



**M'thuraine v Japhet (Miscellaneous Application E005 of 2023)  
[2024] KEELC 3247 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 3247 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
MISCELLANEOUS APPLICATION E005 OF 2023**

**CK YANO, J**

**FEBRUARY 8, 2024**

**BETWEEN**

**MATHIU M'THURAINÉ ..... APPLICANT**

**AND**

**PURITY NKATHA JAPHET ..... RESPONDENT**

**RULING**

1. The applicant moved this court vide the Notice of Motion application dated 30<sup>th</sup> January, 2023 seeking extension of time and an order of stay of execution pending the hearing and determination of the intended appeal against the Judgment in the Chief Magistrate's Court in Meru ELC Case No. E069 of 2021 delivered on 29<sup>th</sup> November, 2022.
2. The application which is stated to be brought under Order 43(3), order 50(6) of the Civil Procedure Rules and Sections 1A, 1B, 3B, 79G and 95 of the *Civil Procedure Act* and Articles 50 and 159 of *the Constitution* of Kenya is supported by the affidavit of Mathiu M'Thuraine, the applicant sworn on 30<sup>th</sup> January, 2023. The applicant states that his former advocate ceased acting for him and he was not made privy to the documents filed by the respondent neither could he understand them. That he was not served with an order as per the provisions of Order 9 Rule 13(1) of the Civil Procedure Rules which the court ought to have enforced.
3. The applicant states that he was aggrieved by the said judgment and wishes to appeal to this court, but the time within which to file and serve the appeal had lapsed. The applicant avers that he is a pauper due to his economic circumstances, it was necessary to sell some stock to acquire funds necessary to lodge an appeal and procure legal assistance. That it would be in the interest of justice that he is afforded an opportunity to pursue the intended appeal, adding that the respondent will not suffer any prejudice if the orders sought are granted. The applicant states that the delay is not inordinate to be considered inexcusable. The applicant states that if stay of execution is not granted, the intended appeal will be rendered nugatory and the applicant will suffer irreparable damage.



4. In opposing the application, the respondent filed a replying affidavit sworn by herself on 20<sup>th</sup> July, 2023. It is her contention that the application has not been brought in good faith but the intended appeal is intended to deny the respondent to enjoy the fruits of the Judgment. That the application is an afterthought and a delay tactic, adding that the intended appeal has no chances of success. The respondent states that she will suffer irreparably if the prayers sought are granted. That in the unlikely event that the application is allowed, the court should compel the applicant to deposit a security of Ksh. 150,000/= in a joint earning account of both parties pending the hearing and determination of the intended appeal.
5. The applicant is a man of means as he averred that he is negotiating with an advocate to act for him, adding that he had previously engaged the services of an advocate. That the respondent has a taxed certificate of costs which the applicant has not satisfied to date.
6. The application was canvassed by way of written submissions. The applicant filed his submissions dated 18<sup>th</sup> December, 2023 while the respondent filed hers dated 25<sup>th</sup> October, 2023.
7. I have considered the application, the response and the submissions filed. The issues for determination are whether the court should grant the applicant leave to file an appeal out of time and whether stay of execution should be granted or not.
8. The decision which is sought to be appealed is from the lower court, under Section 79G, of the *Civil Procedure Act*, appeals from the decisions of the lower court to this court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said Section however allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which an appeal ought to be filed is a matter of Judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.
9. The principles upon which the court should exercise the said discretion and grant leave to appeal out of time are settled. The court ought to consider the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted (see *Leo Sila Mutiso Versus Rose Hellen Wangari Mwangi – Civil Application No. NAI 255 of 1997* and *Thuita Mwangi Versus Kenya Airways Limited [2003]eKLR*, among others). The question therefore is whether taking into account the facts of the instant case, the applicant has satisfied the said conditions.
10. As for the length of the delay, the Judgment of the trial court was delivered on 29<sup>th</sup> November, 2022 while the present application was filed on 30<sup>th</sup> January, 2023. The 30 days period within which the applicant ought to have filed the appeal lapsed on 30<sup>th</sup> December, 2022. The application has been brought after a period of about 30 days. It is my considered view that the application was brought without unreasonable delay.
11. In justifying the delay, the applicant stated that he did not have the services of an advocate and as a lay man, he did not know the timelines within which to file an appeal. The applicant stated that he had an advocate previously, but the said advocate ceased from acting for him. It is my opinion that the reasons for the delay were well explained and are excusable.
12. As for the chances of the appeal succeeding as the applicant alleged the court has perused the draft Memorandum of appeal filed. The applicant intends to appeal against the whole decision of the trial court. The court is not supposed to determine the chances of the appeal succeeding but whether the same is arguable. It has been stated that an arguable appeal is not one which must necessarily succeed,



but one which ought to be argued fully before the court, that is one which is not frivolous. Having perused the draft Memorandum of Appeal, it is my considered opinion that the same is arguable.

13. As for the prejudice which the parties might suffer, the respondent has stated that she stands to suffer irreparably since she would not be able to enjoy the fruits of the judgment. The respondent however stated that if the application is allowed, the applicants to be compelled to deposit a security of Ksh. 150,000/= to be deposited in a joint account of both parties pending the hearing and determination of the intended appeal.
14. Where a party is aggrieved and wishes to pursue an appeal, it would be fair to exercise discretion in his/her favour, especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way. The discretion of the court must always be exercised judiciously. The applicant having expressed his intention to be heard on appeal, it is my considered opinion that he ought not be denied an opportunity to pursue the appeal since the delay is not inordinate and the reasons given for the delay being reasonable. I will therefore exercise my discretion and grant leave to the applicant to appeal out of time.
15. Order 42 Rule 6 of the Civil Procedure Rules lays out the law on stay of execution pending appeal. The rules give the court the discretion to order stay of for sufficient cause. Sub-rule 2 outlines the mandatory conditions that have to be met for a court to grant stay pending appeal. First, the application must be brought without undue delay, secondly, the court must satisfy itself that substantial loss may result to the applicant unless stay of execution is granted, and thirdly, such security as the court order for the due performance of such decree or order as may ultimately be binding upon him has been given by the applicant.
16. I have already found that the application was made timeously regarding the second pre-requisite, that is substantial loss occurring to the applicant, the applicant explained that the suit land was an important component economic activity and would suffer loss if the Judgment is not stayed. In case of Kenya Shell Limited Versus Benjamin Karanja Kibugu & Another (1982- 1988) KAR 108, the court of appeal stated

“It is usually a good rule to see if order 41 rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay”
17. In my view, the applicant has met the prerequisites set under order 42 rule 6 of the Civil Procedure Rules. However, the order for stay of execution will be granted on condition that the applicant provides security.
18. In the result, the court will allow the application in the following terms: -
  - a. Leave is granted to the applicant to file appeal out of time.\*\*
  - b. The appeal shall be filed and served within 14 days from the date of this ruling.
  - c. Stay of execution of the Judgment in Meru CMC.ELC Case No. E069 of 2021 is granted on condition that the applicant deposits Kshs. 100,000/= as security in an interest earning account in the joint names of the parties or their advocates within 30 days from the date hereof, and in default the stay shall lapse.
  - d. Costs of the application to the respondent in any event.\*\*



19. Orders accordingly.

Dated, signed and delivered at MERU this 8<sup>th</sup> day of February, 2024

**Hon. C. Yano**

**ELC – Judge**

**In the presence of:-**

Court Assistant: Kiragu

Kithinji for Applicant

Otieno for Respondent

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RULING

