



Ndururu & another v Mukuria alias John Waweru Mukeri (Miscellaneous Civil Application E040 of 2023) [2024] KEHC 1466 (KLR) (13 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1466 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
MISCELLANEOUS CIVIL APPLICATION E040 OF 2023
GMA DULU, J
FEBRUARY 13, 2024**

BETWEEN

FREDRICK MWENDA NDURURU 1ST APPLICANT

SAMUEL MWANGI NJOROGE 2ND APPLICANT

AND

**JOHN WAWERU MUKURIA ALIAS JOHN WAWERU
MUKERI RESPONDENT**

(Appeal against the judgment of the Honourable Principal Magistrate's Voi Court Civil Case No. E045 of 2020 and judgment delivered on 5th May 2023.)

RULING

1. Before me is an application by way of Notice of Motion dated 14th 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 from the court:-
 1. (Spent).
 2. That the applicant be granted leave to appeal out of time against the judgment of the honourable Principal Magistrate's Voi Court Civil Case No. E045 of 2020 and judgment delivered on 5th May 2023.
 3. That the court be pleased to stay execution of the judgment and decree in Voi CM Civil Suit No. E045 of 2020 and judgment delivered on 5th May 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 herein, and that the 30 days period allowed by law to appeal has lapsed, and that this application is timely and made without inordinate delay, and that the appeal has high chances of success, and that if stay orders are not granted the intended appeal will be rendered nugatory, in this matter wherein judgment was delivered on 5th May 2023 for Kshs. 303,350/= plus costs.
4. The application was filed with a supporting affidavit sworn on 14th 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 26th July 2023 by John Waweru Mukuria the respondent in which it was deponed that the application is misconceived and incompetent and meant to delay the enjoyment of the judgment and that it be struck out or dismissed.
6. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the applicants counsel Kimondo Gachoka & Company Advocates, as well as the submissions filed by the respondent's counsel S. N. Ngare & Company Advocates. Both counsel relied on decided court cases.
7. This is an application for leave to appeal out of time and an application for stay of execution of decree or judgment. This court has statutory powers to grant both orders, under the *Civil Procedure Act* and Rules.
8. With regard to leave to appeal out of time, I have seen the intended Memorandum of Appeal. In my view, the appeal is an arguable appeal.
9. It has also been admitted by the applicants that the 30 days window for filing an appeal had lapsed, and that the application was filed on 17th July 2023 while judgment was delivered on 5th May 2023. In my view, in light of the provisions of Article 25 and 50 of *the Constitution* wherein courts are enjoined to facilitate fair hearing of litigants who come before courts, and Article 159 which calls upon courts to strive to administer substantive justice, 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 by the courts in their cause.
10. With regard to the request for stay of execution of decree or judgment, such requests are governed principally by the provisions of order 42 rule 6 of the *Civil Procedure Rules*.
11. Having evaluated this matter, and perused the record, I am of the view that the stay was filed without any inordinate delay.
12. On the second consideration whether the applicant is likely to suffer substantial loss if the stay orders sought are not granted, I am also satisfied that if the stay orders sought are not granted, the applicant is likely to suffer substantial loss in case the decretal amount is paid and not recovered from the respondent whose financial means are presently unknown. I will thus grant orders of stay of execution.
13. With regard to provision security by the applicant, the applicant has offered to provide a bank guarantee from Family Bank or to deposit the entire decretal amount in a joint account.



14. Having taken into account that this is a money decree, and the decretal sum is Kshs. 303,550/=; and also that the appeal is on quantum of damages. I will order that the applicant pays the respondent part of the decretal sum Kshs. 100,000/= as a condition for granting the stay of execution orders.
15. 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 that the applicant pays the respondent through counsel part of the decretal sum Kshs. 100,000/= 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 this 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. Ndungu for respondent

