



Kamau & another v Mumo & another (Suing as the Administrators of the Estate of Peter Mutugi Musee-Deceased) (Miscellaneous Civil Application E559 of 2021) [2022] KEHC 12469 (KLR) (Civ) (25 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12469 (KLR)

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

CIVIL

MISCELLANEOUS CIVIL APPLICATION E559 OF 2021

JK SERGON, J

AUGUST 25, 2022

BETWEEN

JOSEPHAT MUGE KAMAU 1ST APPELLANT

AMOS MBUGUA NJENGA 2ND APPELLANT

AND

MARY GICUKU NJAGI 1ST RESPONDENT

MUSEE MUSYIMI MUMO 2ND RESPONDENT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF PETER MUTUGI
MUSEE-DECEASED**

(Originating from Milimani CMCC no. 6935 of 2019 delivered on 28th March, 2021)

RULING

1. This ruling relates to the notice of motion dated November 17, 2021 taken out by the 1st and 2nd appellants/applicants and supported by the grounds set out on its body and the facts deponed in the affidavit of Frerick Nyabuti. The orders being sought are for leave to appeal out of time against the judgment and decree in Milimani CMCC no 6935 of 2019 delivered on March 28, 2021 and a further order for a stay of execution of the aforesaid judgment pending the hearing and determination of the appeal. The applicants also sought for an order for provision of security by way of a bank guarantee from Family Bank of Kenya.
2. The 1st respondent responded to the motion by way of the replying affidavit he swore on January 17, 2022.



3. At the interparties hearing of the motion, the parties' respective advocates relied on the averments made in the respective affidavits.
4. I have considered the grounds laid out on the body of the motion; as well as the facts deponed in the supporting and replying 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 his supporting affidavit, Frerick Nyabuti states that the motion has been brought without unreasonable delay. In retort, the respondents state that there has been a delay in bringing the instant motion.
9. Upon my perusal of the record, I note that none of the parties availed a copy of the impugned judgment for this court's reference. Nevertheless, going by the averments made by the respective parties it is apparent that the judgment was delivered on July 28, 2021 while the motion was brought close to four (4) months later sometime on or about the November 17, 2021. I therefore do not find the delay to be unreasonable.
10. Regarding the reason(s) for the delay, it is the assertion by the applicants that the delay was occasioned by the time taken by their advocate in receiving instructions to lodge an appeal against the impugned judgment. The respondents on their part state that the applicants opted not to file their appeal in good time despite having been granted an order for a stay of execution of 30 days by the trial court.
11. Upon taking into account the aforementioned averments, I find the explanation offered by the applicants for the delay to be reasonable in the circumstances.
12. On the principle touching on whether an arguable appeal exists, the applicants submit that they have an arguable appeal with overwhelming chances of success, whereas the respondents are of the view that no arguable appeal exists in the present instance.
13. Upon my perusal of the draft memorandum of appeal annexed to the instant motion, it is apparent that the intended appeal is challenging the finding of the trial court on both liability and quantum. In the premises, I am satisfied that the applicants have raised arguable grounds in their appeal.
14. On the final condition touching on prejudice, the applicants are of the view that the respondents will not be prejudiced in a manner that cannot be adequately compensated by way of costs if the orders sought are granted. The respondents did not address me on this condition.
15. In the absence of any credible evidence of prejudice to be suffered by the respondents, I am convinced that it would not be in the interest of justice to deny 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 applicants to lodge their appeal.



16. The second order sought is that of a stay of execution of the decree pending appeal.
17. 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.
18. The first condition stating that the application must have been made without unreasonable delay has already been addressed above.
19. The second condition touches on substantial loss to be suffered by an applicant. In his supporting affidavit, Frerick Nyabuti portrays 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. In reply, the respondents state that the instant motion is merely intended to delay the execution process.
20. The question on who has the burden of proof on the issue of refund of the decretal sum was aptly discussed 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...”
21. In the absence of anything to indicate or ascertain the respondents' financial capacity here and upon considering the interest of justice, 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.
22. Under the final condition which is the provision of security for the due performance of such decree or order, the applicants have indicated their readiness and willingness to furnish a bank guarantee by their insurer (Directline Assurance Company Limited) as security. The respondents did not address this condition.
23. Consequently, the motion dated November 17, 2021 is allowed giving rise to issuance of the following orders:
 - a. The applicants are granted leave of 14 day to file an appeal out of time.
 - b. An order for stay of execution of the judgment delivered on July 28, 2021 pending the intended appeal is granted on the condition that the applicants furnish security for the due performance of the decree by way of a bank guarantee of the decretal sum from Family Bank of Kenya within 30 days from today, failing which the order for stay shall automatically lapse.
 - c. Costs of the application to abide the outcome of the appeal.

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

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st and 2nd Appellants/Applicants

..... for the Respondents

