



REPUBLIC OF KENYA



KENYA LAW
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**Muiruri v Ogola (Miscellaneous Application E381 of 2022)
[2022] KEHC 10393 (KLR) (Civ) (25 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10393 (KLR)

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

CIVIL

MISCELLANEOUS APPLICATION E381 OF 2022

JK SERGON, J

JULY 25, 2022

BETWEEN

KEZIAH KANINA MUIRURI APPLICANT

AND

WALTER OCHIENG OGOLA RESPONDENT

RULING

1. This ruling is predicated upon the Notice of Motion dated 14th June, 2022 taken out by the applicant herein and is supported by the grounds set out in its body and the facts deponed in the supporting affidavit. The applicant sought for an order for leave to appeal out of time against the judgment delivered on 25th March, 2022 in Milimani SCCC No. E428 of 2021 and a further order for a stay of execution of the aforementioned judgment pending the hearing and determination of the appeal.
2. The respondent opposed the Motion by filing the replying affidavit he swore on 8th July 2022.
3. When the Motion came up for interparties hearing the parties respective advocates chose to rely on the averments made in their respective affidavits.
4. I have considered the grounds laid out on the body of the Motion, the facts deponed in the affidavits supporting and opposing the Motion and the brief oral arguments.
5. 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.
6. 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.



7. 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.
8. 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.
9. Under the first condition touching on length of delay, while it is apparent from the record that there was a copy of the impugned judgment was availed to this court, the parties are in agreement that the impugned judgment was delivered on 25th March, 2022 which is close to three (3) 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.
10. Concerning the reasons for the delay, the applicant explained that the delay was neither deliberate nor intentional but due to an honest mistake and oversight on the part of his advocate and the mistake should not be visited on an innocent litigant. The respondent on the other hand states that no good and sufficient cause for not filing the appeal within 30 days has not been demonstrated.
11. Upon considering the explanation given by the applicant, 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 applicant's assertion on the one hand that he has sufficient grounds for appeal and that the intended appeal is arguable with high chances of success. On the hand the respondent states that the grounds in the intended Memorandum of Appeal do not demonstrate any high chance of success of the appeal as all the issues therein were addressed in the judgment.
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 liability. I am therefore satisfied that the applicant has demonstrated arguable points of law and fact in their appeal.
14. In addressing the final condition on prejudice, the applicant assert that the respondent is unlikely to suffer any prejudice if the orders herein are granted
15. Upon my perusal of the record, it is apparent that the judgment was in favour of the respondent herein and against the applicant. 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 liability. I therefore find it reasonable for the applicants to be given the opportunity of challenging the subordinate court's decision on liability and also on not failing to attach due weight on the appellants evidence.
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. Under the second condition on substantial loss, it is apparent from the Motion that the applicant is anxious that unless an order for a stay of execution is granted the respondent has intimated through his advocate on record the intention to instruct auctioneers to recover the judgment sum.



19. In the Court of Appeal in the case of *Butt v Rent Restriction Tribunal* [1979] eKLR when it held that in considering an application for a stay of execution, the courts ought to exercise their discretion in a manner that will not render the appeal in question nugatory, if successful.
20. I am also alive to the reality that unless the applicant is granted an opportunity to defend its case, it stands to be condemned unheard, thereby undermining the dictates of substantive justice and violating the applicant's constitutional right to be heard on its defence in the dispute before the same is conclusively determined.
21. Under the final condition which is the provision of security for the due performance of the decree or order, the applicant state that they are ready and willing to abide by any reasonable and just consideration that this court may impose in allowing the application herein.
22. 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.
23. In the end therefore, the Motion dated 14th June, 2022 is found to be meritorious and it is allowed, therefore giving rise to a grant of the following orders:
 - i. The applicants is given 14 days to file an appeal out of time.
 - ii. There shall be an order for stay of execution of the judgment and decree issued on 25th March, 2022 pending the hearing and determination of the intended appeal on the condition that the applicant deposits the entire decretal sum in an interest earning account in the joint names of the advocates and or firms of advocates within 45 days from the date of this ruling in default of which the stay order shall lapse.
 - iii. Costs of the Motion shall abide the outcome of the appeal.*

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF JULY, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent**

