



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muya v Simiyu (Civil Appeal E056 of 2023)  
[2023] KEHC 23582 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23582 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E056 OF 2023  
DO CHEPKWONY, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**DANCUN MAINA MUYA ..... APPLICANT**

**AND**

**CHRISTINE NANGILA SIMIYU ..... RESPONDENT**

**RULING**

1. For determination before this Court is a Notice of Motion application dated 28<sup>th</sup> February, 2023 which seeks the following orders:
  - a. Spent;
  - b. That leave be granted to the Applicant to file his Memorandum of Appeal out of time from the Judgment of Kikuyu SPM Civil Suit No.19 of 2015, Christine Nangila Simiyu v Dancun Maina Muya delivered on 9<sup>th</sup> December, 2022 by Hon D. N. Musyoka and the Memorandum of Appeal filed herein be deemed duly filed and served.
  - c. Spent;
  - d. That this Honourable Court be pleased to grant a stay of execution of the Judgment and Decree of Kikuyu SPM Civil Suit No.19 of 2015, Christine Nangila Simiyu v Dancun Maina Muya delivered on 9<sup>th</sup> December, 2022 by Hon D.N.Musyoka pending the hearing and determination of Appeal;
  - e. That this Honourable Court be pleased to grant any other orders as it may deem fit to further the ends of justice;
  - f. That costs of this application be in the cause.



2. The Application is based on the grounds set out on its face and the Supporting Affidavit of Dancun Muya Maina sworn on 28<sup>th</sup> February, 2023. The Applicant avers that on 9<sup>th</sup> December, 2022, the trial court awarded the Respondent Kshs. 3,002,000.00 together with costs and interest of the suit. The Applicant states that he was informed of this by his former advocates on 16<sup>th</sup> January, 2023 and he immediately instructed the present advocates to come on record and they prepared the Memorandum of Appeal dated 28<sup>th</sup> February, 2023.
3. The Applicant contends that the delay was not so inordinate since the Memorandum of Appeal was filed within a period of 27 days. The Applicant holds that he has an arguable appeal as shown in the grounds of appeal and he is likely to suffer substantial loss because, once the Respondent pays the further court fees and obtain decree he can proceed with execution. The Applicant contends that he is ready and willing to deposit a sum of Kshs.750,000.00 as security or any other sum that the court may order.
4. The Respondent filed Replying Affidavit sworn on 9<sup>th</sup> March, 2023 wherein she has stated that the Applicant did not seek leave of the court to have the new advocates come on record in the place of the other advocates. The Respondent also avers that the Applicant has not shown the court how the information of the judgment was delivered to him on 16<sup>th</sup> January, 2023. According to the Respondent, the Applicant should not blame the previous advocates as he was under an obligation to follow up on his case.
5. The Respondent contends that the appeal does not raise triable issues and that the Applicant has not contested her ability to refund the decretal sum should the appeal succeed.
6. On 13<sup>th</sup> March, 2023, the parties were directed to canvass the application dated 28<sup>th</sup> February, 2023 by way of written submissions and they duly complied.

### **Analysis and Determination**

7. This Court has read through the application, the affidavit sworn in support thereof, the Replying Affidavit in opposition of it and considered the arguments and law advanced by both parties in their respective submissions. It is clear that what is for determination is whether the Applicant has satisfied the threshold for leave to appeal out of time and stay of execution orders to issue.
8. On the issue of leave to appeal out of time, this Court is guided by the provisions of:-
  - a. Section 3A of the *Civil Procedure Act* which states:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.
  - b. 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 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 good and sufficient cause for not filing the appeal in time”.



c. Section 95 of the same Act states:-

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired”.

d. Order 50 Rule 6 of the Civil Procedure Rules provides:-

“The time for delivering, amending, or filing any pleading, answer or other document of any kind whatsoever may be enlarged by consent in writing of the parties or their advocates without application to the court. [orders 50, rule7.] Computation of days”.

Read together, all these provisions allow the court the power and discretion to extend the period within which an act such as filing of an appeal as provided for by the law or fixed by a court, provided good and sufficient cause is shown or demonstrated.

9. In the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014], the Supreme Court with regard to granting orders of extension of time stated as follow:-

“..From the above caselaw, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the Applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the Applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a court should consider in exercise of such discretion:-

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and,
7. Whether in certain cases, like Election Petitions, public interest should be a consideration for extending time....”

10. According to the Applicant, the delay in filing the appeal was caused by the delay by his former advocate in informing him of the outcome of his matter at the trial court and the delay by the court in issuing a certificate of decree. The Respondent on the other hand has stated that it was the Applicant’s case



and so he was under an obligation to follow up on it. And even then, the Applicant has not told court how the information was relayed to him to justify the delay. The Respondent has also stated that the Applicant's advocate has not sought leave to come on record for the Applicant in the place of the other advocate.

11. In this case, it is noted that the Judgment was delivered on 9<sup>th</sup> December, 2022 and this application filed on 28<sup>th</sup> February, 2023 which is a period of almost two months after the lapse of the period of 30 days within which the appeal should have been filed. It is evidence that the Applicant changed their advocate and there is communication by the said advocate to confirm a follow up on the decree and certificate of costs from the trial court so they could file an appeal. Therefore even though the Applicant had the duty to follow up on the outcome of its case, it has been demonstrated by the correspondences by his counsel that he was eager to have the appeal filed. Furthermore, a delay of almost two months is not so inordinate. On the issue of leave to come on record, the counsel for the Applicant has stated that they filed a consent to come on record and this was not disputed by any evidence by the Respondent.
12. In view of all these, the court finds that the Applicant has demonstrated the desire to be heard on appeal and therefore deserves to have another day in court for justice to be seen to have prevailed.
13. On the issue of stay of execution, the law is set out under order 42 rule 6 of the [Civil Procedure Rules](#) which provides as follows:

“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; 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”

14. The purpose for an application for stay of execution pending appeal was pronounced in the case of [RWW v EKW](#) [2019] eKLR, as follows:-

“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.

15. It is trite law that for the court to grant stay of execution three conditions must be met:
  - a. The application has been made without unreasonable delay.
  - b. The Applicant will suffer Substantial loss
  - c. The Applicant has offered security for due performance of the decree.
16. On the first condition, the Judgment herein was delivered on 9<sup>th</sup> December, 2022 and the present application was filed on 28<sup>th</sup> February, 2023. The Applicant holds that he was only informed of the delivery of the judgment by his previous advocates on 16<sup>th</sup> January, 2023 however he has not substantiated whether this information was relayed to him in person, or a phone call or a



correspondence. While it is the duty of a litigant to follow up on his/her case from the start to finish, it is also an advocate's responsibility to communicate with the client on the progress and outcome of the case. And even though it has not been shown how the outcome of the impugned Judgment was communicated to the Applicant, there is clear evidence that he changed the advocate and from the annexed communication, the new advocate was on record took up the matter and demonstrated the desire to appeal the said Judgment. Also, courts have held that while there is a set timeline for delay, the same ought not be unreasonable and should be satisfactorily explained. In the case of [Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet](#) [2018]eKLR, the Court held that:-

“The law does not set out any minimum and maximum period of delay. All it state is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable.’

17. In the instant case, the court finds that to some extent, the reasons for the delay have been satisfactorily explained, and the delay of about two months cannot be said to be so inordinate.
18. On the condition of substantial loss, the applicant has stated that he is likely to suffer substantial loss if execution was to proceed because the Judgment and decree involve a substantive amount which the Respondent may not be in a position to refund. According to the Respondent, the Applicant has not demonstrated inability to refund the said amount.
19. It is worth noting that the Respondent has not rebutted the Applicant's fear of her not being able to pay back the decretal sum by showing what resources she has. In the case of [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another](#) [2006]eKLR, the Court of Appeal stated as follows on the issue of the Respondent being unable to pay back the decretal sum;-

“This Court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegations that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicant to know in detail the resources owned by a Respondent or the lack of this. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge”. Clearly, the Respondent has not demonstrated the ability to pay back the decretal sum by disclosing her source of income.

20. Lastly, on the issue of security for the due performance, the Applicant has offered to deposit a sum of Kshs. 700,000.00 as security in order to fulfil this condition. This issue of security was discussed in the case of [Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd](#) [2019] eKLR, held:

“... 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 decree in order to enjoy the fruits of his Judgment in case the appeal fails...”



21. In this case, although the Applicant has proposed the amount of security to be deposited, it is still upon the court to determine what would be reasonable. It is not about willingness to provide the same.
22. However, at this juncture, although the court is not required to consider the merits of the appeal to determine whether or not, it will succeed, this Court finds that the grounds raised therein, particularly on the issue of negligence and the casual link between the purported negligence and the injuries sustained being an arguable ground of appeal which warrants the protection of the court. The court of Appeal in the case of *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Limited & 2 Others* [2009] eKLR on arguable appeals held:-

“...On our part, after considering the rival submissions by the parties, the ruling of the learned Judge below together with pleadings we are satisfied that the appeal is indeed arguable. This, in essence, does not mean an appeal which must necessarily succeed, but of course, one which ought to be argued fully before the Court.”

23. In the circumstances, the court finds that the appeal is arguable and if execution is let to proceed, the same may be rendered nugatory. It then follows that to balance the rights of the Applicant and Respondent, the Notice of Motion application dated 28<sup>th</sup> February, 2023 be and is hereby allowed in the following terms:-
  - a. The Applicant be and is hereby granted leave to file and serve his Memorandum of Appeal out of time and the Memorandum of Appeal dated 28<sup>th</sup> February, 2023 be deemed as duly filed and served.
  - b. That there be a stay of execution of the Judgment and Decree of the Kikuyu SPM Civil Suit NO.19 of 2015, Christine Nangila Simiyu v Duncan Maina Muya delivered on 9<sup>th</sup> December, 2022 pending the hearing and determination of the appeal on condition that the Applicant deposits the entire decretal sum in court as security within thirty (30) days from the date hereof.
  - c. The Deputy Registrar to call for and avail the original record of proceedings from the trial court.
  - d. The Appellant to compile, file and serve the Record of Appeal within forty-five (45) from the date thereof.
  - e. Failure to comply with orders (b) and (d) above, will render the said orders as vacated and the Respondent will be at liberty to execute.
  - f. Costs to be in the cause of the Intended Appeal.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**D.O CHEPKWONY**

**JUDGE**

**In the presence of:**

Mr. Khatete holding brief for Mr. Kanjama (S.C) for the Appellant

Mr. Kipanui holding brief for Mr. Waiganjo counsel for Respondent

Court Assistant – Martin

