



Maitai v Silas (Suing as the personal representative of the Estate of Douglas Muchui – Deceased) (Miscellaneous Civil Application E047 of 2024) [2024] KEHC 5846 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5846 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL APPLICATION E047 OF 2024
EM MURIITHI, J
MAY 23, 2024**

BETWEEN

JOSEPH MAITAI APPLICANT

AND

MUNGATHIA SILAS (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF DOUGLAS MUCHUI – DECEASED) RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 3rd April 2024, brought under Order 22 Rule 22, Order 42 Rules 4 and 6, Order 51 Rules 1 and 3 of the *Civil Procedure Rules*, Sections 3, 3A and 95 of the *Civil Procedure Act* and all other enabling provisions of the law, the Applicant seeks:
 1. Spent
 2. That this Honourable Court be pleased to grant leave to the Intended Appellant/Applicant to appeal out of time against the Judgment of the Honourable Trial magistrate Hon. R.Ongira, in Tigania CMCC No. E070 of 2022 being Peter Mungathia Silas (Suing as the Personal Representative of the Estate of Douglas Muchui-Deceased) vs Joseph Maitai delivered on 27th November 2023.
 3. Spent
 4. That this Honourable Court be pleased to order a stay of advertisement, notification of sale by public auction and or any further dealings with the Applicant/Intended Appellant attached motor vehicle registration Number KDE 539 J and any other movable assets pending the hearing and determination of the application herein..



5. That this Honourable Court be pleased to order unconditional release of the unlawfully proclaimed and attached motor vehicles registration Numbers KDE 539J pending the hearing and determination of this application.
 6. That this Honourable Court be pleased to direct the Applicant/Intended Appellant to deposit a bank guarantee for the entire decretal sum in court.
 7. That M/S Bealine Auctioneers be ordered to tax their costs before the taxing master.
 8. Spent
 9. That the costs of this Application abide the outcome of the Appeal.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Joseph Maitai, the Applicant herein sworn on even date. He contends that the Respondent instituted this suit against the Applicant following a road traffic accident which occurred on or about 22/12/2022. He is dissatisfied with the judgment of the trial court awarding the Respondent Ksh.1,131,204 together with costs and interest which he intends to appeal against. As a result of the above, the Respondent has instructed M/S Bealine Kenya Auctioneers to proclaim, attach and cart away his movable assets being motor vehicle registration No. KDE 539 J. The Respondent's advocates have already written to his advocates calling for payment, failure to which they will proceed to sale the attached motor vehicle. The delay in filing the appeal has been occasioned by the delay in obtaining the typed proceedings and a certified copy of the impugned judgment. If execution proceeds, he stands to suffer irreparable harm, loss and prejudice, as his intended appeal which arguable with high chances of success, will be rendered nugatory. He is apprehensive that if the decretal amount, which is quite substantial, is paid to the Respondent, he may deal with it in a manner prejudicial to him, and the same might not be recoverable in the event of a successful appeal. There is imminent danger of execution, which will expose him to substantial loss and damage. He is ready, able and willing to deposit a Bank Guarantee from a reputable bank and/or deposit half the decretal sum in court as a condition for stay pending the hearing and determination of the intended appeal. The application has been made in good faith, without unreasonable delay, in the interest of justice and it will not occasion any prejudice to the Respondent.
3. The Respondent, Peter Mungathia Silas opposed the application through his replying affidavit sworn on 11/4/2024. He terms the application as a non-starter, an afterthought, frivolous, vexatious and an abuse of the court process, which is aimed at hoodwinking the court into granting the orders sought. The impugned judgment was delivered way back on 27/11/2023 and the Applicant was granted 45 days stay of execution. There has been inordinate delay in filing this application since the delivery of the impugned judgment more than 5 months ago, and the reason for that delay has not been properly explained. The Applicant was served with the bill of costs and a certificate of costs on 17/1/2024, but still opted not to appeal the same. The Applicant has all along been engaging his advocates with a promise to settle the decretal sum, but the same has elicited no fruitful results. He is a man of means who is able to refund the decretal sum in the highly unlikely event that the appeal succeeds and a bank guarantee is a means of denying him his shot at enjoying the fruits of litigation. The alleged intended appeal has no chances of success as the same was well hinged on the laid down principles of law. He continues to suffer since he has a great burden of taking care of the deceased's dependants and he is the sole bread winner, and the orders sought are aimed at forestalling justice and preventing him from enjoying the fruits of litigation. He urges the court to bring the litigation herein to an end by dismissing the application with costs.



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 court notes with concern that the judgment sought to be appealed against and the draft memorandum of appeal have not been availed, to enable the court gauge the arguability or otherwise of the intended appeal. It is averred that the impugned judgment was delivered on 27/11/2023 while the instant application was filed on 5/4/2024. That delay of approximately 5 months has been attributed to the unavailability of the typed proceedings and a certified copy of the judgment sought to be appealed against. This court accepts the reason proffered for that inordinate delay as plausible and satisfactory.
7. From the Respondent's response to the application, no prejudice has been disclosed.
8. For the reasons set out above, this court deems it fit to enlarge time to lodge the appeal out of time.

Stay of Execution

9. The test for applications for stay of execution is set out under Order 42 Rule 6 of the *Civil Procedure Rules*. The conditions that an Applicant has to meet and/or demonstrate for the court to grant stay of execution are as follows: -
 - a. substantial loss will result to applicant if stay is not granted; and
 - b. security is given by the Applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal;
 - c. and the application has been brought without unreasonable delay.

Substantial Loss

10. In money decrees, substantial loss is demonstrated by the apprehension that the Respondent may not be in a position to refund the decretal sums paid, in the event of a successful appeal. In the present case, the Applicant has expressed his fears of losing the decretal sum to the Respondent whose source of income is unknown. The Respondent maintains that he is a man of means and thus able to refund the entire decretal sum if the appeal is successful.

Security

11. The Applicant has indicated his willingness to offer security for the due performance of the decree in form of a Bank Guarantee, or deposit of half of the decretal sum in court. This Court considers that it would be fair to grant stay on condition that security is deposited and some reasonable amount is paid to the Respondent.



Undue Delay

12. The Court has already found above that the delay in the matter was for a period of 5 months which cannot be termed as manifestly unreasonable.

Orders

13. Accordingly, for the reasons set out above, this Court allows the application dated 3/4/2024 in the following terms: -
 1. The Applicant is granted leave to appeal out of time against the judgment and decree made in Tigania CMCC No. E070 of 2022.
 2. The court orders the unconditional release of the proclaimed and attached motor vehicle registration number KDE539J pending the hearing and determination of the appeal.
 3. M/S Bealine Auctioneers are hereby ordered to tax their costs before the taxing officer of the Court.
 4. Stay of execution of the judgment/decree of 27/11/2023 is hereby granted on condition that the Applicant pays to the Respondent Ksh.400,000 and deposit with the Court a Bank Guarantee for the payment of the balance of Ksh.731,204 within 30 days from the date hereof.
 5. The Record of Appeal to be filed within 60 days from the date hereof.
 6. In the event of default of any of the aforementioned conditions, the stay hereby granted shall lapse and be of no effect.
 7. The costs of this application shall abide the outcome of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 23RD DAY OF MAY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Adagala for the Applicant.

Mr. Kaba for Mr. Maranya for the Respondent.

