



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ngala v Mbayachi (Suing as Dependand and/or Personal Representative
of the Estate of Faustne Omwanda Maina) (Civil Appeal
E003 of 2024) [2024] KEHC 1695 (KLR) (19 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1695 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E003 OF 2024
PJO OTIENO, J
FEBRUARY 19, 2024**

BETWEEN

EMMANUEL OBETCH NGALA APPELLANT

AND

**JULIUS MAINA MBAYACHI (SUING AS DEPENDANT AND/OR
PERSONAL REPRESENTATIVE OF THE ESTATE OF FAUSTNE OMWANDA
MAINA) RESPONDENT**

*(Being an appeal from the Ruling of Hon. J. J. Masiga (PM) in
Kakamega CMCC No. 5 of 2018 delivered on 21st November, 2023)*

RULING

1. Having filed the appeal on the 12.01.2024, the Appellant now seeks stay of execution of the decree issued by the trial Court pending the determination of the instant appeal.
2. On the face of the Notice of Motion dated 9.01.2024 and the Affidavit sworn and filed by the Appellant, it is asserted that he has an arguable appeal which would be defeated if the decree is let to be enforced by execution and that he is prepared to abide by all and every condition the Court may impose as regard security for the due performance of the decree.
3. The application was opposed by the Respondent who filed not only a Replying Affidavit but also a Notice of Preliminary Objection both asserting that there is no competent pending appeal as the same was filed out of time and without leave. It is equally contended that the grounds raised in the Memorandum of Appeal raise no triable issue adding that after the application for stay and setting aside was dismissed, warrants of arrest were sought and issued after the Appellant failed to answer to the notice to show cause having gone into hiding.



4. In a spirit of ceding grounds, the respondent surrenders to the discretion of the Court in the matter and avers that if the Court be inclined to grant the orders for stay then, there should be an order that the entire decretal sum be deposited into an escrow account in the joint names of the advocates for the parties.
5. To the Replying Affidavit and Notice of Preliminary Objection, the Appellant filed a Supplementary Affidavit in which he contends that the appeal was filed within time as time did not run from the 21.12.2023 till the 15th (*sic*) January, in terms of the provisions of Order 50 Rule 4 [Civil Procedure Act](#) and that the last day the appeal could have been filed was the 19.01.2024.
6. Having perused the application, as well as the papers filed in opposition thereof, the Court discern the issues for determination to be two;
 - a) Whether the appeal is incompetent for having been filed out of time?
 - b) Whether the request for stay pending appeal is merit?
7. Whether or not the appeal was filed in time goes to the propriety, and competence of the appeal and is thus a preliminary matter that must be handled and dealt with beforehand and in limine because, if the point succeeds there would be no appeal to consider preserving by an order of stay pending appeal.
8. To that question, the answer is not only in order 50 Rule 4 which declare in very unequivocal term that time doesn't run between the 21st of December to the 13th January in each year, both days inclusive.
9. The ruling in this matter having been delivered on the 21st November 2023, the 30 days period lapsed on the 21.12.2023 when time had stopped running. The period upto 13.1.2023 not 15th January and contend by appellant is therefore excluded from computation of time and therefore the last day the appeal ought to have been filed was the 14.1.2024. When filed on the 12.1.2024, it was filed within time and it is erroneous to contend that it was filed out of time. The Court finds no merit in the Preliminary Objection based on the date the appeal was filed. The same is dismissed.
10. On the merits, an applicant in an application for stay pending appeal only needs to demonstrate substantial loss then offer security for the due performance of the decree in the event the appeal fails. To this Court those two conditions are intended to foster the right to access justice for both sides so that the Appellant gets his day in Court in urging his appeal and expecting an efficacious decree, while the Respondent is assured that however long the appeal pends, the reprieve of stay is not used by the Appellant to dissipate his attachable property so that the decree passed on appeal, when the appeal fails, becomes a mere paper judgment.
11. It is not in doubt that the decree now facing the Appellant for settlement is not so modest but a large sum. There is no assurance that the Respondent if paid the sum will be able to effect a refund in full or in part if the appeal fails in whole or part if the appeal succeeds.
12. In such circumstances, the Court considers it just that stay is granted, the Appellant gets his day in Court, while the Respondent as decree holder gets his security, with timelines that ensures the appeal is dealt with expeditiously, but on conditions that the entire decretal sum is deposited into an escrow account.
13. Accordingly, the application dated 19.01.2024 is allowed on terms that;
 - i) The Appellant files and serves both Record of Appeal and Submissions within sixty (60) days from today.



- ii) Upon service the Respondent also files and serves Submissions within twenty one (21) days of the service.
- iii) The Appellant deposits into an escrow account in the joint names of the advocates for the parties, the full decretal sum, within thirty (30) days from today.
- iv) Time is of essence in that if there shall be a default to file the Record of Appeal and Submissions within the timelines set, the appeal shall stand dismissed with costs. If, however, the default shall concern the deposit of the decretal sum, the Respondent shall be at liberty to execute the decree by the trial Court.

12. The costs of the application shall be costs in the appeal.

13. Mention on 9.5.2024 for further directions.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF FEBRUARY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Alobi for the Appellant/Applicant

Mr. Iddi Nandwa for the Respondent

Court Assistant: Polycap Mukabwa

