



**Ngugi v Gitonga & 3 others (Miscellaneous Application E116 of 2022)
[2022] KEHC 13412 (KLR) (Civ) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13412 (KLR)

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

CIVIL

MISCELLANEOUS APPLICATION E116 OF 2022

JN MULWA, J

SEPTEMBER 22, 2022

BETWEEN

JULIUS THIONGO NGUGI APPLICANT

AND

DAMARIS WANGUI GITONGA 1ST RESPONDENT

PETER MUTHEE KAMAU 2ND RESPONDENT

HURUMA SACCO 3RD RESPONDENT

MARTIN GATHONI MWEA 4TH RESPONDENT

RULING

1. Judgment in the trial court was delivered on November 26, 2021, without notice to the 1st Defendant now the Appellant as alleged, nor served with the Notice of entry of the Judgment. Being dissatisfied with the trial court's decision, the Appellant filed the instant Application dated 10/3/2022 seeking this Honourable court's leave to extend time for filing of an appeal, as well as stay of execution orders against the said judgment pending the hearing and determination of the intended appeal.
2. The application is premised on provisions of Section 3A, 79G and 95 of the *Civil Procedure Act* and Order A2 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 and 3 of the *Civil Procedure Rules*.
3. An interim order of stay of execution of the decree was granted by the court on the March 11, 2022, and has since been extended pending determination of the application.
4. The application is based on grounds stated at the face of the application and supporting affidavits of one Kelvin Ngure describing himself as the Claims Manager of Direct Line Assurance Company, the



insurer of the accident Motor Vehicle from which the case arose and Robert Ogode, an advocate who had conduct of the trial court case, both sworn on the March 10, 2022.

5. In opposition to the Application, the 1st Respondent Damaris Wangui Gitonga swore a Replying Affidavit on the March 30, 2022. In addition, both parties filed written submissions which I have carefully considered.
6. It is the Applicant's position that the Judgment was not delivered on the September 24, 2021 but on the November 26, 2021 without any notice to the Applicants advocates; that the Applicant came to know of the delivery of the Judgment when by a letter dated January 24, 2022 by the Respondent's Advocate demanding settlement of the decree upon which the Applicant sought to be supplied with a copy of the Judgment which was supplied in March 2022, necessitating filing of the instant application. Attached to the Application is a draft Memorandum of Appeal raising issues of both liability and quantum.
7. It is submitted for the Applicant that the draft memorandum of appeal raises arguable issues over liability and quantum citing the case *Kenya Revenue Authority vs. Sydney Keitany Changole & 3 others* [2015] e KLR to advance the argument that the Applicant need only prove or establish one arguable point and that it is not necessary one that may succeed, but one that is not frivolous.
8. It is a further argument that if an order of stay of execution is not granted, the Applicant shall suffer substantial loss, as there is no known financial standing of the Respondent; that the quantum of damages is unreasonably excessive and that the Applicant is willing to furnish security for the due performance of the decree as well as stating that the application was filed without undue or delay.
9. For the 1st Respondent, it is submitted that there was undue delay of four months that has not been explained, that as the parties had filed their submissions after close of the case, as notified by the notice, hence their failure to exercise due diligence to find out when judgment would be delivered, and further did nothing despite several demand letters for payment of the decretal sum.
10. It is further submitted that no loss to the Applicant is demonstrated if an order of stay is granted; but further submits that should the court find it fit to allow the application, that 2/3 of the decretal sum should be paid to the Respondent and the 1/3 remaining be placed in a fixed interest earning account to await outcome of the intended appeal.

ANALYSIS AND DETERMINATION

11. LEAVE TO FILE APPEAL OUT OF TIME

An order for leave to lodge an appeal out of time is not automatic. The Applicant is mandated to provide sufficient reasons for the delay in filing the appeal within the stipulated period. As stated in the case *Monica Malel & another vs Republic*, Eldoret Civil application No.246 of 2008, a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which the discretion can be favorably exercised.

12. I have considered the reasons expanded by the Applicant. It has not been disputed by the Respondent that notice of delivery of Judgment for the November 26, 2021 was not sent to the Applicants advocates nor notice of entry of the judgment, which is a necessary notice if the Judgment was entered in their absence.



13. Section 79G of the [Civil Procedure Act](#) provides the statutory provisions that underpin the application, thus:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

14. The Applicant averred and submitted that upon receiving the demand notice for payment of the decretal sum, he applied to the court to be furnished with a copy of the Judgment to satisfy himself of the contents and allude whether to appeal or not; and upon receipt, make this application as the period for filing the appeal had lapsed. The above once again has not been disputed, see [Kenya Power and Lighting Company Limited vs Rose and Anyango & Another](#) [2020] e KLR.

15. The delay for four months in my opinion and upon consideration of the reasons for delay is not inordinate.

In the case *Hamam Singh vs. Mistri* [1971] EA 122, the court observed that:

“mistakes of legal advisor may however amount to sufficient cause under the East African Rule”.

See Also [Belinda Mura & 9 others vs Amos Wainaina](#) [1978] e KLR where the Court of Appeal upheld the decision in Hamam Singh (Supra) and specifically a delay of one day.

To that extent then, a delay reasonably explained, matters not the period of the delay in filing the appeal. The measurement for delay is not by a gadget, but by reasonableness of the reasons advanced to the court.

16. I want to reiterate the principles as restated by the Supreme Court of Kenya in [Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others](#) as:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. As to whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay; the delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice to be suffered by the Respondents if the extension is granted;
6. The application should have been brought without undue delay; and in certain cases, like election petition, public interest should be a consideration for extending time...”

17. Guided by the above principles, I am of the opinion that the Respondent will not be prejudiced in any way if time is extended for filing the appeal out of time by the Applicant.



STAY OF EXECUTION

18. The purpose for an order of stay of execution pending appeal is to preserve the subject of the appeal, so that the Appellant's rights of appeal are safeguarded should the appeal be successful, is not rendered nugatory, *RWW vs EKW* [2019] e KLR.

For a party to be successful provisions under Order 42 Rule 6

(2) of the *Civil Procedure Rules* ought to be satisfied thus:

- a. Substantial loss may result to the Applicant unless the order is made
- b. The application has been made without unreasonable delay
- c. Such security as the court orders for the due perforce of such decree or order as may ultimately be binding

To that end, an order of stay is not automatic. But at the court's discretion, which should be exercised, within the confines of the law, taking into account circumstances of each case, ELC No. 8 of 2021 *Peter Nakupang Lowar vs Nautu Lowar* [2022] eKLR.

19. Further, and without further interrogation, the decree hereof is a money decree. The Applicant has expressed itself of its willingness to abide by court orders as may be issued. On the other hand, the Respondent has made proposals of the kind of security it deems proper in the circumstances.

I have considered the above; and also that no affidavit of means has been filed by the Respondent. The decretal sum as stated by the Applicant in its affidavit is Kshs. 454,191/=. The appeal is on both quantum and liability. I have also considered the 1st Respondents proposal on the security.

20. Justice and fairness demands that both rival parties interests be considered so as not to cause hardship and prejudice to either -*George Kagima kariuki & 2 others vs Gichimu & 2 others* [2014] e KLR, *Dancan Kinyua Mugambi vs Salome Wambui Njora* [2022] e KLR, *Edward Kamau & another vs Hannah Mukui*.

21. Accordingly, I am persuaded to allow an order of stay of execution of the trial court's judgment and decree pending hearing ad determination of the intended appeal upon the following conditions:

1. The Applicant is granted leave to lodge an appeal out of time, the Memorandum of Appeal to be filed and served within 10 days of this ruling.
2. The Record of Appeal to be filed and served within 60 days of filing of Memorandum of Appeal,
3. The Applicant to pay to the 1st Respondent 50% of the Decretal Sum within 45 days of this ruling,
4. The balance 50% of the decretal sum to be deposited in an interest earning bank account in the parties Advocates names within 45 days, at any branch, as may be agreed, at Kenya Commercial Bank (KCB).
5. In default of either of the above, the stay orders to lapse automatically.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022.

J.N.MULWA



JUDGE.

