier before the judgment was entered and that his debt stands unsettled. He further denied that the applicant has offered security or bank statements for due performance of the decree. On this, he relied on Order 42 Rule 6(2)(b) and the case of *Gianfranco Manenthi & Another Vs Africa Merchant Assurance Company Ltd* (2019) eKLR.

11. I have considered the application for stay, grounds thereof, supporting and Replying affidavits and submissions together with case law cited by both parties and in my view, the issues for determination are:
 - a. Whether or not the court should grant stay of execution of the decree issued by the trial court;
 - b. Whether or not the applicant should be granted leave to appeal out of time; and
 - c. Who should bear the costs of the application.
12. This court has power to issue the orders prayed by virtue of Order 42 Rule 6 which provides:
 - (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.
13. In the case of *Nicholas Stephen Okaka & another Vs Alfred Waga Wesonga* [2022] eKLR, the court held that:

“The court, in *RWW Vs EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:



“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

14. In the present application, the applicant herein claims delay in receiving the ruling occasioned by human error in operating the electronic court management system. In my view, this has been explained and proof of the same produced as exhibit in the supporting affidavit to the application.
15. The judgment was entered against the applicant on February 1, 2023 and the application to set aside the judgment was filed on February 21, 2023. The time lapse is not inordinately long and in my view, the explanation given is satisfactory, being outside of the applicant’s control. The applicant had a right to be represented and his counsel in the matter provided his email address to the court to enable communication of the court documents through the said address. If the advocate failed to receive the email in good time due to error on the part of the court systems, this should not be visited on the applicant’s options in seeking the orders herein.
16. The applicant stated that he has paid up a significant amount of the decretal amount and that if these orders are not granted he stands to lose the amount already paid. The respondent disputed this position stating that the evidence produced by the applicant showing that he has been paying the decretal amount was for a different transaction altogether and that the decretal amount was untouched. I also do not find any confirmation that the applicant gave security for due performance of the decree. For this I refer to Order 42 Rule 6(2)(b) of the Civil Procedure Rules which has 2 limbs:

“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..
1. I am satisfied the first limb of this subrule has been satisfied but the second one, not so much. The security may not have been provided in the trial court but the applicant prayed that the court grant any other order that meets the ends of justice. In the case of *Martin Muthee Vs Patrick Muchiri* [2021] eKLR the court held:

“The security must be one which can serve the purpose of guaranteeing due performance of such decree or order as may ultimately be binding on the applicant (See *Arun C Sharma Vs Ashana Raikundalia t/a Raikundalia & Co Advocates & 2 others* [2014] eKLR).”



In another case of *HGE Vs SM* [2020] eKLR the court stated:

“In *Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, the court observed:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.

18. In the interest of justice and in accordance with Article 159(2)(d) of the *Constitution* of Kenya 2010 and Sections 1A, 1B and 3A of the *Civil Procedure Act*, the application is hereby allowed and the following orders to issue:
- a. That the applicant is hereby granted leave to file the appeal against the decision of the court in Siakago Civil Case E11 of 2022 out of time. The appeal to be filed and served within 30 days of this ruling and be prosecuted within 120 days thereafter, failure to which the appeal shall stand dismissed;
 - b. That an order for stay of execution be and is hereby issued staying execution of the judgment and the subsequent orders arising from Siakago Civil Case E11 of 2022 on April 20, 2023 pending the hearing and determination of the appeal.
 - c. That the applicant deposits half the decretal sum in court within 30 days of this ruling, failing which the stay order shall lapse.
 - d. Costs of this application to abide the outcome of the appeal.

19. It is so ordered.

Delivered, dated and signed at Embu this 9th day of August, 2023.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent

