



REPUBLIC OF KENYA



**KENYA LAW**

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**Wainana & 2 others v Sande (Miscellaneous Application E015 of 2022)  
[2022] KEHC 11111 (KLR) (Civ) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11111 (KLR)

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

**MISCELLANEOUS APPLICATION E015 OF 2022**

**JK SERGON, J**

**MAY 31, 2022**

**BETWEEN**

**BERNARD KAMAU WAINANA ..... 1<sup>ST</sup> APPLICANT**

**FORWARD TRAVELLERS ..... 2<sup>ND</sup> APPLICANT**

**ERIC KIETI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**PATRICK AMBUNDO SANDE ..... RESPONDENT**

**RULING**

1. This ruling is predicated on the Notice of Motion dated January 13, 2022 taken out by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants/applicants and supported by the grounds set out on its body and the facts stated in the affidavit of Harriet A Sang their advocate. The applicants sought for an order for leave to appeal out of time against the judgment and decree delivered on March 17, 2021 in Milimani CMCC No. 5690 of 2019 and a further order for a stay of execution of the aforementioned judgment pending the hearing and determination of the appeal.
2. In opposing the said Motion, the respondent filed the replying affidavit of advocate Patrick Ambundo Sande sworn on January 27, 2022.
3. The instant Motion was canvassed through oral arguments whereby the parties' respective advocates chose to rely on the averments made in their respective affidavits. I have considered the grounds laid out on the body of the Motion, the facts deponed in the affidavits supporting and opposing the Motion.
4. The orders being sought in the Motion are two-fold: first is the order seeking for enlargement of time to appeal and for leave to appeal out of time against the impugned judgment and decree.



5. Section 79G of the *Civil Procedure Act* stipulates that an appeal against the decision of a subordinate court shall be lodged within 30 days from the date of the decree or the order being appealed against. The provision further stipulates that an appeal can be admitted out of time where sufficient cause has been shown.
6. Moreover, under the provisions of section 95 of the *Civil Procedure Act* and Order 50, Rule 5 of the *Civil Procedure Rules*, the courts have 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 illustrated the conditions to be met in deciding whether to extend the period for filing an appeal out of time and which I shall address hereunder.
8. Under the first condition touching on length of delay, while it is apparent from the record that the parties are in agreement that the impugned judgment was delivered on March 17, 2021 which is close to nine (9) months prior to the filing of the Motion. In my mind, while there has clearly been a delay in filing the Motion, I do not find the delay to be inordinate.
9. Concerning the reasons for the delay, the applicant explained that the delay was caused by the fact that on March 17, 2021, a judgment was entered in favor of the respondent against the applicants, and by the time the applicants received it, they discovered that their submissions had not been considered despite the fact that they had been filed.
10. The applicants issued instructions to their advocates to have the trial court review their judgment and include their submissions, and the said application was heard and the ruling was to be delivered on August 20, 2021, and the applicants were not given any notice from the trial court as to when the ruling would be delivered, and it was only on January 11, 2022 that they learned the respondents had served them with a letter threatening to file a declaratory suit against the insurer, and it was only when they became aware that the court had delivered the ruling on October 15, 2021 in the absence of both parties.
11. Upon considering the explanation given by the applicants, I find the same to be reasonable in the circumstances.
12. As relates to the condition on whether or not an arguable appeal exists, it is the applicants' assertion on the one hand that they have an arguable appeal which raises valid points of law and fact. The respondent on the other hand contends that the appeal does not raise any appealable grounds.
13. Upon my perusal of the grounds of appeal raised in the draft memorandum of appeal annexed to the Motion, I note that the appeal is challenging the finding of the trial court on quantum. I am therefore satisfied that the applicants have demonstrated arguable points of law and fact in their appeal.
14. In addressing the final condition on prejudice, the applicants assert that the respondent does not stand to be prejudiced that cannot be adequately compensated by way of costs.
15. Upon my perusal of the record, it is apparent that the judgment was in favour of the respondent herein and against the applicants. It therefore follows that the respondent is lawfully entitled to enjoy the fruits of his judgment. Suffice it to say that it would not be in the interest of justice to lock out the applicants who is aggrieved by the judgment of the trial court on damages. I therefore find it reasonable for the applicants to be given the opportunity of challenging the subordinate court's assessment on damages on appeal.



16. The second prayer is for stay of execution of the decree pending appeal, for which the guiding provision is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the conditions to be satisfied for such an order to be granted.
17. The first condition being that the application must have been brought without unreasonable delay has already been addressed hereinabove.
18. The second condition touches on substantial loss to be suffered by an applicants.
19. The applicants on their part are apprehensive that if the decretal amount is paid to the respondent, the likelihood of recovering the amount from the respondent should the appeal succeed is slim.
20. The question on who has the burden of proof on the issue of refund of the decretal sum was discussed by the Court of Appeal in the case of National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR when it held that:

“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...”
21. In the absence of anything to ascertain the respondent’s financial capacity to refund the decretal sum, I am satisfied that the applicants have reasonably demonstrated that they stand to suffer substantial loss if the order for a stay of execution is not granted.
22. Under the final condition which is the provision of security for the due performance of the decree or order, the applicants state that they are ready and willing to provide security by way of a bank guarantee. In retort, The respondent avers that if the court be inclined to find merit in the applicants application then the applicants be ordered to pay 2/3 of the decretal sum being Kshs.452,426.67/= and the other 1/3 being Kshs.226,213.33/= to be placed in a joint interest earning account bearing the names of the advocates on record in this suit.
23. In making an order for the provision of security, this court must balance the interest of the parties. In the present instance, it is noteworthy that the respondent has not shown any pressing need that would require payment of part of the decretal amount to him at this stage. It is also noteworthy that the respondent is not amenable to the provision of a bank guarantee.
24. In the end therefore, the Motion dated January 13, 2022 is found to be meritorious hence it is allowed thus giving rise to issuance of 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 shall be an order for stay of execution of the judgment and decree issued on March 17, 2021 pending the hearing and determination of the intended appeal on the condition that the applicants deposit the half the decretal sum in an interest earning account in the joint names of the advocates or firms of advocates within 45 days from the date of the ruling and in default of which the stay order shall lapse.
  - iii. Costs of the Motion shall abide the outcome of the intended 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> Applicant

..... for the 2<sup>nd</sup> Applicant

..... for the 3<sup>rd</sup> Applicant

..... for the Respondent

