



REPUBLIC OF KENYA



**Irungu & another v Mathenge (Miscellaneous Civil Case E006 of 2023)  
[2023] KEHC 26706 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26706 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
MISCELLANEOUS CIVIL CASE E006 OF 2023  
CM KARIUKI, J  
DECEMBER 20, 2023**

**BETWEEN**

**SIMON IRUNGU ..... 1<sup>ST</sup> APPLICANT**

**RAHAB WAMBUI MATHENGE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PETER NDEGWA MATHENGE ..... RESPONDENT**

**RULING**

1. The application is a notice of motion dated 24/3/2023 seeking two limbs of prayers, namely, a stay of execution of the decree of the subordinate Court and leave to appeal against the decision of the subordinate Court.
2. The applicants swore an affidavit on 24/3/2023 to support their application.
3. In opposition to the application, the Respondent swore an affidavit on 19/4/2023.
4. Parties were directed to canvass the application via submissions, which they filed and exchanged.

**5. - Applicants Submissions**

6. The Applicant's case is that in 2010, they entered into a plot sale agreement with one Agnes Njeri and her husband, Gabriel Gitui Muchiri. The agreement entailed the purchase of Plot No. B Residential Opposite Lokwa River, and Plot No. D Residential Opposite Lokwa River Lokwa at Ol'kalou at a consideration of Kenya Shillings Three Hundred and Thirty Thousand (Kshs.330,000/-). On 27 June 1994, Plot D was allocated to Agnes Njeri by the Ol'Ka1au Town Council. (Annexed and marked SRI-I is an allotment letter from the Town Council).
7. Further, in 2012, the 2<sup>nd</sup> Applicant entered into a sale agreement with the Respondent, Peter Ndegwa, to exchange one of the above parcels of land, Plot No. D Residential Opposite Lokwa River Lokwa,



at Ol'Ka10, agreed to consider Kenya Shillings Four Hundred and Ten thousand (Kshs. 410,000/-) in return for motor vehicle registration number KAC 649R. The motor vehicle's agreed price was Kenya Shillings Four Hundred Thousand (Kshs. 400,000/-). The Respondent, in cash, topped up the deficit of Kenya Shillings Ten Thousand (Kshs. 10,000/-), given that the value of the Parcel exceeded that of the motor vehicle by this amount. The exchange of this plot was successful, and the Respondent took possession, the transfer being effected by the then Town Council Clerk, one Kennedy Otwari, and the Board.

8. One month after the exchange between the 2nd Applicant and the Respondent herein, in the company of police officers, the said motor vehicle was apprehended without a warrant, thus creating significant losses for the 2<sup>nd</sup> Applicant. The Respondent filed Civil Case No. 6 of 2013 in the Chief Magistrate Court in Nyahururu, seeking the rescission of the contract he entered into with the 2<sup>nd</sup> Applicant. That the Judgment in Civil Case No. 6 of 2013 was made in the absence of themselves and/or their legal representatives. The Judgment in the case mentioned above was made by Hon. J. Wanjala on 12 July 2022, in their absence, and the period for the right of Appeal elapsed without the Applicants' knowledge that the matter had since been concluded. Eight months after the said Judgment, by a phone call made by the Advocate on record, Sigilai Joel & Company Advocates informed the applicants.
9. On learning that the trial court had entered Judgment against them, the Applicants herein filed a Notice of Motion dated 24 March 2023 under Sections IA and 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules*, and Articles 50 & 169 of the *Constitution* of Kenya 2010 seeking to stay the execution and sought to set aside the said Judgment. They further requested that they be granted leave to file an Appeal out of time against the Judgment or decree delivered and issued on 12 July 2022 in the Chief Magistrate at Nyahururu CMCC 6 of 2013.
10. That the Applicants' failure to file a memorandum of Appeal within the prescribed statutory time was not intentional but an inadvertent error caused by non-communication between the trial court, their Advocate, and the Appellants of the Judgment made in CMCC No. 6 of 2013.
11. The Applicants contend that the intended Appeal raises arguable and meritorious issues with high chances of success, and if the Stay of execution is denied, it shall render the intended Appeal nugatory. The applicants will suffer irreparable harm as they will have to pay the decretal sum. Furthermore, it is contended that if the decretal sum is paid, the Applicant may not recover the sum from the Respondent as he is not in a financial position to refund the sum if the Appeal succeeds. Moreover, the Applicants state that the Respondent does not stand to suffer any loss or injustice that costs cannot adequately compensate.

### **Applicant Argument Of The Issues**

12. Applicant: Submit each of the issues identified herein under this head;

#### **i. On the first issue, The Applicants humbly submit that the Stay of execution is warranted.**

13. An applicant for a Stay of execution of a decree or order pending appeal must satisfy the conditions set out in Order 42 Rule 6(2) of the *Civil Procedure Rules*.
14. Applicants met the requirements for Stay of Execution as outlined in Order 42 Rule 6(2) of the *Civil Procedure Rules*.



**a. The Applicants will suffer substantial loss unless the orders are granted.**

15. They are concerned with the first requirement of making an Appeal. The Applicants herein submit that they stand to suffer substantial and irreparable loss and prejudice over Ksh. 477,000 if the orders sought herein are not granted. To be particular, the Applicants herein are bound to suffer irreparable prejudice, loss, and damages for the following reasons:
- i. The motor vehicle exchanged in return for the subject matter parcel of land has never been utilized to make profits due to numerous apprehensions by Traffic Police Officers since CMCC 6 of 2012 was filed in Court.
  - ii. The 2<sup>nd</sup> Applicant, in exchange for the Subject Matter motor vehicle, gave out what she reasonably believed to be hers, having purchased the subject matter parcels of land from Agnes Njeri and Gabriel Gitui Muchiri in 2010 with a consideration of Kenya Shillings Three Hundred and Thirty Thousand (Kshs.330,000/-) (Attached and Marked 'SWI-I is a copy of the Allotment letter dated 27<sup>th</sup> June 1994 from the Olkalou Town Council and a copy of a sale agreement made in 2010.
  - iii. The Applicants, without fail, had been paying rates and rents to the Town Council of Olkalou for the exchanged parcels of land from the time of purchase to the time of exchange with the Respondent herein.
  - iv. The Applicants are likely to lose the Kenya Shillings Three Hundred and Thirty (Kshs.330,000/-) Thousand, being consideration paid to Agnes Njeri for the two parcels of land and the Motor Vehicle.
16. The Appeal raises arguable issues with high chances of success and that failure to stay the execution orders sought herein, the intended Appeal stands to be rendered nugatory. The Applicants aver that they will suffer substantial loss if they pay the decretal judgment sum of ksh.477,000, interests attached to it, and damages.
17. The Applicants wish to rely on the case of *Mukuma v Abuoga*, where the Court of Appeal, in referring to the exercise of discretion to grant a Stay of execution by the High Court and the Court of Appeal under Order 42 of the *Civil Procedure Rules* and Rule 5(2) (b) of the *Court of Appeal Rules*, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

18. The Applicants further aver that they suffer substantial monetary loss as the decretal sum may not be recovered if paid to the Respondent. To demonstrate this point, the Applicants rely on the case of *Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2001*.
19. The Applicants submit that the purpose of filing the Notice of Motion seeking leave of Court is to preserve the subject matter of the Judgment being Ksh. Four hundred seventy-seven thousand issued on 12 July 2022 at the Chief Magistrate Court in Nyahururu. The Applicants wish to rely on the case of *RWW-v-EKW* [2019] eKLR, where the Court 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 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 an award of costs cannot compensate.

20. The applicants submit that they are likely to suffer prejudice that an award of costs cannot compensate if the execution of the Judgment is not stopped and the leave to file an appeal out of time is granted.

**i. The Applicants submit that their Notice of Motion dated 27 March 2023 was filed without unreasonable delay.**

21. In the case of *Jaber Mohsen Ali & Another v Priscillah Boit & Another* E & L No. 200 of 2012 [2014] eKLR, the Court, in determining what amounts to unreasonable delay, held as follows:

“What is unreasonable delay depends on the surrounding circumstances of each case.”

22. In the present matter, the Applicants submit that the circumstances leading to the unintentional delay guarantee the need to be allowed to file an appeal out of time. The Applicants submit that the Judgment in Civil Case No. 6 of 2013 was made in the absence of themselves and/or their legal representative, M/S Sigilai Joel & Company Advocates. The Judgment of the Chief Magistrate's Court in the case mentioned above was made on 12 July 2022 in their absence, and the period for the right of Appeal elapsed without the Applicants' knowledge that the matter had been concluded. The Applicants learned about the Court's Judgment on 14 March 2023 through a phone call from Sigilai Joel & Company Advocates, who were their advocates on record during the entire hearing of the CMCC No.6 of 2013.
23. On learning that the trial court had entered Judgment against them, the Applicants herein filed a Notice of Motion in Court dated 27 March 2023 under Sections IA and 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules and Articles 50 & 169 of the *Constitution* of Kenya 2010 seeking to stay the execution and to set aside the said Judgment. They further requested that they be granted leave to file an appeal out of time Judgment or decree delivered and issued by Hon. J. Wanjala on 12 July 2022 Magistrate Court at Nyahururu CMCC 6 of 2013.

**ii. The Requisite Security as the court orders for the due performance of such decree or order, as may ultimately be binding on the Applicants, has been proposed.**

24. The Applicants contend that if the intended Appeal fails, it is financially stable with a well-established asset base and can settle the judgment sum without difficulty.
25. The Applicants, as a sign of good faith, have willingly offered/ proposed to offer security through the 1<sup>st</sup> Applicant's property BAHATI/42695 for the due performance of the decree of the lower Court. The security property has in its Construction Materials building stones (5 Lorries), ballast, and sand, all worth approximately Kenya Shillings Nine Hundred Thousand (Kshs. 900,000/).

**b. Whether the Applicants can be granted leave to Appeal out time**

26. The Applicants, through this application, also seek leave to appeal out of time relying on Section 79G of the *Civil Procedure Act*, which provides the time within which an appeal from subordinate Courts may be made to the High Court:



27. In seeking the issuance of the Prayers sought, the Applicants also rely on Section 95 of the [Civil Procedure Act](#), which provides that
- “Where any period 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 granted may have expired.”
28. It is the Applicant's submission that they had good and sufficient cause for not filing the Appeal within the required statutory period. As stated earlier, the Applicants reiterate that they became aware of the Court's Judgment on 14 March 2023 while the Court had issued the Judgment on 12 July 2022, where they had been granted 30 days to file an appeal. The Applicants were unaware that the CMCC 6 of 2013 had been concluded, and Judgment was made against them.
29. In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997* (unreported), the Court of Appeal, in dealing with the issue of application for Extension of time within which to file and serve Notice of Appeal and Record of Appeal, stated as follows: -
- “It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that, in general, the matters which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay; secondly, the reason for the delay, thirdly (possibly) the chances of the Appeal succeeding if the application is granted and fourthly, the degree of prejudice to the Respondent if the application is granted.”
30. The Applicants submit that the requirements outlined by the Court of Appeal are met in the present matter. The delay by the Applicants to file a memorandum of Appeal within the prescribed time was not intentional but an inadvertent error occasioned by the Trial Court's side and failure to communicate/ notify the Applicants or their legal representative of the Judgment entered against them.

### **Respondents Submission**

31. The Respondent sued the Applicants herein in Nyahururu CMCC 6 OF 2013, wherein Judgment was delivered on 12 July 2022 in favor of the plaintiff/respondent in that the contract between the parties was rescinded, and the applicants were ordered to refund Kshs 477,000 plus costs of the suit and interest thereon.
32. The application raises the following issues of determination:
- i. Whether the applicants should be granted leave to appeal out of time.
  - ii. Whether the applicants have adequately demonstrated all the grounds necessary for the grant of Stay of execution pending appeal.
  - iii. Who should bear the cost of instant application?
33. The statutory provision regarding the Extension of time can be found in Section 79G of the [Civil Procedure Act](#).
34. Factors to be considered in an application for Extension of time were laid out in the case of [County Executive of Kisumu V. County Government of Kisumu](#) Application No. 3 of 2016) as follows:



- a. ". Extension of time is not a right of a party. It is an equitable remedy that is only party at the discretion of the Court;
  - b. A party seeking Extension of time has the burden of laying a basis to the satisfaction of the Court.
  - c. Whether the Court should exercise the discretion to extend time is a consideration on a case-to-case basis.
  - d. Whether there is a reasonable reason for the delay, The delay should be explained to the satisfaction of the Court.
  - e. Whether the respondents will suffer any prejudice if the Extension is granted.
  - f. Whether the application has been brought without undue delay and
  - g. Whether in some instances, like election petitions, public interest should be a consideration for extending time."
35. The Judgment sought to be appealed was delivered on 12 July 2022. The instant application was filed on 27 March 2023, eight and a half (8 1/2) months after the fact. The applicants claim they were not made aware of the judgment date. The Respondent has, however, presented evidence of a judgment notice issued by the court administrator on 7 June 2023. The Respondent's assertion that the applicants' Advocate was undoubtedly aware of the judgment date remains uncontroverted.
  36. Because of this, the applicants' delay of eight and a half (8 1/2) months is not only undue and unreasonable but also not satisfactorily explained.
  37. What is more, the application was made after execution had commenced. As the Respondent correctly stated in his Replying Affidavit, he has been waiting for justice to prevail since 2013. It would be prejudicial to him to make him wait further when the applicants have been indolent in pursuing their rights.
  38. The Stay of execution orders cannot exist without an appeal. The applicants herein have not filed any appeal as yet. As is evident from their application, one of the orders sought is for leave to appeal out of time. A plain reading of Order 42 Rule 6 of the Civil Procedure Rules will show that Stay of execution orders are given pending an appeal, and orders cannot be issued unless an appeal has already been filed.
  39. Assuming a stay of execution could be granted without an appeal, the applicants would still be undeserving of said orders. The grounds for granting a Stay of execution pending Appeal are set out under Order 42 Rule 6(2) of the Civil Procedure Rule.
  40. On Substantial Loss, the Honourable Court in Machira T/A Machira and Company Advocates v East Africa Standard (no 2) [2002] KLR 63 stated that:
    - "To be obsessed with the protection of an appellant in total disregard of flitting mention of the so-for successful opposite party is to flirt one party as crocodile tears are shed for the other, contrary to sound principle for exercising judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his Judgment or any decision of the Court giving him success at any stage. This is true knowledge; this is one of the fundamental procedural values acknowledged and normally must be put in effect by how we handle the applications for Stay of further proceeding or execution pending Appeal...Any subsequent decision of the Court that tends to impede the normal flow of justice by suspending the enjoyment of the consequential benefits of one's success can only be rendered in exceptional



circumstances after exercising great caution and finding that suspension is necessary for justice and fairness."

41. In that regard, this means that in order for an unsuccessful party to obtain a suspension of further proceeding or execution, he must satisfy the Court on affidavit or on some other proper evidential material that substantial loss may result to him out of all proportions concerning the interest of justice and fairness unless suspension or Stay is ordered and the parties' position so regulated and ordered that injustice is averted. If an applicant cites, as a ground substantial loss, the kind of loss likely to be sustained, the specified details or particulars thereof must be given.
42. In this instant case, the applicants do not stand to suffer any substantial loss if the orders for a Stay of execution pending Appeal are denied, as the Judgment sought to be stayed is what is commonly referred to as a money decree. The applicants have not demonstrated that parting ways with the decretal amount awarded would translate into a substantial loss.
43. As many courts have held before, the word substantial loss cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his proper consequence. That is a natural consequence of every decree and/or court order.
44. On Undue Delay, the instant application has been made long after the Judgment was delivered, i.e., 8.5 months after the fact, and the applicants have not given a satisfactory explanation for the delay in applying; therefore, the application fails on this ground as well. See Respondent's submissions regarding undue delay as made on issue 1 hereinabove.
45. Security for the due performance of the decree is vital, and the applicants must provide security for the due performance of the decree in case the Appeal fails. The applicants herein have not in any way provided for any security, shown any interest in doing so, or even demonstrated the type of security they will be providing.

#### **46. Issues, Analysis And Determination**

47. After reviewing the proceedings, pleadings, and submissions on record, I find whether the leave to file an appeal out of time is justified. If the above is in affirmative, has the application for a Stay pending Appeal merited? What is the order as to costs?

#### **48. Leave To Appeal Out of Time**

49. The principles Obtaining an Extension of time of filing an appeal are set out in case law and invariably reiterated by many other case laws. In the case of *County Executive of Kisumu v County Government of Kisumu* Application No. 3 of 2016) as follows: ". Extension of time is not a right of a party. It is an equitable remedy that is only party at the discretion of the Court; A party who seeks an Extension of time has the burden of laying a basis to the satisfaction of the Court. Whether the Court should exercise the discretion to extend time is a consideration on a case-to-case basis. Whether there is a reasonable reason for the delay or not, the delay should be explained to the Court's satisfaction. Whether there will be any prejudice, the respondents will suffer if the Extension is granted. Whether the application has been brought without undue delay and Whether in some instances, like election petitions, public interest should be a consideration for extending time."
50. The record shows that the Judgment sought to be impugned in Appeal was delivered on 12 July 2022. The instant application was filed on 27 March 2023, eight and a half (8 1/2) months after the fact. Evidence does not support the Applicant's claim that they were unaware of the judgment date. The Respondent has, however, presented evidence of a judgment notice issued by the court administrator



on 7 June 2023. The Respondent's assertion that the applicants' Advocate was undoubtedly aware of the judgment date remains uncontroverted.

51. The absence of a reasonable explanation of over eight (8) months delay is enough grounds to dismiss the application for leave to file an appeal out of time. However, because of the subject matter involved herein, i.e., land and the motor vehicle, the Court is amenable to give conditional leave to appeal as set down later.

## 52. Stay Application

53. The issue of Stay of execution and the aspect of principles of grant are stipulated in Order 42 Rule 6(2) of the *Civil Procedure Rules*. An applicant for a Stay of execution of a decree or order pending appeal must satisfy the conditions set out in Order 42 Rule 6(2) of the *Civil Procedure Rules*.
54. Applicants submit that they met the requirements for Stay of Execution as outlined in Order 42 Rule 6(2) of the *Civil Procedure Rules*. They submit that they will suffer substantial loss unless the orders are granted.
55. The Respondent's rejoinder is that the applicants do not stand to suffer any substantial loss if the orders for Stay of execution pending Appeal are denied, as the Judgment sought to be stayed is commonly referred to as a money decree.
56. In the case of *RWW v EKW* [2019] eKLR, the Court 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 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 an award of costs cannot compensate.

57. The applicants have security in the form of a plot; however, because of the delay in applying (8 months plus), the Court finds the same inadequate and unsuitable. In balancing the parties' interest and considering that Respondent has not demonstrated the ability to refund the decretal amount if the Appeal succeeds, the Court will grant a conditional Stay. Thus, the Court makes the following orders;
- i. The leave to appeal is granted provided the same Appeal is filed and served within seven days from the dates herein.
  - ii. The decretal sum shall be deposited in an interest-earning account in the joint name of the parties' advocates within 30 days of filing the Appeal.
  - iii. The application costs shall be paid to the Respondent and assessed at ksh10,000 within seven days after filing the Appeal.
  - iv. In the case of any default in any of the above conditions, the application will stand dismissed, and execution will proceed.

**DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 20TH DECEMBER 2023**

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**C KARIUKI**



**JUDGE**

