



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutwiri v Mwangi & 2 others (Civil Appeal E112 of 2022)  
[2023] KEHC 22787 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22787 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E112 OF 2022  
PM MULWA, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**SAMUEL MAINA MUTWIRI ..... APPELLANT**

**AND**

**JOHN MWANGI ..... 1<sup>ST</sup> RESPONDENT**

**NAOMI WAMBUI MACHARIA ..... 2<sup>ND</sup> RESPONDENT**

**MICHAEL CHEGE NDUNGU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before the court for determination is a Notice of Motion application dated May 27, 2022, seeking the following orders:
  - i. spent
  - ii. This Honourable court to find that the Memorandum of Appeal being Kiambu HCA no E112 of 2022 was filed out of time on May 27, 2022 to have been filled within time.
  - iii. That the court finds that the appeal is properly on record.
  - iv. An order for a stay of execution of the judgment and decree issued by Honourable CK Kisiangani on April 21, 2022 pending the hearing and determination of the application.
  - v. That the court allows the applicant to furnish the court with security in the form of a Bank Guarantee from the DTB Bank.
  - vi. That the application be heard inter parties on such date and time as this Honourable court may direct.
  - vii. That the costs of this application abide the outcome of the appeal.



2. This appeal arises from the claim filed by the Respondents in Ruiru SPMCC No E111 of 2021 where a judgment was delivered on April 21, 2022 by Hon Kisiangani in favour of the Respondents.
3. The Appellant aggrieved by the judgment, filed a Memorandum of Appeal and subsequently filed an application seeking a stay of execution of the judgment. This court on June 2, 2022, directed the appellant to deposit half the decretal amount into court within 21 days from the date thereof. Having failed to comply with the court orders the applicant filed a second application seeking to enlarge the time within which to comply with the orders of June 2, 2022.
4. The grounds on the face of the application are that the time within which to file an appeal has since lapsed, and unless a stay of execution is granted the application to have the appeal admitted out of time and the subsequent appeal will be rendered nugatory. That the delay in filing the appeal was occasioned by the delay in obtaining the judgment delivered on April 21, 2022.
5. The application is supported by the annexed affidavit sworn by Kelvin Ngure on May 27, 2022, wherein he averred that the appellant's counsel had a challenge in obtaining a copy of the judgment as the trial magistrate retained the file until May 27, 2022. That the stay of execution granted lapsed and the appeal may be rendered nugatory. There is an impending risk of execution.
6. Opposing the application, the respondents filed the Replying Affidavit sworn by Naomi Wambui Macharia on October 19, 2022. It was contended that the applicant's averments and reasons given for the delay in obtaining a copy of the judgments are untrue and show a lack of seriousness. That the appellant failed to comply with the court orders of June 2, 2022, shows that the application is an afterthought aimed at limiting the Respondents from enjoying the fruits of the judgment and the application ought to be dismissed.
7. The application was heard by way of written submissions. I have noted the applicant filed submissions in respect to the application dated October 6, 2022 seeking to enlarge the time within which to comply with the court orders of June 2, 2022.

#### **Appellant's Submissions**

8. The applicant submits that the application is brought without unreasonable delay and the delay has been explained. That the Respondents will not be prejudiced if the orders are granted.

#### **Respondent's Submissions**

9. It was submitted that the Applicant failed to satisfy the conditions for granting a stay of execution pending appeal. That the intended appeal lacks merit and has no chance of success. That the conditional stay granted by Justice Ngetich on June 2, 2022 was not adhered to and the application is an abuse of the court process.
10. Counsel argued that the Applicant is not befitting of the orders of enlargement of time to file an appeal as the delay in filing the appeal has not been sufficiently addressed. The applicant only attached one letter as proof of the efforts made in obtaining the trial court judgment.
11. Counsel urged the court that if it feels inclined to grant the orders of stay the appellant be directed to deposit the balance of the decretal amount forthwith.



## Analysis and Determination

12. I have considered the application, the replying affidavit and the submissions by counsel in support of their respective arguments. In my view, the main issue for determination is whether the application has any merit and therefore whether the orders sought should be granted.
13. According to the applicant the delay in filing the appeal was occasioned by the process of obtaining a copy of the judgment, the delay was inadvertent on the part of the advocates for the appellant and the same was not deliberate as they were not in a position to advise their clients accordingly without a copy of the judgment.
14. It was argued that the judgment was delivered on April 21, 2022, and the advocates managed to get a copy of the judgment on May 27, 2022, a time when the statutory stipulated time of appeal had lapsed. It is pleaded that the court find the memorandum of appeal filed on May 31, 2022 to have been duly filed.
15. Under Section 79G of the *Civil Procedure Act*, the time for filing an appeal from judgment of the Subordinate Court to the High Court is 30 days. The section provides:

“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.”

16. In this case, the judgment sought to be challenged was rendered on April 21, 2022. It follows that any appeal challenging that decision ought to have been filed on or before May 21, 2022. The Memorandum of Appeal was filed on May 31, 2022, that is 9 days after the stipulated timelines. the reason for the delay is the late obtaining a copy of the judgment.
17. Order 42 Rule 6 of the *Civil Procedure Rules*, provides 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 the application being made, to consider such application and to make such order thereon as may to it seems 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 a 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.

18. Considering all the material before me, I do not think that the delay was deliberate, despite the period taken. I have looked at the memorandum of appeal filed by the Appellant which seeks to challenge the quantum of damages awarded by the trial court. It raises issues for determination by this court. I find the said issues to be arguable. In the interest of justice, the applicant should be given an opportunity to articulate them before the appeal court.
19. In the circumstances I find the application dated, May 27, 2022 is merited, and I allow the same in the following terms:
- i. Leave is granted to appeal out of time.
  - ii. The memorandum of appeal dated May 27, 2022 is hereby admitted and deemed as duly and properly filed within time.
  - iii. Costs of the application will abide the outcome of the appeal.

Orders accordingly.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

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**P.M. MULWA**

**JUDGE**

**In the presence of:**

Kinyua/Duale – Court assistants

Mr. Njuguna h/b for Ms. Ayiera - for Applicant/Appellant

Ms. Okusimba h/b for Mr. Ndolo - for Respondents

