



**Kusunga & another v Mrira & another (Suing as the Legal Representatives  
of the Estate of Peter Kithi Kubo) (Miscellaneous Application  
E089 of 2023) [2024] KEHC 2278 (KLR) (5 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2278 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS APPLICATION E089 OF 2023  
SM GITHINJI, J  
MARCH 5, 2024**

**BETWEEN**

**MICHAEL MUTHINI KUSUNGA ..... 1<sup>ST</sup> APPLICANT**

**DREAMLINE EXPRESS LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**RIZIKI KUBO MRIRA ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPHINE SAUMU SHEHE ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF PETER  
KITHI KUBO**

**RULING**

1. By way of a Notice of motion dated 30<sup>th</sup> June 2023 the Appellants moved this court under order 22 Rule 22, Order 42 Rule 4,6 and 7, Section 79G of the [Civil Procedure Act](#), Order 51 Rules 1 and 3 of the [Civil Procedure Rules](#) 2010 and Section 3 and 3A of the [Civil Procedure Act](#) seeking the following orders;
  1. Spent.
  2. Spent.
  3. That this honourable court be pleased to order a stay of execution of the judgment of the Honourable Chief Magistrate's Court at Malindi in CMCC No. E233 of 2021 delivered on 10.02.2023 by the honourable Irene Thamara (RM) pending the hearing and determination of the intended appeal.
  4. That this honourable court be pleased to grant the Applicant leave to file an appeal out of time.



5. That as a condition for stay of execution pending the hearing and determination of this appeal/intended appeal, this honourable court be pleased to direct that the applicant/appellant be and is hereby ordered to provide/issue security for the entire decretal sum/amount in the form of a bank guarantee to be issued by Family Bank Limited.
  6. That the honourable court be pleased to give directions on the appeal.
  7. That the costs of this application abide by the outcome of the appeal.
2. The application is founded on the grounds on its face and the supporting affidavit of Abdulrahman Abdulaziz Amid the insured of Motor vehicle registration number KCJ 860E who deposed that judgment was entered in the lower court on 10<sup>th</sup> February 2023 in favour of the Respondents herein and a 30 days stay of execution was granted which has since lapsed and the time to file an appeal has also lapsed. He stated that he tried to follow up through his advocate to obtain a copy of the judgment in vain and upon obtaining the same, his advocates drafted a memorandum of appeal on which the intended appeal is founded. Further that the appeal raises pertinent issues and has high chances of success. It was also stated that the insured and the insurer are apprehensive that the respondent may or has taken out warrants of attachment and a proclamation and execution may commence thus it is in the interest of justice that the court be pleased to direct that stay of execution be secured through a bank guarantee.
  3. The respondents filed a replying affidavit sworn by Riziki Kubo Mrira the 1<sup>st</sup> Respondent who stated that judgment was delivered in favour of the respondents and the same is yet to be satisfied. She also stated that the draft memorandum of appeal reveals no valid grounds of appeal and the same is an academic exercise meant to delay the respondents from enjoying the fruits of the judgment and the applicant is not entitled to the orders sought.

### **Disposition**

4. The application was canvassed by way of written submissions. I have considered the submissions by the parties as well as the authorities relied upon. The issues for determination are; whether the orders sought for stay of execution and for enlargement of time are merited.
5. The applicant's prayer to file appeal out of time may only be accepted if it satisfies the court that it had good and sufficient cause for not filing the appeal in time. The supreme court of Kenya sitting at Kisumu in the case of *County Executive of Kisumu vs County Government of Kisumu & others* [2017] eKLR while relying to its decision in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others* Application No. 16 of 2014 [2014] eKLR the Hon. Judges reiterated the considerations to be made in such a case as follows:
  1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
  2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted;



6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
6. The applicants have a duty to explain to this court why they did not file this application after judgment was delivered on 10/02/23. According to the Applicants, the delay was occasioned by failure to obtain a copy of the judgment on time. The instant application was filed on 6th July 2022 approximately four months within which an appeal ought to have been filed. In my view, this explanation is not satisfactory and there’s no sufficient cause why the Applicants waited for four months after judgment had been delivered to bring the instant application. Further, there is no certificate of delay accompanying the application to demonstrate that indeed it was not the Applicant’s fault. It follows that the prayer for leave to appeal out of time fails for want of merit and is hereby dismissed.
7. As regards stay of execution, having found that the prayer for leave to appeal out of time is not merited, then it follows that an order for stay of execution cannot issue. The reasoning is that the prayer for stay has been stripped of legs to stand on.
8. In the end, the Notice of Motion dated 31<sup>st</sup> January 2023 fails for want of merit and the same is hereby dismissed with costs.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 5<sup>TH</sup> DAY OF MARCH, 2024.**

.....  
**S.M. GITHINJI**

**JUDGE**

In the absence of both parties; -

They be served and notified.

Ms Wanyama now present for the Respondent

Mr Njiru also present holding brief for Mr Mirembe for the Applicant/Kathata.

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**S.M. GITHINJI**

**JUDGE**

**5/3/2024**

