



**Mwangi v Kinyeru (Civil Miscellaneous Application E544 of 2021)
[2023] KEHC 24204 (KLR) (Civ) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24204 (KLR)

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

CIVIL

CIVIL MISCELLANEOUS APPLICATION E544 OF 2021

AN ONGERI, J

OCTOBER 27, 2023

BETWEEN

DANSON MWANGI APPLICANT

AND

LUCY NJOKI KINYERU RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 8/6/2023 brought under Section 1A, 1B and 3A of the *Civil procedure act*, order 42 Rule 6, Order 40 Rule 7 and Order 51 Rule 1 of the *Civil Procedure Rules* seeking the following orders;
 - i. That the orders of this honourable court issued on 8th July 2022 staying execution of the judgment of the Subordinate Court delivered on 25th June 2021 in CMCC no 7648 of 2018 be set aside.
 - ii. That this honourable court does hereby order Equity Bank Ltd to release to the respondent's advocates the sum of ksh 1,143,775 held in account no xxxx in the joint names of Kimondo Gachoka & Co. Advocates and Julius Juma & Co. Advocates together with all the interest accrued thereon.
 - iii. That further to Order 2 above, the respondents be at liberty to execute for the balance of the decretal sum from the judgment of the Subordinate Court delivered on 25th June, 2021 in CMCC no 7648 of 2018.
 - iv. That costs of this application be awarded to the respondents.
2. The application is based on the following grounds;



- a. That despite the court granting the applicants orders for stay of execution under Order 42 Rule 6 of the *Civil Procedure Rules* on 8th July, 2021, no appeal has been filed against it.
That further, despite the judgment of the lower court having been delivered on 25th June, 2021 no appeal has been filed against it.
 - b. That the orders of stay of execution were obtained from this court fraudulently as the court was made to believe that the applicant had appealed (intended to appeal) hence the said prayers were granted under Order 42 Rule 6 of the *Civil Procedure Rules*.
 - c. That it is now exactly two years since the lower court's judgment was delivered yet no appeal has been filed.
 - d. That it is exactly one year since orders for stay of execution were issued yet no appeal has been filed to date.
 - e. That the respondents/decreed holders cannot be expected to wait eternally for justice to be served at the altar of a judgment debtor who has not taken any steps to appeal, despite lying to the court that they had appealed.
 - f. That this matter relates to a fatal traffic accident in which a single parent died, leaving his two minor children in the custody of his elderly mother.
 - g. That it is not fair that these minor children for whose benefits these proceedings were filed should be made to wait for the fruits of their judgment for eternity.
 - h. That the applicants have themselves to blame for squandering the opportunity they had to appeal.
 - i. That even when the court granted the applicants stay of execution on condition that they deposit the decretal sum in a joint account within 30 days from 8th July 2022 they did not comply with the said condition until seven months later.
 - j. That the applicant should not be allowed any further to benefit from their lackadaisical handling of this matter by enjoying eternal stay of execution while the deceased's minor children drop out of school
3. The application is supported by the affidavit of Julius Juma sworn on 8/6/2023 which reiterates the grounds of the application (above).
 4. The appellant/respondent filed a replying affidavit by Danson Mwangi dated 31/7/2023 in which it is deposed that the suit herein was listed for mention/directions for main application where they were to confirm compliance of stay conditions on 24/7/2023. However, the joint account was not opened by the parties due to the challenges experienced from the firm of Julius Juma and Company Advocates which prompted the delay of compliance.
 5. The matter came up for directions on 24/7/2023 on the application dated 8/6/2023 seeking the money deposited as security pending appeal be released based on the ground that the applicant complied out of time. There is an appeal which has been lodged HCA E706/2023 together with a record of appeal now pending directions in court which memorandum has been served to the applicant which has triable issues for determination.
 6. The application herein is therefore an after thought since the applicant is guilty of inordinate delay in prosecuting the suit and bringing up the application herein. That if the application herein is allowed



and HCA E706/2023 is not prosecuted it will cause serious prejudice and deny a fair trial to the appellant.

7. The parties filed written submissions as follows; the respondent/applicant submitted that the substratum of an application for stay of execution pending an intended appeal is the appeal itself. An order for stay of execution pending appeal can therefore not be granted in vacuo without the appeal being filed. They relied on *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR where his lordship G.V Odunga J, (Now JA) ruled as follows:-

“As the applicant has failed in satisfying the first ground for extension or enlargement of time to file an appeal out of time, this application must fail and without an order extending time the stay cannot be granted in vacuum.”

8. The respondent/applicant submitted that it has been more than two years since the impugned judgement was delivered, no appeal has been filed against it yet the appellant/respondent wants to continue to enjoy orders of stay of execution. No explanation has been proffered for failure to appeal and they should be allowed to execute the judgement so that they may enjoy the fruits of judgement.
9. The respondent/applicant argued that the suit before the lower court was a fatal accident claim where the victim was a single father who left behind 2 primary school-going children. The minors have been cared for by their grandmother who is 72 years old and justice delayed is justice denied.
10. The appellant/respondent submitted that it has already provided security in form of a bank deposit in a joint interest account pending the hearing and determination of the appeal. The memorandum of appeal herein is arguable and raises serious points of law and fact that warrant the court’s intervention on appeal. That the court has a wide power and discretion to enlarge time and/or grant leave for the filing of a Memorandum of Appeal out of time if an applicant can demonstrate a good and sufficient cause for not filing the Appeal on time.
11. The appellant/respondent submitted that the delay in filing the memorandum of appeal was sufficiently explained and constitutes sufficient cause.
12. The sole issue for determination is whether the stay orders should be vacated and the deposit released to the respondent/applicant.
13. I find that the Appellant has not taken any steps to prosecute the appeal.
14. It is not in dispute that this matter relates to a fatal traffic accident in which a single parent died, leaving his two minor children in the custody of his elderly mother.
15. The *Constitution* of Kenya and the *children Act* admonish all individuals, government institutions, courts and tribunals to act in the best interest of the child in all matters involving minors.
16. Article 53(2) of the *Constitution* provides as follows:

“A child’s best interests are of paramount importance in every matter concerning the child.”

17. The *Children Act* also provides at Section 4(3) as follows;

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”



18. I allow the Application dated 8/6/2023 and I dismiss the appeal and order Equity Bank Ltd to release to the respondent's advocates the sum of ksh 1,143,775 held in account no xxxx in the joint names of Kimondo Gachoka & Co. Advocates and Julius Juma & Co. Advocates together with all the interest accrued thereon.
19. The Appellant/Respondents are also ordered to pay the Respondents the balance of the decretal sum and in default the Applicants are at liberty to execute for the same.
20. The appellant/Respondents also to pay the Applicants the costs of the Application.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 27th day of October, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent

