



REPUBLIC OF KENYA



**Mburu & another v Gathecha & another (Miscellaneous Civil Case E167 of 2024) [2025] KEHC 2982 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2982 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
MISCELLANEOUS CIVIL CASE E167 OF 2024  
FN MUCHEMI, J  
MARCH 13, 2025**

**BETWEEN**

**MERCY WAMBUI MBURU ..... 1<sup>ST</sup> APPLICANT**

**MBURU GITAU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOSEPH KIMANI GATHECHA ..... 1<sup>ST</sup> RESPONDENT**

**PAUL NJENGA KIMANI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Brief facts**

1. The application dated October 28, 2024 seeks for orders of leave to file an appeal out of time against the judgment in CM Gatundu Civil Case No. 227 of 2017 delivered on 4<sup>th</sup> September 2024. The applicants further seek for orders of stay of execution of the said judgment.
2. The respondent opposed the application and filed a Replying Affidavit dated 4<sup>th</sup> November 2024 pending the filing and determination of the appeal.

**Applicants' Case**

3. The applicants state that judgment in Gatundu CMCC No. 227 of 2017 was delivered on 4<sup>th</sup> September 2024 where the court dismissed their application seeking for orders for payment of the decretal sum in installments. Being aggrieved with the entire judgment of the court, the applicants are desirous of lodging an appeal. However, the statutory period within which to file an appeal already lapsed. The applicants aver that the delay in filing the appeal was occasioned by financial difficulties including the inability to pay the decretal sum in lump sum despite all reasonable attempts within their means.



4. The applicants state that they have an arguable appeal and the issues raised in the intended appeal are substantial. The applicants aver that unless leave to appeal out of time is granted, they stand to suffer irreparable harm as they will be unable to comply with the judgment due to financial hardship.
5. The applicants aver that they are willing to comply with any conditions this Honourable Court may deem fit to impose, including depositing part of the decretal sum in court or providing a payment plan for the decretal sum pending the appeal.

### **The Respondents' Case**

6. The respondents state that the judgment in the instant case was rendered on 23/8/2021 and they have never enjoyed the fruits of the same due to flimsy reasons and excuses advanced by the applicants by way of numerous applications post judgment.
7. The respondents state that the applicants have filed an application for leave to appeal out of time in the High Court at Kiambu being Misc. Civil Case No. E240 of 2021. The respondents further state that the said application was heard and the court rendered its decision on 24/11/2022 dismissing the said application.
8. The respondents state that the applicants then proceeded to file an application objecting to the attachment after carrying out execution whereby proclamation took place. The lower court heard the application and dismissed it on 30/5/2023 with costs. The respondents further state that the applicants instructed another firm of advocates who filed an application dated 9/4/2024 seeking to pay the decretal sum by installments. The application was dismissed with costs vide a ruling dated 4/9/2024.
9. The respondent argue that the current application is meant to delay them the realization of the decretal sum through execution. The numerous applications filed by the applicants are intended to defeat the execution process. The respondents argue that the costs of the suit and interests on the decretal sum keep accumulating with every dismissed application and there is a need for litigation to come to an end. The respondents state that the cavalier attitude by the applicants should not lead the court to exercise discretion in their favour.
10. The respondents state that on one hand the applicants have relied on financial difficulties as the cause of delay to file the appeal whereas on other instances, the applicant have failed to comply with conditions issued by the court. The respondents argue that it is only fair that the decretal sum be settled in full bringing to an end the prolonged litigation that has dragged for 7 years.
11. The respondents further state that there has been no plausible explanation given as to why there was indolence on the part of the applicants whereas the order sought for payment in installments can only be appealed against with leave of the court which was not sought from the court below. Due to failure to seek leave, the present application is incompetent and void of jurisdiction by the current court.
12. The respondents state that the decretal sum stood at Kshs. 223,905/- but has accrued due to the continuous costs of defending applications filed by the applicants. The applicants have only paid Kshs. 40,000/- and no further payments have been made.
13. Directions were issued that the application be canvassed by way of written submissions and from the record the applicants did not comply. The respondents opted not to file submissions.

### **The Law**

Whether the instant application is res judicata



14. Although the respondent did not file a preliminary objection or directly plead the doctrine of res judicata is anchored in Section 7 of the Civil Procedure Act, due to the in disputed facts of this application, it is important that this court takes up the issue. The Section provides: -

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which issue has been subsequently raised, and has been heard and finally decided by such court.

15. The Court of Appeal in *The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR held:-

For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
  - b. That the former suit was between the same parties or parties under whom they or any of them claim.
  - c. Those parties were litigating under the same title.
  - d. The issue was heard and finally determined in the former suit.
  - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
16. It is trite law that for res judicata to suffice, a court should look at all the four corners set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the court in the former suit.
17. The respondents have annexed an application filed in the High Court Kiambu H.C. Misc. Civil Application No. E240 of 2021 seeking for leave to file an appeal out of time against the decision in Gatundu CMCC No. 227 of 2017 and stay of execution of the said judgment. The applicants filed another application dated 3<sup>rd</sup> November 2021 in the High Court Kiambu being Misc. Civil Application No. E240 of 2021 seeking for leave of the court to file an appeal out of time against the decision in Gatundu CMCC No. 227 of 2017 delivered on 23<sup>rd</sup> August 2021. The applicants further sought for orders of stay of execution of the said impugned judgment. The court heard and determined the application dated..... in Kiambu H.C. MISC. Civil Application No.240 of 2021 and rendered its decision on 24<sup>th</sup> November 2022. The application was dismissed for lack of merit.
18. The current application is seeking similar orders of leave to file the appeal out of time against the decision in Gatundu CMCC No. 227 of 2017 dated 23<sup>rd</sup> August 2021 and for stay of execution of the said impugned judgment. On further perusal of the application, the parties are the same as in this application. The grounds supporting the application are similar and the grounds of appeal are similar. The two applications arise from the same judgment in Gatundu CMCC No.227 of 2017. The High Court in Kiambu, is a court of competent jurisdiction and rendered its decision on 24<sup>th</sup> November



2022 after hearing the parties. The Kiambu High Court has concurrent jurisdiction to this court. As such, this court cannot entertain the current application which is similar to the one heard and determined in Kiambu. If the applicants are aggrieved by the said orders, they ought to have filed an appeal in the Court of Appeal.

19. It is my considered view that this application dated October 28, 2024 is res judicata and it hereby struck out with costs to the respondent.
20. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 13TH DAY OF MARCH 2025.**

**F. MUCHEMI**

**JUDGE**

