



**Maganga v Kimondiu & another (Suing on Behalf of the Estate of
Mwanyumba Komu Kimondiu) (Miscellaneous Civil Application
E042 of 2023) [2024] KEHC 1438 (KLR) (13 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1438 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
MISCELLANEOUS CIVIL APPLICATION E042 OF 2023
GMA DULU, J
FEBRUARY 13, 2024**

BETWEEN

JUSTUS NYANGE MAGANGA APPLICANT

AND

BEATRICE MUENI KIMONDIU 1ST RESPONDENT

VALENTINE WANYIKA WAKESHO 2ND RESPONDENT

SUING ON BEHALF OF THE ESTATE OF MWANYUMBA KOMU KIMONDIU

RULING

1. Before me is an application by way of Notice of Motion dated 24th July 2023 filed by the applicant through counsel Kimondo Gachoka & Company Advocates.
2. The application was filed under Section 1A, 1B, 3 and 3A, 79G and 95 of the *Civil Procedure Act* (Cap.21), and Order 23 Rule 22, Order 42 Rule 6 and Order 50 Rule 6 as well as Order 51 Rules 1 and 3 of the *Civil Procedure Rules* 2010 and seeks the following orders:-
 1. (Spent).
 2. That the applicant be granted leave to appeal out of time against the judgment of the honourable Principal Magistrate's Court civil Case No. E040 of 2021 and judgment delivered on 14th April 2023.
 3. That the court be pleased to stay execution of the judgment and decree in Voi CM Civil Suit No. E040 of 2021 and judgment delivered on 14th April 2023 pending hearing and determination of this application and the intended appeal herein.



4. That as a condition for stay of execution pending the hearing and determination of the appeal the applicant be ordered to provide security for the entire decretal amount in the form of a Bank Guarantee to be issued by Family Bank Ltd or deposit the entire amount in a joint account.
5. That the costs of this application abide the outcome of the intended appeal.
3. The application has grounds on the face of the Notice of Motion that the applicant is aggrieved by the judgment in the case, and the 30 days period allowed by law to appeal has lapsed, and that this application is timely made without inordinate delay, and the appeal has high chances of success, and that if stay orders sought are not granted the intended appeal will be rendered nugatory.
4. The application was filed with a supporting affidavit sworn on 24th July 2023 by Nannungi Mariat counsel for the applicant, which amplifies the grounds of the application.
5. The application is opposed through a replying affidavit sworn on 28th September 2023 by Beatrice Mueni Kimondiu a co-administrator of the estate and a respondent herein, in which it was deponed that the application is fatally defective as the estate mentioned is a different estate of Kahaso Katana Thoya while this is the estate of Mwanyumba Komu Kimondiu, and that there was inordinate delay in bringing this application.
6. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the applicant's counsel Kimondo Gachoka & Company Advocates, as well as the submissions filed by the respondents counsel Njoroge Mwangi & Company Advocates. Both counsel relied on decided court cases.
7. Having considered the application, I am of the view that the reference to a different estate of a deceased person was a clerical error or minor mistake which did not go to the root of the application, as all the details on the application relate to Voi CMCC No. E040 of 2021, and both sides are aware of the subject litigation. Thus the application is not totally defective or incompetent.
8. This is an application for leave to appeal out of time and for stay of execution of decree or judgment. This court has statutory powers to grant both orders, under the [Civil Procedure Act](#) (Cap.21) and [Rules](#) thereunder.
9. With regard to the request for leave to appeal out of time, I have seen the intended Memorandum of Appeal. In my view, the appeal is an arguable appeal.
10. The applicant has also admitted that the 30 days window for appeal had lapsed, and that the application was filed on 25th July 2023. Thus in line with the provisions of Article 25 and 50 of the [Constitution](#) wherein courts are enjoined to facilitate fair hearing to all litigants, I will allow the request to extend the time to appeal, as not doing so would amount to denying a party the opportunity to be heard in their cause.
11. With regard to the request for stay of execution of decree pending appeal, this is governed principally by Order 42 Rule 6 of the [Civil Procedure Rules](#).
12. Having reviewed the matter, I am of the view that the application for stay orders was filed without any inordinate delay, in the circumstances of this case.
13. In the same breath, I am also satisfied that if the stay orders sought are not granted, the applicant is likely to suffer substantial loss, if the appeal succeeds and they do not recover the decretal sum from the respondent.



14. With regard to provision of security for granting stay, the applicant has offered to provide a bank guarantee from Family Bank Ltd or to deposit the entire decretal amount in a joint bank account.
15. I note that this is a case involving a money decree, and the decretal sum is Kshs. 2,774,166/=. I note also that the intended appeal is on quantum of damages.
16. In those circumstances, I will order that the applicant pays the respondent part of the decretal sum Kshs. 800,000/= as a condition for granting stay.
17. Consequently and for the above reasons, I order as follows:-
 1. I enlarge time to file appeal herein. The appeal will be filed within fourteen (14) days from today.
 2. I grant stay of execution of judgment or decree pending determination of appeal, provided the applicant pays the respondent through counsel part of the decretal sum Kshs. 800,000/= within 45 days from today.
 3. In default of either (1) or (2) above, the stay of execution orders herein granted will automatically lapse and be of no effect.
 4. Costs of the application will abide the decision in the appeal.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF FEBRUARY 2024 AT VOI IN OPEN COURT VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Ms. Kasanga for Applicant

Mr. Kazungu for Respondent

