



**Kaguura & another v Ngaku (Miscellaneous Civil Application
E074 of 2021) [2022] KEHC 15938 (KLR) (28 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15938 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL APPLICATION E074 OF 2021
EM MURIITHI, J
NOVEMBER 28, 2022**

BETWEEN

GEORGE KIRIMI KAGUURA 1ST APPLICANT

VICTOR NYAGA NJERU 2ND APPLICANT

AND

JOY KOORU NGAKU RESPONDENT

RULING

1. The court is called upon to determine a notice of motion under certificate of urgency dated September 27, 2021 by the applicants, brought under order 42 rules 6, order 51 rule 1 of the *Civil Procedure Rules*, section 79G of the *Civil Procedure Act* and all other enabling provisions of the law, seeking that:
 1. Spent
 2. The honourable court be pleased to issue a temporary order for stay of execution of the judgement and decree in Nkubu CMCC No 38 of 2018 pending the inter partes hearing of this application and thereafter as the Court shall order.
 3. The honourable Court be pleased to grant leave to the applicant to file an Appeal out of time against the decision and judgement of the of the trial court in Nkubu CMCC No 38 of 2018, Joy Kooru Ngaku v George Kiriimi Kaguura & Victor Nyaga Njeru.
 4. Upon granting the orders in prayer No 3 here above, this honourable court be pleased to issue an order for stay of execution of the judgement and decree in Nkubu CMCC No 38 of 2018 pending the filing, hearing and determination of the said intended appeal.
 5. The costs of this application be costs in the appeal.



2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of George Kirimi Kaguura, the 1st applicant sworn on even date. He contends that the sum of Kshs 254,200 awarded by the trial court was inordinately high relative to the injuries sustained. After his insurer was duly notified of the said judgment by his counsel on record, the insurer evaluated it and gave instructions to pursue an appeal. The said instructions were issued on September 23, 2021 after the period for filing the appeal had lapsed. The delay is not inordinate and is excusable as it was occasioned by an inadvertent and/or honest mistake occasioned by mix up of files in his insurer's legal department. He is keen on the appeal and now seeks leave to appeal out time, as the circumstances leading to the delay in filing the same were beyond his own control or that of his advocate. He contends that the intended appeal raises arguable issues and is well grounded with high chances of success, and urges the court to grant the orders sought. In his view, the respondent is an impecunious individual with no known assets or property and will not be able to refund the decretal sum if paid to her, at the successful conclusion of the appeal herein. He is ready, capable and willing to offer any reasonable security and to comply with any reasonable conditions that the court may impose upon granting the prayers being sought. He avers that the respondent is actively and progressively in the process of executing the said judgment and decree and unless stay is granted, the whole process of the intended appeal will be rendered nugatory. He avers that the application is made in utmost good faith, and the respondent will not in any way be prejudiced, if the orders sought are granted.
3. The respondent, Joy Kooru Ngaku, opposed the application through her replying affidavit sworn on October 15, 2021. She terms the application as an afterthought, procured in bad faith with the sheer motive of denying her the fruits of her judgment and decree, and that the orders sought herein only aim at perpetuating an ancient and untenable injustice. She urges the court not to disturb the trial court's judgment as it will aid the applicants' ill intent to delay the recovery of the decretal sum. She believes that the intended appeal is not an automatic stay of execution and the applicants have not demonstrated the loss they will suffer should the stay orders not be granted. She prays for the application to be dismissed but she is open to conditional stay being granted upon the applicants paying to her ²/₃ of the decretal sum being Kshs 235,114.67 and deposit the other ¹/₃ being Kshs 117,557.33 in a fixed deposit joint account of both advocates forthwith failure to which execution should proceed.
4. In his further affidavit sworn on March 7, 2022, the 1st applicant avers that the decretal sum of Kshs 254,200 is quite colossal and the respondent has not shown or demonstrated that in the likely event of the intended appeal succeeding, she is capable of repaying it.

Submissions

5. The application was canvassed by way of written submissions which were filed by the parties, respectively, on March 8, 2022 and March 31, 2022.
6. The applicants submit that they are not guilty of inordinate delay, as the delay in preferring the appeal was purely inadvertent and/or honest, and rely on *Joshua Muthija Bundi & 2 others v Julius Mugendi Chege* (2017) eKLR. They submit that unless stay is granted, they will suffer irreparably, as the respondent will proceed with execution, and rely on *Kenya Orient Insurance Co Ltd v Paul Mathenge Gichuki & anor* (2014) eKLR. Further, the respondent has not shown her ability to refund the decretal sum, which is quite colossal, in the event the intended appeal succeeds, and they have indicated their readiness to furnish security for the due performance of the decree. They urge that the application was brought timeously without unreasonable delay and the intended appeal raises arguable issues which need to be addressed by the appellate court.



7. The respondent urges that application is incompetent and improperly before court as the applicants' insurer, APA Insurance, is not a party to these proceedings, and rely on *Paul Ngila & another v Musili Malonza & another* (2020) eKLR. She urges that the applicants have not demonstrated any substantive reason for the delay in filing the appeal, and it would be a travesty of justice for the court to exercise its discretion in their favour, and relies on the Court of Appeal case of *Thuita Mwangi v Kenya Airways Ltd* (2003) eKLR. The respondent further urges that she will be greatly prejudiced by the delaying tactics employed by the applicants if the prayers sought are allowed to prevail, and relies on *Monica Malel & anor v R & 2 others* [2009] eKLR, *Kenya Red Cross Society v Mbondo Katbeke Mwanja* (2019) eKLR and *Port Reitz Maternity v James Karanga Kabia* Mombasa High Court Civil Appeal number 63 of 1997. She accuses the applicants of failing to place before the court any satisfactory evidential means to demonstrate what substantial loss they will suffer unless the application is allowed, and relies on the Court of Appeal case of *Shoko Molu Beka & anor v Augustine Gwaro* Mokamba Civil Appeal No E121 of 2021. She urges the court to balance the rights of both parties by ordering the applicants to pay ²/3 of the decretal sum and deposit the balance in a joint fixed account in the names of the advocates herein forthwith.

Analysis and Determination

8. The issues for determination are whether leave to appeal out of time and stay should be granted.
9. The contention by the respondent that the application is incompetent, because the insurance company is not a party to these proceedings, is quite unfounded and misplaced. The insurance company, being the party satisfying the decretal sum, has a stake in these proceedings, although not actively involved.

Leave to Appeal Out of Time

10. The principles for consideration on an application for extension of time to appeal out of time are that –
1. the power is discretionary;
 2. the applicants must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay are plausible;
 3. that the appeal is arguable and not frivolous; and
 4. that the respondent will not be unduly prejudiced by the order being made. See *Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others* (2014) eKLR.
11. The judgment sought to be appealed against was made on August 11, 2021 while the instant application was filed on September 30, 2021. A delay of less than a month cannot be termed to be inordinate and inexcusable.
12. The reason for that delay is attributed to an inadvertent mistake on the part of the applicants' insurer's legal department. It is averred that there was a mix up of the files which led to inability by the applicants' insurer to revert with instructions to appeal within the requisite 30 day period. This court finds that the reason for the reason for the delay has been satisfactorily explained.
13. On the arguability or otherwise of the intended appeal, the grounds raised in the draft memorandum faulting the trial court for misdirecting itself in law and fact thus arriving at inordinately excessive award of general damages cannot be said to be frivolous. For the reasons set out above, this court deems it fit to enlarge time to lodge the appeal out of time.



Stay of Execution

14. Order 42 rule 6 of the [Civil Procedure Rules](#) empowers a court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided under rule 6 (2) as follows:

“No order for stay of execution shall be made under subrule (1) unless–

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

15. There is no doubt that the application herein was filed without unreasonable delay. The applicants contend that they will suffer substantially as the respondent will be unable to refund the decretal sum, which according to them is quite colossal, in the event the intended appeal succeeds. While it may be true that the respondent is not a person of means, that in itself does not justify unnecessarily keeping her away from the fruits of her legally obtained judgment and decree. The duty of the court is to ensure that no substantial loss as may be occasioned by failure of recovery of a huge payout is suffered by the Judgment-debtor should the appeal eventually succeed.

16. This court respectfully agrees with the rendition in [Dr Daniel Chebutuk Rotich v Morgan Kimaset Chebutuk \(Minor suing through his father and next friend Daniel Chebutuk Rotich\)](#) (2005)eKLR, where Musinga J(as he then was) that:

“It is not enough for an applicant to merely state that it is likely to suffer substantial loss, it must make effort to demonstrate how the same is likely to occur. Disruption of business and loss of reputation can only be suffered if stay of execution was refused and the applicant refused to pay or became unable to pay and auctioneers had to move in to carry out execution. “Substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum. An order requiring a poor judgment debtor to pay, say, Kshs 100,000/- may have very serious harmful consequences to him if he has to pay that amount whereas a different judgment debtor may easily pay a decretal sum of Kshs 1,000,000/- with little or no consequence to its operations.”

17. This court appreciates the applicants’ willingness to offer security for the due performance of the decree. The court equally notes the respondent’s readiness to conditional stay of execution being granted. The court does not consider that the payment of 1/3 of the decretal sum will occasion substantial loss to the appellant, even if he were to succeed in the appeal.

Orders

18. Taking all the relevant issues into consideration, this court allows the applicants’ application dated September 27, 2021 on the following terms:-

1. The applicants are granted leave to appeal out of time.
2. An order for stay of execution is hereby granted on condition that the applicants pay to the respondent a sum of Kshs 117,557.33 equivalent approximately of 1/3 of the decretal sum



and deposit the balance of the decretal sum into an escrow account in the joint names of the advocates for the parties within 30 days from the date hereof.

3. The record of appeal shall be filed within sixty (60) days from the date hereof.
4. In the event of default of any of the above conditions, the stay hereby granted shall stand as discharged, and the respondent shall be at liberty to execute.
5. The costs of this application shall abide the outcome of the appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 28TH DAY OF NOVEMBER, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Kariuki, Advocate for the Appellant/Applicant.

Mr. Odhiambo, Advocate for the Respondent.

