



**Njau v Mwanga & another (Suing as administrators of the Estate of the Late Onesmus Ngungu Kula - Deceased) (Civil Appeal 104 of 2023) [2024] KEHC 1066 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1066 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 104 OF 2023  
FN MUCHEMI, J  
FEBRUARY 8, 2024**

**BETWEEN**

**HEZEKIAH MACHARIA NJAU ..... APPLICANT**

**AND**

**RACHAEL NDEREKE MWANGA ..... 1<sup>ST</sup> RESPONDENT**

**NZAMBA KULA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE ONESMUS  
NGUNGU KULA - DECEASED**

**RULING**

1. The application dated 12<sup>th</sup> April 2023 is seeking for orders of leave to file an appeal out of time against the judgment in Gatundu Civil Case No. E373 of 2021 delivered on 14<sup>th</sup> February 2023 and for orders of stay of execution pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed Grounds of Opposition dated 9<sup>th</sup> June 2023.

**Applicant's Case**

3. The application was supported by an affidavit sworn by Mercy Maweu, a Legal Officer of the Kenyan Alliance Insurance Company Limited, the applicant's insurer who stated that she was aware that on 30<sup>th</sup> December 2021, the respondents filed a suit Gatundu CMCC No. E373 of 2021 claiming damages for the deceased for fatal injuries sustained by the deceased in a road traffic accident involving the applicant's motor vehicle registration number KCV 542N owned by the applicant. The deponent avers that they instructed the firm of Njoki Njogu & Company Advocates to defend the applicant who periodically informed them of the progress of the case but inexplicably failed to inform them of the delivery of the judgment. The deponent further states that they instructed the firm of Eboso &



Company Advocates to peruse the lower court file and update them on the progress of the matter, when no response was forthcoming by the end of March.

4. Upon the said advocates perusing the court file, they discovered that judgment was entered against the applicant on 14<sup>th</sup> February 2023. Being aggrieved by the judgment, the deponent states that they instructed their advocates to lodge an appeal but the advocates informed them that the time stipulated for filing an appeal had lapsed.
5. The deponent states that the appeal has high chances of success as the trial magistrate erred in indicating that the deceased died at the age of 27 years instead of 35 years as indicated on the death certificate attached to the respondents' pleadings, which led the court to adopt a high multiplier leading to a higher award of damages. Consequently, the deponent argues that they stand to suffer substantial loss and irreparable harm by being made to pay an excessively high amount in damages. The deponent states that they are willing to tender such security as the court may order for due performance of the decree.

### **The Respondents' Case**

6. The respondents oppose the application on the premise that it is frivolous, vexatious, total abuse of the court process and has been brought after an inordinate delay. The respondents state that judgment in the matter was delivered on 14<sup>th</sup> February 2023 and the instant application was filed on 12<sup>th</sup> April 2023 which is over 3 months ago.
7. The respondents argue that the application has been brought to frustrate the process of execution. Further, the respondents state that no plausible reasons have been given to warrant the granting of the orders sought. Moreover, the respondents contend that the applicant has not offered any security for costs and urges the court to order the applicant to pay half the decretal sum of Kshs. 1,514,524.64/- to them and deposit a similar amount of Kshs. 1,514,524.64/- in court within fourteen (14) days from the date of the court's ruling.

### **The Applicant's Submissions**

8. The applicant relies on Section 79G& 95 of the [Civil Procedure Act](#) and the case of Githiaka vs Nduriri [2004] eKLR and argues that there was no inordinate delay in filing the instant application as the former advocates on record, Njoki Njogu & Company Advocates inexplicably failed to inform the insurer of the delivery of judgment. Thus when no response was forthcoming, the applicant's insurer instructed the firm of Eboso & Company Advocates who perused the court file and noted that judgment was delivered on 14<sup>th</sup> February 2023. The applicant's insurer being aggrieved by the judgment instructed the said firm to lodge an appeal however by such time, the duration for lodging an appeal had already lapsed.
9. The applicant relies on the case of Civil Application No. Nai 35 of 2014 Governors Ballon Safaris Limited vs Skyship Company Limited & the County of Asmara and submits that he has an arguable appeal as it raises the questions on the age adopted by the trial court as opposed to what was indicated in the death certificate as attached by the respondents. Further the applicant submits that the trial court ignored the guidelines and legal principles established for the award of damages thus making a high award of damages. The applicant further submits that no prejudice shall be suffered by the respondents if the instant application is allowed.
10. The applicant further submits that he stands to suffer substantial loss as the respondents have not indicated nor have they adduced any evidence to show that they are people of means and capable of refunding the decretal sum if the appeal succeeds. As such, the respondent argues that the only reasonable conclusion that could be drawn is that the respondents may not be in a position to refund



the decretal sum if the appeal succeeds. To support his contentions, the applicant relies on the case of Apart Industries Limited vs Joe's Freighters Limited [2015]eKLR.

11. The applicant submits that his insurer is willing to tender security as the honourable court may deem fit to guarantee the due satisfaction of the decree. As such, the applicant submits that he has met the criteria for granting stay of execution pending appeal as set out in Order 42 Rule 6(1) & (2) of the Civil Procedure Rules.

### **The Respondents' Submissions**

12. The respondents submit that judgment was delivered on 14<sup>th</sup> February 2022, which is over 9 months ago and thus the delay in bringing the instant application is inordinate and inexcusable. The respondents further argue that no proper explanation has been given for the delay. The respondents contend that although the applicant alleges that his previous advocates never informed him of the delivery of the judgment on time, there is no supporting documents to prove the said allegations.
13. The respondents rely on the cases of Bungoma HC. Misc. Application No. 42 of 2021 James Wangalwa & Another vs Agnes Naliaka Cheseto and HCCC No. 288 of 2011 Jason Ngumba Kagu (Suing as the personal representative of Nancy Nyawira Ngumba (Deceased) & Another vs Intra Africa Assurance Co. Limited and submits that the applicant has not demonstrated what substantial loss he stands to suffer.
14. In the event the court grants the instant application, the respondents urge the court to order the applicant to pay half the decretal sum of Kshs. 1,571,577.90/- to them and the other half of Kshs. 1,571,577.90/- be deposited in court within 14 days from the date of this court's ruling to ensure that the interests of both parties is protected.

### **Issues for determination**

15. The two main issues for determination herein are:-
  - a. Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;
  - b. Whether the applicant has met the prerequisite for grant of stay of execution pending appeal;

### **The Law**

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

16. 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.

17. 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.

18. 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.

19. 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.”

20. The applicant has faulted his previous advocates for the delay in filing the appeal as they inexplicably failed to inform his insurer of the judgment. The applicant’s insurer thus instructed new advocates who perused the court file and discovered that judgment had already been delivered. I have perused the court record and noted that judgment was delivered on 14<sup>th</sup> February 2022 and that this application was filed on 12<sup>th</sup> April 2023. This is about 1 year one month after the requisite period within which to file an appeal. I have further perused the record and noted that although the applicant has faulted his former advocates for delaying the lodging of the appeal. It is noted that the applicant has not annexed any supporting documents or any sworn affidavit from the said advocates confirming the position he is riding on. It is averred in the affidavit of the applicant’s insurer, that the insurer instructed the current advocates on record on 27<sup>th</sup> March 2023 after waiting for one month from the date of judgment. However, the said judgment was delivered on 14<sup>th</sup> February 2022 and the applicant’s insurer has not given any plausible explanation why they waited for over one year to inquire about the judgment. Thus,



it is my considered view that the delay of 1 year 1 month is inordinate and inexcusable. The applicant in my view, has not given any plausible explanation on the delay.

21. I have further perused the grounds of appeal as set out in the Memorandum of Appeal. Without delving into the merits of the appeal it is noted that the appeal raises arguable grounds of appeal. The applicant has attached the death certificate of the deceased which was also attached by the respondents. The document gives the age of the deceased being 35 years. However, on perusal of the trial judgment, the court adopted the age of the deceased as 27 years. Thus, it is evident, that the chances of the appeal succeeding if the instant application is granted are high. Although the applicant has not given any plausible reasons for the delay and that the delay is inordinate and inexcusable, it is my considered view that the applicant has established to the satisfaction of the court that he has a valid reason for seeking extension of time to file his appeal. should be enlarged to enable him file his appeal.

**Whether the applicant has met the conditions for grant of stay of execution pending appeal.**

22. 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.

23. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:  
SUBPARA 1.

Substantial loss may result to him/her unless the order is made;

SUBPARA 2.

That the application has been made without unreasonable delay; and

SUBPARA 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.

24. Substantial loss was clearly explained in the case of James Wangalwa & Another v 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.

25. The applicant contends that it stands to suffer irreparably if the respondents levy execution against him. The respondents argue that the applicant has not demonstrated that he will suffer substantial loss in the event that the orders sought are not granted. On perusal of the applicant's affidavit, I have noted that the applicant has averred that he stands to suffer substantial loss should he be forced to pay an excessively high amount of damages and further that the intended appeal shall be rendered nugatory if stay is not granted. It is in his submissions that the applicant states that he stands to suffer irreparable damage as the respondents will not be financially able to repay back the decretal sum.
26. 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 how execution shall irreparably affect him or will alter the status quo to its detriment therefore rendering the appeal nugatory. Considering the facts of this application, it is my considered view that the applicant has not demonstrated that he will suffer substantial loss should he be made liable to pay excessive general damages.
- Has the application has been made without unreasonable delay.
27. Judgment was delivered on 14<sup>th</sup> February 2022 and the applicant has brought the present application on 12<sup>th</sup> April 2023. It has taken the applicant 1 year 2 months days between the date of judgment delivered in the trial court and the time when he filed the instant application. Thus as discussed, the delay of 1 year 2 months is inordinate and inexcusable.

### **Security of costs.**

28. 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.
29. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant's insurer has stated that she is ready and willing to tender such security as the court may order for the due performance of the decree.
30. Additionally, the right of appeal 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.”

31. The court in granting stay has to carry out a balancing act between the rights of the parties. The issue is whether there is a just cause for depriving the respondents their right of enjoying their judgment. The matter was instituted in the trial court in 2021 to which judgment was delivered the following year. However since judgment was delivered on 14<sup>th</sup> February 2022, the respondents have not carried out any execution. Furthermore, the grounds of appeal raised by the applicant raise arguable points of law especially on the age of the deceased used by the trial court to arrive at the multiplier, a fact that has not been denied by the respondents.
32. Consequently, I am of the considered view that this application dated 12<sup>th</sup> April 2023 has merit and it is hereby allowed in the following terms:-
  - a. That orders for appealing out of time are hereby granted.
  - b. That the appeal be filed within 14 days.
  - c. That orders for stay of execution pending hearing and determination of the appeal are hereby granted.
  - d. That the applicant shall deposit half of the decretal amount in court within 30 days and in default, these orders will stand vacated.
  - e. That the costs of this application shall abide in the appeal.
  - f. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 8TH DAY OF FEBRUARY 2024.**

**F. MUCHEMI**

**JUDGE**

