



**Ochieng & another v Mwali & another (Suing as the legal representatives of the estate of Erick Abika Zachariah-Deceased)) (Miscellaneous Civil Application E647 of 2021) [2022] KEHC 3245 (KLR) (Civ) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 3245 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS CIVIL APPLICATION E647 OF 2021**

**JK SERGON, J**

**MAY 31, 2022**

**BETWEEN**

**SAMUEL OCHIENG ..... 1<sup>ST</sup> APPLICANT**

**JOEL OKELO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**HARRIET MWALI ..... 1<sup>ST</sup> RESPONDENT**

**ZACHARIAH ORURU HARRIET MWALI ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ERICK  
ABIKA ZACHARIAH-DECEASED)**

**RULING**

1. This ruling relates to the Notice of Motion dated December 10, 2021 taken out by the 1<sup>st</sup> and 2<sup>nd</sup> appellants/applicants and supported by the grounds set out on its body and the facts stated in the affidavit of Lydia Mwangi, Legal Officer at CIC Insurance Group Limited (“the insurer”) of the 2<sup>nd</sup> applicant. The orders being sought are for leave to lodge an appeal out of time against the judgment and decree in Milimani CMCC NO. 7677 OF 2016 delivered on 3<sup>rd</sup> September, 2021; and a further order for a stay of execution of the aforesaid judgment pending the hearing and determination of the appeal.
2. The 2<sup>nd</sup> respondent swore a replying affidavit on 1 January 2, 2022 in response to the Motion, to which Lydia Mwangi and the 2<sup>nd</sup> respondent rejoined with supplementary affidavits sworn on March 2, 2022 and March 10, 2022 respectively.
3. At the interparties hearing of the Motion, the parties’ respective advocates opted to rely on the averments made in the Motion and affidavits.



4. I have considered the grounds laid out on the body of the Motion; the facts deponed in the supporting and opposing affidavits respectively.
5. From a reading of the instant Motion it is evident that the orders sought therein are two-fold. The first is the order seeking for leave to appeal out of time against the impugned judgment and decree.
6. The provisions of section 79G of the *Civil Procedure Act* are clear that the timelines for lodging an appeal against the decision of a subordinate court are within 30 days from the date of the decree or the order being appealed against. Furthermore, under the provisions of section 95 of the *Civil Procedure Act* and Order 50, Rule 6 of the *Civil Procedure Rules*, the courts have discretionary power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
7. In the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR the Court of Appeal developed various conditions to offer guidance in deciding whether to extend the period for filing an appeal out of time and which I will address hereunder.
8. The first condition concerns the length of delay. In her affidavit, Lydia Mwangi states that the Motion has been brought without unreasonable delay.
9. The respondents are of the view that there has been an inordinate delay in bringing the instant Motion.
10. Upon my perusal of the record and as pointed out to me by the parties, it is apparent that the impugned judgment was delivered on September 3, 2021 while the Motion was brought sometime on or about the 10<sup>th</sup> day of December, 2021; about three (3) months later. I therefore do not find the delay to be unreasonable.
11. Concerning the reason(s) for the delay, it is the applicants' assertion that the delay was occasioned by the fact that their advocate only came to learn of the delivery of judgment on November 15, 2021 following which instructions to lodge the appeal were received on November 16, 2021.
12. The respondents on their part state that the applicants have not given any sufficient reasons for the delay in filing the Motion.
13. Upon taking into account the rival averments indicated above, I find the explanation offered by the applicants for the delay to be reasonable in the circumstances.
14. On the principle touching on whether an arguable appeal exists, the applicants on the one part state that their appeal is arguable and has high chances of success.
15. The respondents are of the view that no arguable appeal exists since the trial court properly considered the material placed before it and arrived at a reasonable finding.
16. It is apparent from the grounds to the draft memorandum of appeal annexed to the Motion that the intended appeal is challenging the finding by the trial court on both liability and quantum, arising out of a fatal accident claim. In the premises, I am satisfied that the applicants have raised arguable grounds in their appeal.
17. On the final condition touching on prejudice, the applicants are of the view that the respondents will not be prejudiced if the orders sought are granted, while the respondents state that they stand to suffer prejudice in the event that the orders being sought are granted.
18. Upon my consideration of the rival positions above, I am of the view that in the absence of any credible evidence of prejudice to be suffered by any of the respondents, I am convinced that it would be in the interest of justice to grant the applicants an opportunity to challenge the trial court's decision on



appeal. I therefore find it reasonable in the circumstances to extend the time required for the applicant to lodge their appeal.

19. The second order sought is that of a stay of execution of the decree pending appeal.
20. The guiding provision is Order 42, Rule 6(2) of the [Civil Procedure Rules](#) which sets out the following conditions in determining an application for stay.
21. The first condition stating that the application must have been made without unreasonable delay has already been addressed above.
22. The second condition touches on substantial loss to be suffered by an applicant.
23. Going by the averments made in the respective supporting affidavits to the instant Motion and the written submissions, it is the applicants' apprehension that unless an order for a stay of execution is granted, it is likely that the applicants will not be able to recover the decretal sum from the respondents once the same is paid to them and the appeal succeeds, especially considering the colossal nature of the decretal sum.
24. In reply, the respondents are of the view that the Motion is purely intended to delay execution of the decree arising out of the impugned judgment and to preclude them from realizing the fruits of their judgment.
25. The question on who has the burden of proof on the issue of refund of the decretal sum was considered and determined by the Court of Appeal in the case of [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another](#) [2006] eKLR, where it held thus:

“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...”
26. In the absence of anything to indicate or ascertain the respondents' financial standing, I am satisfied that the applicants have reasonably shown the likelihood of substantial loss occurring should the order for a stay of execution be denied.
27. Under the final condition which is the provision of security for the due performance of such decree or order, the applicants have indicated the readiness and willingness by the insurer to comply with the same by depositing the sum of Kshs.3,000,000/=, whereas the respondents urge that the entire decretal sum be deposited in a joint interest earning account.
28. The law is clear that the provision of security must be commensurate to the decretal amount in question and this court cannot therefore allow the applicants to deposit only part of the decree as security.
29. The upshot therefore is that the Motion dated 10<sup>th</sup> December, 2021 is allowed as prayed, giving rise to the following orders:
  - i. The applicants are granted leave to file and serve the memorandum of appeal within 14 days from today's date.
  - ii. There be an order for stay of execution of the judgment/decreed delivered on 3<sup>rd</sup> September, 2021 on the condition that the applicants deposit the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within 45 days from today's date, failing which the order for stay shall automatically lapse.



iii. Costs of the application to abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
31<sup>ST</sup> DAY OF MAY, 2022.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants

..... for the Respondents

