



**Kamau & another v Muhonja (Miscellaneous Application E405 of 2022)
[2022] KEHC 14109 (KLR) (Civ) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14109 (KLR)

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

MISCELLANEOUS APPLICATION E405 OF 2022

JK SERGON, J

OCTOBER 21, 2022

BETWEEN

SAMUEL NJOROGE KAMAU 1ST APPELLANT

ERNEST GICHIGU KIARIE 2ND APPELLANT

AND

JOYCE MUHONJA RESPONDENT

RULING

1. This ruling is predicated on the Notice of Motion dated 24th June, 2022 brought by the 1st and 2nd appellants/applicants and supported by the grounds set out on its body and the facts stated in the affidavit of the 1st applicant. The applicants sought for an order for leave to appeal out of time against the judgment and decree delivered on 11th April, 2022 in Milimani CMCC no. 7618 of 2018 and a further order for a stay of execution of the aforementioned judgment pending the hearing and determination of the appeal.
2. To oppose the said Motion, advocate Caroline Jepkorir Kibiwott swore a replying affidavit on 25th July, 2022 on behalf of the respondent.
3. The instant Motion was dispensed with through oral arguments whereby the parties' respective advocates chose to rely on the respective documents filed and on record.
4. I have considered the grounds laid out on the body of the Motion; the facts deponed in the supporting and replying affidavits; and the 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 6 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, the applicants on the one part state and submit that the delay in bringing the instant Motion is not so inordinate as to be deemed inexcusable, whereas the respondent states and submits that the delay is inordinate and inexcusable.
10. While it is apparent from the record that no copy of the impugned judgment was availed to this court, the parties are in agreement that the impugned judgment was delivered on 11th April, 2022 while the Motion was brought close to two (2) months later. In my mind, I do not find the delay to be inordinate.
11. Concerning the reasons for the delay, the applicants explained that the delay was occasioned by the fact that the judgment was initially slated for delivery on 8th December, 2021 but that the same was to be delivered on notice and that the applicants only came to learn that the judgment had been delivered on the abovementioned 11th April, 2022 upon being served with a letter from the respondent's advocate, demanding payment of the decretal amount.
12. The applicants further stated that even then, their advocates experienced difficulties in obtaining a copy of the impugned judgment.
13. The respondent on her part asserts that the applicants have not given any reasonable explanation for the delay or provided any evidence to support the averments made.
14. Upon considering the explanation given by the applicants, I find the same to be reasonable in the circumstances.
15. As relates to the condition on whether or not an arguable appeal exists, it is the applicants' assertion 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 disclose any arguable grounds and therefore has no chances of success.
16. 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.
17. In addressing the final condition on prejudice, the applicants state that the respondent does not stand to be prejudiced in a manner that cannot be adequately compensated by way of an award on costs.
18. 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 her judgment.



19. Suffice it to say that it would not be in the interest of justice to lock out the applicants who are 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.
20. The second order sought is for a stay of execution of the decree pending appeal, provided for under 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.
21. The first condition being that the application must have been brought without unreasonable delay has already been discussed hereinabove.
22. The second condition touches on substantial loss to be suffered by an applicants.
23. 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 to none.
24. The respondent is of the view that the applicants have not demonstrated by way of evidence the substantial loss they stand to suffer in the circumstances.
25. 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...”
26. 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 the substantial loss likely to be suffered if the order for a stay of execution is not granted.
27. 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 proposes that a deposit be made on the decretal sum.
28. 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 is not amenable to the provision of a bank guarantee and hence this may not constitute the most suitable form of security.
29. The upshot therefore is that the Notice of Motion dated 24th June, 2022 is hereby allowed on merit thus giving rise to the following orders:
 - i. The applicants to file an appeal out of time within 14 days from today's date.
 - ii. There shall be an order for stay of execution of the judgment and decree issued on 11th April, 2022 in Milimani CMCC No. 7618 of 2018 pending the hearing and determination of the intended appeal on the condition that the applicants deposit the entire 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 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 21ST DAY OF OCTOBER, 2022.



.....

J. K. SERGON

JUDGE

In the presence of:

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

..... for the Respondent

