



M’Ndegwa & another v Murungi & another (Suing as personal representatives of the Estate of Moffat Kinyua – Deceased) (Miscellaneous Civil Application E034 of 2024) [2024] KEHC 4884 (KLR) (18 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4884 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL APPLICATION E034 OF 2024
EM MURIITHI, J
APRIL 18, 2024**

BETWEEN

SALESIO KUNYIYA M’NDEGWA 1ST APPLICANT

SAMSON KIRINYA GIKUNDA 2ND APPLICANT

AND

TERESIA MWONTHEA MURUNGI AND MARYPIA MWENDWA (SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF MOFFAT KINYUA – DECEASED) RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 27th February, 2024 brought under Articles 159 and 50 of the Constitution, Order 42 Rule 6 and Order 22 Rule 22 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 79G of the Civil Procedure Act and all other enabling provisions of the law, the Applicants seek that:
 1. Spent
 2. Spent
 3. This Honorable Court be pleased to grant stay of execution orders of the Judgment and Decree of the Lower Court pending the hearing and determination of this application.
 4. This Honorable court be pleased to grant the applicants leave to appeal out of time against the judgment delivered by Hon. D.W. Nyambu on 16th January 2024.



5. This Honorable Court be pleased to grant stay of execution orders of the Judgment and Decree of the Lower Court pending the hearing and determination of the intended appeal.
 6. The costs of this application be in the cause.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Peter Ngola Makau, the corporate legal officer of the Applicants' insurer sworn on even date. He contends that the insurer instructed the firm of Samuel Gitonga & Associates to handle this claim in the Magistrates Court on behalf of the Applicants. After the advocate duly informed him of the trial court's decision, it was apparent that the same was erroneous and irregular, and he advised the company to appeal against it. His advisory to the company was subjected to internal approvals in line with the company's decision-making policy. The management Committee of the company approved his recommendation after the lapse of the statutory 30 days period within which the Applicants were required to lodge the appeal. He has instructed their advocates to appeal against the said judgment and the appeal is weighty with high chances of success. The delay in lodging the appeal was caused by bureaucracies in the decision making process by his employer, noting that all decisions made by the company require ratification by their management committee. He verily believes that the stay of execution orders issued by the lower court lapsed on 16/2/2024. The Applicants stand to suffer loss as their goods are likely to be attached and sold by public auction if the decree is executed. If the decree is executed, the intended appeal will be rendered nugatory and the Applicants will suffer injustice and high prejudice. The Respondent may be financially unable to refund the decretal sum of Ksh.885,168 if the appeal succeeds and this will cause the Applicants loss of their money. The insurer is not only willing to offer security for costs but is also ready to satisfy the judgment of the court after the appeal is heard and determined. The Respondent will not be prejudiced because she will have security of the decretal sum in the case the Applicants' appeal is unsuccessful and she will enjoy the fruit of the judgment as the money will accrue interest.
3. The Respondent, Teresia Mwonthea Murungi opposed the application through her replying affidavit sworn on 14/3/2024. She avers that no appeal has been filed yet and the Applicants cannot seek stay on the basis that they intend to lodge an appeal. She is advised that the time within which the appeal was to be lodged has since expired and the Applicants should not have sought stay of the judgment since the court is yet to determine the prayer for leave to appeal out of time. She is further advised that the Applicants have not demonstrated sufficient reasons upon which the court can exercise its discretion in determining the prayer for leave to appeal out of time. The lower court granted the Applicants 30 days stay of execution after the expiry of which the Applicants decided to file this application to avoid paying the decretal sum. The Applicants have failed to show that they requested and paid for proceedings, and thus the application is an afterthought. She faults the Applicants for failing to support their reason for the delay with evidence, and in any case, since the insurance company was not a party to this case, it was incumbent upon the Applicants to file their appeal within time. She is advised that no decree has been extracted or attached to the application, hence the same is misconceived and it ought to be dismissed. The Respondent's bill of costs is set for taxation on 8/4/2024 and the decree and certificate of costs are yet to be extracted. She is advised that the court cannot at this point determine whether or not the appeal raises arguable issues or it has high chances of success because none has been filed. The Applicants' undertaking to offer security pending the determination of the appeal should not be determined at this stage since no appeal has been filed. The issue of whether she is able to refund the decretal sum cannot be determined in an application for leave to appeal out of time or in an application for stay pending an intended appeal. She will be greatly prejudiced if the application is allowed since the sum awarded as compensation in the judgment shall remain unpaid.



Analysis and Determination

4. The issues for determination are whether leave to appeal out of time and stay should be issued.

Leave to appeal out of time

5. The principles for consideration on an application for extension of time to appeal out of time are that, the power is discretionary but the applicants must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay are plausible, that the appeal is arguable and not frivolous and that the respondent will not be unduly prejudiced by the order being made. See *Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others* (2014) eKLR.
6. The Applicants have simultaneously sought for leave to appeal out of time and stay of execution, which is permissible and a productive use of precious judicial time.
7. This court finds that the application was filed timeously on 1/3/2024 as the judgment sought to be appealed against was made on 16/1/2024.
8. On the arguability or otherwise of the intended appeal, the grounds raised in the annexed memorandum of appeal fault the trial court for inter alia apportioning liability against the weight of the evidence, failing to consider the defence and awarding inordinately high general damages.
9. This court finds that the intended appeal is indeed arguable, which is not one which must necessarily succeed and neither is it for the court to go into the merits of the intended appeal.
10. This court is minded that the Applicants will suffer great prejudice of being condemned unheard and deems it fit to enlarge time to lodge the appeal out of time.

Stay of Execution

11. Order 42 Rule 6 of the *Civil Procedure Rules* empowers a court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided under Rule 6 (2) as follows:

“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 delay in filing the appeal in time has been attributed to the insurance company’s bureaucracies, which explanation this court finds plausible and satisfactory.
13. The Applicants’ real apprehension of loss of their money in the event of a successful appeal, to the Respondent, whose financial capability has not been established, cannot be wished away. That is what substantial loss entails.
14. The Applicants’ willingness to offer security for the due performance of the decree is appreciated.

Orders

15. Accordingly, for the reasons set out above, this court will allow the application dated 27/2/2024 on the following terms:-



1. The Applicants are granted leave to appeal out of time against the judgment delivered by Hon. D.W. Nyambu on 16/1/2024.
2. Stay of execution of the judgment and decree of the lower court is hereby granted.
3. The Applicants shall within 30 days of the date hereof pay to the Respondent Ksh. 300,000 and deposit the balance of the decretal sum of Ksh. 585,168 into an escrow account in the joint names of the advocates for the parties.
4. The Record of Appeal to be filed within sixty (60) days from the date hereof.
5. In the event of default of any of the aforementioned conditions, the stay hereby granted shall stand as discharged, and the Respondent shall be at liberty to execute.
6. In terms of Order 50 Rule 6 of the *Civil Procedure Rules*, the costs of this application shall be paid by the appellant to the Respondent.

Order accordingly.

DATED AND DELIVERED THIS 18TH DAY OF APRIL, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. B. Olunga for Applicants

Ms. Ntarangwi for the Respondent

