



**Nyang'au v Muthoka (Miscellaneous Civil Application E355 of 2022)
[2022] KEHC 12473 (KLR) (Civ) (25 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12473 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E355 OF 2022**

**JK SERGON, J
AUGUST 25, 2022**

BETWEEN

WILFRED NAYCHOTI NYANG'AU APPELLANT

AND

BENSON SYENGO MUTHOKA RESPONDENT

RULING

1. Wilfred Nyachoti Nyangau, the applicant herein, took out the motion dated June 16, 2022 whereof he sought for the following orders *inter alia*:
 - i. That this honourable court be pleased and hereby grants the applicant leave to file an appeal out of time against the judgment delivered by Hon S Muchungi (Mrs) (SRM) in Milimani CMCC no 6115 of 2018.
 - ii. That upon granting prayer number 3 above, the court be and is hereby pleased to order stay of execution of the judgment and decree in Milimani CMCC no 6115 of 2018, Benson Sengo Muthoka vs Wilfred Nyachoti Nyangau pending the hearing and determination of the applicant's intended appeal.
 - iii. That the honourable court be pleased to allow the applicant deposit a bank guarantee as security for the due performance of the decretal amount which is the subject of the applicant's intended appeal.
2. The applicant filed two affidavits i.e one he swore and the other sworn by Moses Mwariri in support of the motion. The respondent on the other hand filed the replying affidavit sworn by Nelson Kaburu to oppose the application.



3. I have considered the grounds stated on the face of the motion and the facts deponed in the rival affidavits. It is the submission of the applicant that judgment was entered against him by the trial court on May 6, 2022 and that the time to appeal has lapsed hence the need to seek for leave to appeal out of time.
4. The applicant averred that it took time for Madison General Insurance Ltd the applicant's insurer to trace its file due to the age of the case hence the delay to give instructions to the applicant's advocate to appeal.
5. It is also stated that upon tracing its file, it took some time for the instructing client to give instructions to the applicant's advocates to lodge the intended appeal as the senior management took time to consider the entire file and peruse the judgment. Instructions to appeal were only given after the time to appeal had lapsed.
6. The applicant further urged this court to grant the order for stay of execution pending appeal. He argued that unless the order is granted he would suffer substantial loss, in that the respondent is not in a financial position to refund the decretal sum if the appeal turns successful. The applicant also offered to provide security for the due performance of the decree.
7. The respondent opposed the motion arguing that there is no appeal as against quantum while the applicant was found wholly liable when he failed to defend the suit before the trial court. The respondent stated that the appeal against quantum therefore would therefore be an academic exercise.
8. Having considered the rival arguments, it is clear that the respondent did not controvert the applicant's assertion that the delay to file the appeal was due to the failure on the part of the applicant's insurer to instruct its advocate to file an appeal within the statutory timelines.
9. It is said that the insurer was unable to trace its file due to the age of the matter. I am convinced by the reasons given by the applicant that the applicant is entitled to benefit from the discretion of this court to be given leave to appeal out of time.
10. It is not in dispute that on May 6, 2022 the trial court entered judgment in favour of the respondent in the sum of ksh 602,027/= which amount represents both general and special damages.
11. The applicant has filed a draft memorandum of appeal indicating that he intends to challenge the award of quantum. It is also clear from the draft memorandum of appeal that the applicant does not intend to appeal against liability.
12. In the circumstances, it cannot be said that the appeal as against quantum is an academic exercise. The applicant has specifically pleaded that the trial court failed to consider his submissions and authorities in determining quantum. That ground alone is a serious ground that can be determined on appeal. The instant application was filed in the month of June 2022. The delay is explained and is not unreasonable.
13. The other order sought is for stay of execution of the decree pending the intended appeal. The applicant has stated that he will suffer substantial loss if the order for stay is denied because the respondent is not in a position to make a refund if the appeal turns successful. The respondent did not discharge the burden of proof that he is in a financial position to make a refund. I am therefore convinced that the applicant has shown the substantial loss he would suffer if the order for stay is denied.
14. In the end, I find the motion dated June 16, 2022 to be with merits. It is allowed. Consequently, the applicant is granted leave of 15 days to file an appeal out of time. An order for stay of execution of the trial court's decree is granted pending appeal on condition that the judgment sum of ksh 602,027/= is deposited in an interest earning account in the joint names of the advocates and or firms of advocates



within 45 days. In default, the order for stay shall automatically lapse. Costs of the motion to abide the outcome of the intended 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

