



REPUBLIC OF KENYA



**Muoki v Mutisya (Civil Appeal E343 of 2024) [2025] KEHC 4582 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4582 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E343 OF 2024  
FN MUCHEMI, J  
APRIL 3, 2025**

**BETWEEN**

**AUGUSTINE MUOKI ..... APPLICANT**

**AND**

**DAVID MUTISYA ..... RESPONDENT**

**RULING**

1. The application dated 11<sup>th</sup> December 2024 seeks for orders for leave to file an appeal out of time against the ruling in Thika Small Claims Court SCC COMM No. E567 of 2022 delivered on 29<sup>th</sup> June 2023. The applicants further seek for orders of stay of execution of the said ruling pending the hearing and determination of the intended appeal.
2. The respondent opposed the application and filed a Replying Affidavit dated 25<sup>th</sup> February 2025.

**Applicants' Case**

3. The applicant states that the ruling in Thika SCC COMM No. E567 of 2022 was delivered on 29<sup>th</sup> June 2023 whereas the court dismissed the applicant's application seeking for orders of setting aside the judgment entered on 6<sup>th</sup> September 2022. Being aggrieved with the said ruling, the applicant is desirous of lodging an appeal against the said ruling but the statutory period within which to file an appeal already lapsed. The applicant avers that he tried to resolve the payment issue out of court but the negotiations were not fruitful following which the respondent went ahead and executed the notice to show cause.
4. The applicant states that he has an arguable appeal that raises serious triable issues and therefore he would like to be vindicated on appeal. The applicant is apprehensive that the respondent will execute the decree which shall render the appeal nugatory.



## The Respondent's Case

5. The respondent states that the applicant erroneously cites the date 29<sup>th</sup> June 2023 of the ruling of his application to set aside judgment in Thika Small Claims Court Commercial Case No. E567 of 2022 which was entered on 22<sup>nd</sup> September 2022 as the date of judgment he seeks to appeal. The respondent argues that the judgment in the trial court was delivered in the year 2022 and the applicant failed to lodge an appeal within the prescribed time and without any reasons for the delay.
6. The respondent denies the applicant's averment that there were out of court negotiations between the parties as his advocates proceeded with the execution process lawfully by preparing an application for execution which was received by the court registry on 6<sup>th</sup> July 2023 and through a letter dated 3<sup>rd</sup> July 2023 requesting for a date for Notice to Show Cause which was issued on 24<sup>th</sup> July 2023 for the applicant to appear in court on 17<sup>th</sup> August 2023.
7. Consequently, the applicant failed to appear in court on 17<sup>th</sup> August 2023 for the hearing of the Notice to Show Cause. As a result the relevant orders were issued including a warrant of arrest against the respondent. The applicant states that on 29<sup>th</sup> January 2024, the applicant was arrested and arraigned in court but he did not have any proposal on how he was to pay the decretal sum and as a result he was committed to civil jail for 21 days and a mention date for 19<sup>th</sup> February 2024 was given by the court.
8. On 19<sup>th</sup> February 2024, the applicant's counsel intimated that the applicant was ready to settle the decretal amount in installments. The applicant settled part of the said decretal sum on the same day leaving a balance of Kshs. 458,000/- which he proposed to settle in monthly installments of Kshs. 100,000/- starting from 10<sup>th</sup> June 2024. He further provided two sureties in court being his father Benson Muasa and his brother Robert Musyoki who have already been issued with Notice to Show Cause on 16/4/2025 by the trial court.
9. On 11<sup>th</sup> June 2024, the applicant's advocate deposited Kshs. 100,000/- to the applicant's bank account Cooperative Bank account number 0116558649500 leaving a decretal balance of Kshs. 358,000/-.
10. The respondent avers that the applicant having voluntarily entered into a payment plan and partly settled the decretal sum cannot now seek to challenge the same judgment he complied with. The respondent states that the applicant's actions including the partial settlement amount to an admission of liability making an appeal frivolous and vexatious.
11. The respondent argues that the applicant has not demonstrated sufficient cause for the delay in filing the appeal and that the delay is unreasonable and prejudicial to him.
12. Directions were issued that the application be canvassed by way of written submissions and the respondent opted not to file any written submissions.

## The Law

### Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;

13. Section 79G of the *Civil Procedure Act* states:-

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.

14. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.
15. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
  - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
  - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
  - e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
  - f. Whether the application has been brought without undue delay.
16. Similarly in the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

17. It is important to note that the ruling herein was delivered on 29<sup>th</sup> June 2023 and the applicant filed the current application on 11<sup>th</sup> December 2024. This is approximately five (5) months outside the time limited for filing an appeal. The applicant has attributed his delay to the fact that parties were negotiating an out of court settlement which was denied by the respondent. It is noted that the applicant has not annexed any proof that parties were pursuing an out of court settlement. The respondent averred that his advocate proceeded to execute the decree.
18. From the record, judgment was entered on 6<sup>th</sup> September 2022 and a decree was subsequently issued on 14<sup>th</sup> September 2022. Warrants of arrest were issued on 15<sup>th</sup> March 2023 and the applicant was



committed to civil jail on 17<sup>th</sup> April 2023 and later released on 20<sup>th</sup> April 2023 upon payment of Kshs. 100,000/-. Thus it is evident from the foregoing that no negotiations were carried out and the respondent proceeded to execute the decree without any hinderance. It is noted that the applicant has not given any plausible explanation as to why he did not file his appeal within the statutory time. Furthermore, the applicant waited approximately 5 months to lodge an appeal which render his action as an afterthought.

19. In my considered view, the delay for which no satisfactory reason has been given is inordinate and unreasonable. It is trite that an appeal from the Small Claims Court must be on points of law. I have perused the draft Memorandum of Appeal and noted the grounds of appeal do not raise arguable points of law. A copy of the impugned ruling was annexed which I have perused and noted that the magistrate's ruling was well reasoned in my view. Thus, without delving into the merits of the appeal, the intended appeal has limited chances of success.
20. Consequently, I find that the applicant has not established to the satisfaction of the court that time should be enlarged for him to file his appeal.

**Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.**

21. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
  1. "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
  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 1<sup>st</sup> 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.
22. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
  1. Substantial loss may result to him/her unless the order is made;
  2. That the application has been made without unreasonable delay; and
  3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.



23. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

24. The applicant in his affidavit argues that he is apprehensive that the respondent will proceed with execution rendering the appeal nugatory. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show that execution shall irreparably affect him or will alter the status quo to his detriment thus rendering the appeal nugatory. In the instant case, the applicant has not shown that he stands to suffer substantial loss. The applicant has only mentioned that should the respondent proceed with the execution, the instant proceedings and the appeal shall be rendered nugatory.

25. Additionally, the trial court dismissed the applicant’s application which is in effect a negative order. Notably, the court cannot grant stay of the impugned judgment as it dismissed the applicants’ case which in essence is a negative order and incapable of execution. This principle was enunciated by the Court of Appeal in Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya) [2015] eKLR where the court held as follows:-

An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.

26. Similarly in Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others [2016] eKLR the Court of Appeal expounded on stay of execution stating:-

In Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-

The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December 2006. The order of 18<sup>th</sup> December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.

The same reasoning was applied in the case of Raymond M. Omboga vs Austine Pyan Maranga (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-

The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of



execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

27. The foregoing decision is clear that a negative order that did not order any of the parties to do anything or restrain from doing anything is incapable of execution. The court declines to grant orders. For this court to issue orders of stay of execution of a negative order would be an exercise in futility.
28. Accordingly, it is my considered view that the applicant has not demonstrated that he stands to suffer substantial loss in the event that stay orders are refused.  
Has the application has been made without unreasonable delay.
29. The ruling was delivered on 29<sup>th</sup> June 2023 and the applicant filed the instant application on 11<sup>th</sup> December 2024. The applicant has not explained the delay which is in my view inordinate, unreasonable and unacceptable.

### **Security of costs.**

30. The purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

31. It is trite the issue of security is discretionary and it is upon the court to determine security and set the terms. It is noted that the applicant has not offered any form of security for the due performance of the decree.
32. In regard to the right of appeal, it is trite that it must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

33. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue that arises is whether there is just cause for depriving the respondent his right of enjoying



his judgment. In this appeal, the suit was filed on 17<sup>th</sup> August 2022 seeking judgment in the sum of Kshs. 620,000/- and the court rendered its judgment on 6<sup>th</sup> September 2022. It is no doubt that the respondent has been kept away from enjoying the fruits of his judgment for about two years yet the applicant has managed to settle only Kshs. 100,000/- and this deposit was made after the applicant was arrested and taken to civil jail. It is evident that the applicant has failed to meet his legal obligation to settle the decretal amount.

34. The court must interrogate the chances of success of the appeal. It is my considered view that the grounds of appeal relied on herein do not raise any arguable points of law.
35. From the foregoing, the applicant has not met the threshold of granting stay of execution pending appeal. Accordingly, it is my considered view that the application dated 11<sup>th</sup> December 2024 lacks merit and is hereby dismissed with costs.
36. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 3<sup>RD</sup> DAY OF APRIL 2025.**

**F. MUCHEMI**

**JUDGE**

