



**Mwangi v Gitutu & another (Miscellaneous Civil Appeal  
E008 of 2024) [2024] KEHC 2734 (KLR) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2734 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS CIVIL APPEAL E008 OF 2024**

**FR OLEL, J**

**MARCH 12, 2024**

**BETWEEN**

**FRANCIS KARIUKI MWANGI ..... APPELLANT**

**AND**

**PETER MACHARIA GITUTU ..... 1<sup>ST</sup> RESPONDENT**

**PETER KIOKO MACHARIA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application before this court for determination is the Notice of Motion application dated 17<sup>th</sup> January 2024 brought pursuant to provisions of Section 3A of the *Civil Procedure Act*, 95 of the *Civil procedure Act* and Order 50 Rule 6 and order 51 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers (1) and (3) of the said application are basically spent and the main prayers sought are prayer (2) and (4) of the said application that; the applicant be granted leave to appeal out of time and that pending the hearing and determination of this Appeal this Honourable court be pleased to stay execution of the Judgement rendered on 9<sup>th</sup> November 2023 in Mavoko MCCC No E043 of 2023 delivered by Honourable Barbara Ojoo (CM).
2. The application is supported by the grounds on the face of the said application and the supporting affidavit of Kenneth Mwiti dated 17<sup>th</sup> January 2024. He depones that judgement had been made in favour of the respondents in the sum of Kshs.1,920,840.30/= being the decretal amount plus cost and interest of the suit. Being dissatisfied by the said award, they intend to appeal as against the said decision and had prepared the draft memorandum of Appeal, which raised arguable grounds of appeal and had high chances of success.
3. This application is opposed by the Respondents who filed their Replying Affidavit's dated 29<sup>TH</sup> September 2023 sworn by Maureen Wambui Kungu, the respondents advocate who maintained that the said application was misconceived, bad in law and an apparent abuse of the Court Process,



fashioned to delay execution and deny the respondents enjoyment of the fruits of their judgement. They had been in discussion with the appellants counsel on settling this claim and exchanged emails concerning the same. It was therefore not true that the applicant was not aware about this judgement and the explanation given for the delay was not plausible.

4. Finally, extension of time was an equitable remedy reserved for deserving parties and since the applicant had not given any plausible reason for not filing the appeal on time, the orders sought ought not to be granted. But if the court was inclined to grant stay of execution, the applicant should be compelled to deposit the entire decretal sum plus costs into a joint interest earning account to be held by the counsels herein.

### **Analysis & Determination**

5. I have carefully considered the Application, Supporting Affidavit and the Respondent's Replying Affidavit filed by both parties. The issues which arise for determination is whether this court should grant leave to file the memorandum of appeal out of time and whether grant stay of execution of the Judgment/Decree dated 9th November 2023 issued in Mavoko MCCC No. E043 of 2023.

6. Section 79G of the *Civil Procedure Act* provides that:

“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 to the appellant 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 a good and sufficient cause for not filing the appeal in time.”

7. The Court of Appeal in case of *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014]eKLR, Odek JJA as observed that the several facts which the court has to consider, when considering an application for extension of time were that :

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

8. Similarly, The Court of Appeal in the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR discussed some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time, they include the following:

- i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;
- iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
- v) The importance of compliance with time limits to the particular litigation or issue; and
- vi) The effect if any on the administration of justice or public interest if any is involved.



9. The importance of giving a sufficient reason for the extension of time to appeal was also discussed in the Court of Appeal case of *Susan Ogutu Oloo & 2 Others v Doris Odindo Omolo* [2019] eKLR where it was held:-

“In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC* [2014] eKLR Sup Ct Application No 16 of 2014.”

10. The judgement appeal against was delivered on 9<sup>th</sup> November 2023 and this application was filed on 18<sup>th</sup> January 2023. This is a period of about two months before excluding the vacation period when time does not run. The application therefore cannot be said to have been filed too late by the applicant. As regards the reason for delay, the appellant has not given any reason for the delay, other than stating that they are dissatisfied by the award on liability and quantum. No proper reason has been advanced as to why the appellant was late in filing his appeal on time, but in the interest of justice and since the appellant has a right to be heard I do in the interest of justice allow him to appeal out of time.

11. Stay of Execution is provided under Order 42 Rule 6 of the *Civil Procedure Rules* 2010 as follows;

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless –

- (a) the court is satisfied that substantial loss may result to the 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.”

12. The three conditions to be fulfilled can therefore be summarized as follows;

- a. that substantial loss may result to the applicant unless the order is made
- b. application has been made without unreasonable delay
- c. security as the court orders for the due performance

13. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.



- b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
  - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.
14. In *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
15. To the foregoing I would add that an order of stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay shall also consider the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, to enable court give effect to the overriding objective, while in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589.

#### **i. Undue Delay**

16. As to whether the Application has been filed without undue delay, judgment was entered on 9<sup>th</sup> November 2023 and this application for stay pending appeal was filed on the 18<sup>th</sup> January 2023, which is a period of about two months, but less when the vacation period when time does not run is considered. This court thus finds that this application for stay of execution has been filed without undue delay.

#### **ii. Substantial Loss**

17. On the issue of substantial loss, Ogolla, J in *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 stated that:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”

18. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR the court expressed itself as hereunder:

“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.”

19. The same position was adopted by Kimaru, J in *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

20. Guided by the above authorities and in the absence of the requisite proof from the Respondents that they are person of means, I find that the Appellant has satisfied this court that he will suffer substantial loss if the entire decretal sum is paid to the Respondents before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.

### iii. Security

21. As regards deposit of security, the court observed in the case of *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* [2019] eKLR it was held that:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal...

Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue



of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

22. The Court must similarly consider the overriding objective and balance the interest of the parties to the suit while considering the issue of security to be offered. The law is that where the applicant intends to exercise his undoubted right of appeal, and in the event, that he were eventually to succeed, he should not be faced with a situation in which he would find himself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.
23. The issue of adequacy of security was dealt with by the Court of Appeal in *Ndubiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them.

So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it”.

24. The applicants did state with regard to the issue of security that, they were ready to abide by any conditions that may be imposed by court and. The respondent on the other hand submitted that the same should be deposited in a joint interest earning account pending determination of this suit.

### **Disposition**

25. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, I do grant the following prayers;
- a. Leave is hereby granted to the Appellant to file their Appeal out of time within the next 14 days.
  - b. Stay of execution of the decrees herein is granted in condition that the Appellant/Applicant do pay the respondents half the decretal sum and assessed cost being a sum of Kshs.1,047, 774.15/ = and deposit the other half of the decretal sum and assessed costs being a sum of Kshs.1,047,



774.15/= a joint interest earning account in the joint names of advocate for the appellant and advocates for the respondent at a reputable financial bank for the whole duration of this appeal

- c. This condition is to be met within 45 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.

26. The costs of this Application will be in the cause.

27. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 12TH DAY OF MARCH, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 12TH DAY OF MARCH, 2024.**

**In the presence of;**

**Mr. Mudiezi .for Appellant**

**No appearance for Respondent**

**Sam Court Assistant**

