



**Muteti v Nyakundi & another (Miscellaneous Application
E120 of 2024) [2025] KEHC 3037 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION E120 OF 2024
SM MOHOCHI, J
MARCH 13, 2025**

BETWEEN

PAUL MUCHOKI MUTETI APPLICANT

AND

MARTHA KERUBO NYAKUNDI 1ST RESPONDENT

ERNEST ONYANGO 2ND RESPONDENT

RULING

1. Before Court for determination is the Applicant's Notice of Motion Application dated 15th April 2024, brought under Sections 1A, 1B, 3A 79G and 95 of the *Civil Procedure Act* and Order 42 Rule 6 (1), (2) & (7), Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules wherein he seeks:
 - a. Spent
 - b. That the Honourable Court be pleased to grant the Applicant leave to Appeal out of time in respect to the judgment /decree delivered in Nakuru CMCC No. E0119 of 2020 by Hon. Priscah Nyotah (SRM)
 - c. Spent
 - d. That the Honourable Court be pleased to grant an order of Stay of Execution of the judgment and or Decree delivered on 7th February 2024, and all consequential orders arising therefrom pending the hearing and determination of the intended Appeal herein.
 - e. This Court be pleased to issue an order for provision of a bank guarantee of Kshs 423,667/- plus costs and interests only as security pending the hearing and determination of the intended Appeal herein;



- f. This Honourable Court be pleased to issue any other order as it may deem just appropriate and expediate in the interest of justice;
 - g. Costs of this Application be provided for.
2. The Application was predicated on the grounds on its face, the Supporting Affidavit of Audrey Mwera, Advocate sworn on the same date.

Applicant's Case

3. Judgment in Nakuru E0119 of 2020 was delivered on 7th February, 2024 in favour of the Respondent.
4. She deposed that they advised their instructing client Directline Assurance Ltd of the terms of the judgement for further instructions of forwarding the payments. Unfortunately, the Claims Officer who received the terms of the judgment left employment of Directline Assurance.
5. She deposed further that she followed-up with the payment and the client being dissatisfied with the terms of the judgment instructed them to file an appeal. That by the time they received instructions, the period for lodging the appeal had lapsed. It was her case that the appeal raises triable issues and points of law and has a high chance of success.
6. She deposed further that they are apprehensive that the Respondent will commence execution proceedings thereby rendering the appeal nugatory. That the Respondent's income is unknown hence there is a likelihood that he may not be able to refund the decretal sum in the event the appeal succeeds. That they are willing to provide a bank guarantee for the entire decretal sum pending hearing and determination of the appeal.
7. She argued that the Applicant's right of appeal will be injured if the prayers sought are not granted. That the Respondent will not be prejudiced in any way and that the Applicant is willing to abide by the terms and conditions that will be imposed. The Application is made in utmost good faith and without undue delay.

Respondent's Case

8. The 1st Respondent Martha K Nyakundi filed his Replying Affidavit sworn on 6th June 2024 in opposition to the Application.
9. She contends that, the Applicant's application is frivolous, vexatious and brought in bad faith and with an intention of delaying Court process and the same should be dismissed with costs.
10. That she has been advised by her advocate on record whose advice she verily believes to be true that, Section IA of the [Civil Procedure Act](#) provides for the overriding objective of the [Civil Procedure Act](#) and the rules to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act this claim being a 2020 matter.
11. That she has equally been advised by her advocate on record whose advice she verily believes to be true that, that the Applicant has failed to meet the threshold under Order 42 Rule 6 of the Civil Procedure Rules in order to be granted the orders of stay sought as the Applicant has not demonstrated what substantial loss it will suffer should the Court disallow the prayer of stay.
12. She contends that, the Applicant has failed to demonstrate that this Application has been brought forth without unreasonable delay. The Applicant has failed to give a plausible explanation for the delay in filing the intended appeal.



13. That, the Applicant ought to have known that all conditions under Order 42 Rule 6 of the Civil Procedure Rules must be met and that it is not enough to merely observe some and ignore the rest.
14. That the Applicant was jolted to action after being served with Proclamation Letter by the Auctioneers on the 3rd of April 2024.
15. That the 1st Respondent has a right to the fruits of successful litigation hence is within her rights to enforce the judgment and assert her right to equal treatment in law.
16. That she is a woman of substance, with a good position and prospects, a respectable person and there is no evidence that she will cease to be so.
17. That, the mere allegation that she is unable to refund the decretal amount in case the Appeal is successful, does not necessarily justify being barred from benefiting from the fruits of her judgment.
18. That allowing this application will only delay the enjoyment of the fruits of the judgment.
19. That, should the Court be inclined to grant stay, it should order the applicant to pay her at least half the decretal sum and have the balance deposited in a joint interest earning account of the advocates of the parties on record.
20. As an alternate, the 1st Respondent proposes that, in the event stay is granted, the whole of the decretal sum should be deposited in a joint interests earning account of the advocates of the parties on record.
21. She further contends that, the litigation has to come to an end, the Applicant in the matter paints a picture that he is keen to delay the conclusion of this litigation for as long as possible.
22. That the application filed, is an afterthought brought with the intentions to delay and prolong the Court process.
23. The Court directed parties to file written submissions. The 1st Respondent has filed submissions while the 2nd Respondent did not participate.

Analysis and Determination.

24. I have considered the applications and the affidavits in support and against it, the submission by the parties, the draft memorandum of Appeal and find the sole issue for determination is: -

a. Whether the Application is merited?

25. The Applicable law for extending time pending appeal is found in Section 79G of the Civil Procedure Rules and judicial pronouncements which have set forth the trajectory for what is to be considered when dealing with an application to extend time to file an appeal.
26. Section 79G of the *Civil Procedure Act* provides that:-

“Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.”

27. In *Nicholas Kiptoo Korir arap Salat v IEBC & Others* [2014] eKLR the Supreme Court stated that: -



- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court
 - iii. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
28. Judgment was delivered on 7th February 2024, and the present application was filed on 15th April 2024, almost two months later. The statutory period for filing an appeal lapsed on or about 8th, March 2024. The Applicants also averred that they were granted stay by the trial Court but lapsed while awaiting instructions from the client. It therefore follows the Application was filed almost one month post statutory period.
 29. The delay in filing the instant motion is not inordinate and is excusable. With regards to the exposure by the Applicant to suffer substantial loss, the Court finds that the Applicant has not demonstrated that should execution of judgment decree proceeds he shall suffer substantial loss which cannot be compensated in monetary terms.
 30. I am inclined to find favor in the Applicant's Application for leave to file the intended appeal, noting that, a period of two (2) months is not inordinate, inexcusable and good cause has been advanced.
 31. The Applicants have equally failed to satisfy the security for costs test, the security proposed, Clause 2 of the Bank Guarantee dated 6th July 2023 provided that the guarantee is for twelve (12) months. The same is expired and past its best. Upon expiry counsel should have provided a guarantee specific to this case. No renewal agreement has been provided.
 32. In a strict and mechanical approach, this Application is without merit and candidate for dismissal, however in the exercise of its discretion finds that the Right to Appeal fosters access to justice and that litigants who genuinely intend to Appeal where triable issues arise such as in this instant then where such delay is not in ordinate should be allowed to ventilate the same.
 33. Therefore, the Notice of Motion dated 15th April, 2024 is allowed on the following conditions:
 - a. That leave is hereby granted to the Applicant to file an Appeal out of time in respect to the judgment /decree delivered in Nakuru CMCC No. E119 of 2020 by Hon. Priscah Nyotah (SRM)
 - b. The Applicant shall file the Memorandum of Appeal within Fourteen (14) days from this Ruling
 - c. The Applicant shall file the Record of Appeal within sixty (60) days of filing the Memorandum of Appeal



- d. There shall be a stay of execution of the Judgement and/or decree of the Honourable Court delivered on 7th February 2024, pending the hearing and determination of the Applicant's appeal.
- e. The Applicants to deposit the full decretal amount, in an interest-earning joint Bank account in the names of their respective advocates within sixty (60) days of this Ruling;
- f. The Respondent shall have costs of this Application of assessed at Kshs 10,000 to be paid within thirty (30) days from this ruling
- g. In default of any the orders in (e) and (f) hereinabove the Stay Order shall stand vacated and the Respondent shall be at liberty to execute the judgment/decree.

It is so Ordered.

SIGNED, DATED AND VIRTUALLY DELIVERED AT NAKURU THIS 13TH DAY OF MARCH, 2024.

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MOHOCHI S.M

JUDGE

