



**Ndungu v Waweru (Suing as the legal Representative of the Estate
of Wilson Wainaina Kairu)) (Miscellaneous Civil Application
054 of 2022) [2022] KEHC 15346 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15346 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION 054 OF 2022
HK CHEMITEI, J
NOVEMBER 17, 2022**

BETWEEN

DANIEL IRUNGU NDUNGU APPLICANT

AND

JULIA WANJIRU WAWERU RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF WILSON
WAINAINA KAIRU)**

RULING

1. The applicant's notice of motion dated June 2, 2022 prays that he be granted leave to file his appeal out of time and meanwhile pending the said intended appeal there be stay of execution of the lower court's judgment delivered on May 21, 2021 in Nakuru CMCC No 985 of 2018. Also, that the court to issue an order for provision of a bank guarantee of the entire decretal sum awarded by the trial court of Kshs 543, 875/= only as security, pending the hearing and determination of the appeal. The application is supported by the sworn affidavit of Elijah M Ombeo, the applicant's advocate dated the same date and the grounds on the face of it.
2. He deposed that he was aware that judgment in Nakuru CMCC No 02 of 2018 was delivered on May 21, 2021 whereby the honorable court apportioned liability between the plaintiff and the defendants in the ratio 50:50 and also awarded the plaintiff general damages of Kshs 50,000/= for pain and suffering, Kshs 150,000/= for loss of expectation of life, Kshs. 800,000/= for loss of dependency and Kshs 87,750/= as special damages as well as costs of the suit and interest thereon.
3. He went on depose that the said judgment was delivered without notice to the applicant or his counsel on record as the court had indicated on November 5, 2021 and therefore no stay of execution was granted. That the applicant's advocate on record never received any notice for delivery of the impugned judgment before the same was delivered. They only learnt of judgment on February 29, 2022 from



- respondent's counsel who served them a notice of entry of judgment and request for payment of the decretal sum and that they were not able to lodge the appeal within the 30 days' period for lodging an appeal.
4. He deposed that the applicant was dissatisfied with the said judgment wholly and had instructed them to lodge an appeal against the same. Further that the applicant had no stay orders in this matter and unless an order of stay of execution was granted, he would suffer irreparable loss and damage the consequent appeal will be rendered nugatory. That the applicant was ready, willing to furnish such reasonable security by way of bank guarantee as a condition for granting the stay orders.
 5. The respondent vide her replying affidavit dated June 28, 2022 confirmed that indeed her advocate on record served the applicant's advocate with judgment notice dated 28th March 2022 which they responded to. That the said notice had been in respondent's custody for quite a long time and their response had been lacking. He argued that the application was an afterthought, an abuse of the court process and the same was only meant to prevent and or delay her from enjoying the fruits of her judgment.
 6. She deposed that it had taken an unreasonable period of time for the applicant to file his application for stay of execution. Further, that it was prudent and just to open an interest earning joint bank account with both parties as signatories and deposit the said amounts to avoid further delay tactics on the part of the applicant. She argued that the applicant had never been keen in prosecuting his case as he occasioned so many adjournments and therefore his application ought to be dismissed as it lacked merit.

Applicants Submissions

7. The applicant in his submissions identified two issues for determination by this court namely; whether or not he should be granted leave to appeal out of time and whether or not there should be stay of execution pending hearing and determination of the intended appeal.
8. On the first issue it was submitted that section 79G of the [Civil Procedure Act](#) capped the time within which an appeal from a subordinate court to the high court as being 30 thirty days from the date of the decree. Further, that section 95 of the [Civil Procedure Act](#) stipulated that a court may in its discretion from time enlarge where any period is fixed even though the said period originally fixed or granted may have expired.
9. It was submitted further that under order 50 rule 6 of the [Civil Procedure Rules, 2010](#) the court had powers to enlarge time so long as the application for such enlargement was not made until after the expiration of the time appointed or allowed. Additionally, section 3A of the [Civil Procedure Act](#) conferred inherent powers to the court to make orders that advanced the dispensation of justice or prevent an abuse of the court process. Also, article 50 (2) (k) on fair hearing, accorded parties to a dispute ample opportunity to adduce and challenge evidence right from trial up to the appeal stage.
10. The courts attention was drawn to the case of [Stecol Corporation Limited v Susan Awuor Mudemb](#) [2021] eKLR, where the court in allowing an application for enlargement of time held that a one-day delay was not inordinate or unreasonable and therefore failure to establish sufficient cause was not a reason for it to fetter its discretion to lock the door of justice to the applicant therein.
11. On the second issue, the applicant relying on the case of [Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others](#) [2014] eKLR, Supreme Court enunciated the threshold to be met to warrant the grant of orders for stay pending appeal. The same entailed; that the appeal or intended appeal was arguable and not frivolous, that unless the order of stay is granted, the appeal or intended appeal were



it eventually to succeed would be rendered nugatory and that it was in the public interest that the order of stay be granted.

12. It was submitted further that the intended appeal raised arguable and triable issues touching on liability and quantum and this was evident in the applicant's draft memorandum of appeal annexed in the application. The court's attention was drawn to the case of *Kenya Hotel Properties Limited v Willisden Investment Limited & 6 others* [2013] eKLR where the Court of Appeal held that the rule was that even where only one arguable point had been demonstrated to exist, stay should be granted.
13. It was submitted as well that failure to grant the applicant orders for stay of execution of the impugned judgement meant that there were high chances that his right of appeal would be jeopardized if execution took place before the intended appeal was heard and determined. Further, that the applicant had reasonable fear that the respondent was a man of straw and may not be able to repay the colossal sums claimed in the decree in the event the intended appeal was successful.
14. While placing reliance on the case of *APA Insurance Limited v Michael Kinyanjui Muturi* [2016] eKLR, the advocate for the applicant submitted that the if execution against the impugned judgment was not stayed pending hearing and determination the intended appeal herein would be rendered an academic exercise. He also submitted that the applicant was willing and able to offer reasonable security by way of a bank guarantee from Family Bank of Kenya for the entire decretal sum pending the outcome of the appeal. He placed reliance on the case of *Kenya Power & Lighting Company Ltd v Rose Anyango & another* [2020] eKLR. In conclusion, he urged the court to grant the prayers sought by the applicant in the application.

Respondent's Submissions

15. The respondent on her part also identified two issues for determination by this court namely; whether the applicant's appeal had merit and whether the trial court award was excessive and needs to be interfered with as alleged by the appellants.
16. On the first issue, the respondent's advocate submitted that the intended appeal had no merit and should therefore be dismissed with costs. It was submitted further on behalf of the respondent, that the award for Kshs 543,875/= as was awarded by the trial court was not in excess to warrant this court to reduce or interfere with the same. He placed reliance on the case of *John Wambua v Mathew Makau Mwololo & another* [2020] eKLR and submitted that the appeal should be dismissed for being a waste of court's time and was meant to deny the respondent an opportunity to enjoy fruits of the judgment.
17. On the second issue, it was submitted that the applicant had not proved that the trial court relied on wrong evidence hence the intended appeal was meant to delay the execution process. Further, that the deceased left behind 4 children who he supported and being a businessman he used to give his wife Kshs 30,000/= per month for upkeep. The advocate for the respondent urged the court to issue orders for opening of a joint interest earning account in the names of both parties' advocates.

Analysis and Determination

18. I have considered the pleadings and submissions by the parties and in my view the issues arising for determination is whether this court should grant the applicant leave to appeal out of time and whether there should be stay of execution of the orders issued in Nakuru CMCC No 985 of 2018 pending hearing and determination of the intended appeal herein.



19. The principles governing leave to appeal out of time are well settled. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In *Tbuita Mwangi v Kenya Airways* [2003] e KLR, the Court of Appeal while considering rule 4 of the *Court of Appeal Rules* which is similar to section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that generally the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

20. In the instant application it is not disputed that the judgment of the lower court was delivered on May 23, 2021 on notice. It is the applicants’ case that his advocates did not receive any notification from the trial court concerning the date when the judgment was to be delivered. That his advocates only found out on March 29, 2022, that judgment had been delivered on the said date upon being served with a notice of entry of judgment and requesting for payment of the decretal sum.

21. The applicant herein filed the present application on August 6, 2021, the delay herein is approximately two (2) months 1 week which in my estimate is not inordinate considering that no notice was issued to the applicant’s advocate on the date for the delivery of judgment and the same is not disputed by the respondent. The applicant has urged this court to exercise its discretion and allow him to file his appeal outside the 30-day period provided for under section 79G of the *Civil Procedure Act*.

22. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favour and in this case he has.

23. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of *Telkom Kenya Limited v John Ochanda and 996 others* [2015] eKLR that:

“In instances where there is delay in filing the notice of appeal, this court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the court’s discretion in curing the pleadings before it. This court’s position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place....

It is this court’s position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course.....”

24. With regard to the request for stay of execution pending appeal, the parameters to be taken into account by the court in determining such an application are contained in order 42 rule 6(2) of the *Civil Procedure Rules*, which provides as follows –

“6(2) No order for stay of execution shall be made under sub rule (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."
25. Will the applicant suffer substantial loss if the stay orders sought are not granted? This is a money decree for an amount which was determined by the trial court and the intended appeal is on liability and quantum. In my view, the applicant may stand to suffer substantial loss if stay is not granted. On the other hand, on appeal on quantum, the respondent also stands to suffer prejudice if no amount is paid to her in the meantime. There is therefore need to balance both parties interest.
26. Additionally, the applicant has not demonstrated that the respondent may not refund the decretal sum if he is successful in his appeal and neither has the applicant demonstrated her pecuniary capacity.
27. In view of the above analysis and taking the interest of both parties and this courts discretion it is hereby ordered and directed that;
- (a) The applicant is hereby granted leave to file his appeal and serve within 14 days from the delivery of this ruling.
 - (b) Half of the decretal sum awarded be paid to the respondent within 30 days from the date herein and the balance to await the outcome of the appeal.
 - (c) Pending prayer (b) above there be stay of execution but in default the entire amount shall fall due.
 - (d) costs of this application to the respondent.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 17TH DAY OF NOVEMBER 2022.

H. K. CHEMITEI.

JUDGE

