



Ndururu & another v SCM alias SKM ((Minor Suing Through CSM)) (Miscellaneous Civil Application E039 of 2023) [2024] KEHC 1433 (KLR) (13 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1433 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
MISCELLANEOUS CIVIL APPLICATION E039 OF 2023
GMA DULU, J
FEBRUARY 13, 2024**

BETWEEN

FREDRICK MWENDA NDURURU 1ST APPLICANT

SAMUEL MWANGI NJOROGE 2ND APPLICANT

AND

SCM ALIAS SKM RESPONDENT

(MINOR SUING THROUGH CSM)

RULING

1. Before me is a Notice of Motion dated 14th July 2023 filed through counsel Kimondo Gachoka & Company Advocates for the applicants.
2. The application was filed under Section 1A, 1B, 3, 3A, 79G and 95 of the *Civil Procedure Act* (Cap.21), as well as Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 and 3 of the *Civil Procedure Rules* and seeks the following orders:-
 1. (Spent).
 2. That the court be pleased to grant leave to the applicant/intended appellant to appeal out of time against the judgment of the Principal Magistrate in Voi Civil Suit No. E043 of 2020 and judgment delivered on 25th May 2023.
 3. That the court be pleased to stay execution of the judgment and decree in Voi CMCC No. E043 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 hearing and determination of the intended appeal the applicant be and is hereby 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 judgment in Voi CMCC No. E043 of 2020 was delivered on 5th May 2023 and the statutory time allowed to file an appeal had lapsed. That the respondent is likely to commence process of execution; that the amount awarded was Kshs. 303,550/=; that if the orders sought herein were not granted the applicant will suffer substantial or irreparable loss, as the appeal has good chances of success.
4. The application was filed with a supporting affidavit sworn on 14th July 2023 by Nannungi Advocate for the applicant, which amplifies the grounds of the application.
5. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Kimondo Gachoka & Company Advocates for the applicant as well as the submissions filed by S. N. Ngare & Company Advocates for the respondents. Each side cited decided court cases.
6. I have considered the application and the arguments on both sides. I have also perused the intended Memorandum of Appeal, which is on the quantum of damages awarded.
7. I note that the judgment herein was delivered on 5th May 2023 and this application filed on 17th July 2023, and it is admitted by the applicant that the initial stay of execution orders granted had lapsed before the application was filed.
8. Having considered the requests made by the applicant, I find that this court has jurisdiction under the Civil Procedure Act (Cap.21) and Rules thereunder to grant the orders sought subject to the applicant satisfying certain requirements.
9. Taking into account the entire circumstances of this matter, in my view, the delay of between the month of May and July when this application was filed cannot be said to be inordinate. In addition, the provisions on affording fair trial to parties under Article 25 and 50 of the Constitution would be violated if I decline to extend time for the applicant to appeal herein. I will thus extend the time to appeal.
10. With regard to the request for stay of execution pending appeal, which is governed by Order 42 Rule 6 Civil Procedure Rules, I am also of the view that the delay in bringing the application is not inordinate.
11. On whether the applicant will suffer substantial loss if the stay orders sought are not granted, I am persuaded that the applicant stands to suffer substantial loss if the amount of decree is paid presently to the respondent, and not recovered if the appeal wins, as the financial means of the respondent are not known.
12. With regard to provision of security, the applicant has proposed to provide a bank guarantee, or pay the entire decretal amount in a joint account. In my view, since this being a money decree, and the appeal being on quantum of damages, it will be fair and just to all parties for this court to grant stay orders, subject to payment of the part of the decretal amount, which I assess at Kshs. 100,000/=
13. Consequently and for the above reasons, I order as follows:-
 - i. I extend time to file appeal. The appeal will be filed within 14 days from today.



- ii. I grant stay of execution of decree or judgment pending determination of appeal, provided the applicant pays part of the decretal amount Kshs. 100,000/= to the respondent through counsel within 45 days from today and proof of payment be made to the respondent.
- iii. In default of either (i) or (ii) or both, the stay of execution orders herein granted will automatically lapse and be of no effect.
- iv. Costs of the application will follow 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

