



**Muthomi & another v Mutwiri (Miscellaneous Civil Application E017 of 2024) [2024] KEHC 5842 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5842 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
MISCELLANEOUS CIVIL APPLICATION E017 OF 2024**

**EM MURIITHI, J**

**MAY 23, 2024**

**BETWEEN**

**SILAS MUTHOMI ..... 1<sup>ST</sup> APPLICANT**

**MARY WANJIKU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DICKENS MUTWIRI ..... RESPONDENT**

**RULING**

1. By a Notice of Motion under certificate of urgency dated January 15, 2024, brought under Sections 3A, 79G and 95 of the *Civil Procedure Act*, Article 159(2)(d) of the *Constitution*, Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6, Order 51 Rules 1 and 3 of the *Civil Procedure Rules* and all other enabling provisions of the law, the Applicants seek:
  1. Spent
  2. That this honorable court be pleased to grant leave to the applicants to appeal out of time against the Judgement/Decree of the Honourable LW Maina Muoti in Meru – SCC No. E199 of 2023 delivered on September 21, 2023.
  3. Spent
  4. That this Honorable Court be pleased to stay any further proceedings in Meru SCC No. E366 of 2023 being Dickens Mutwiri vs Directline Assurance Company Limited together with all consequential orders pending the hearing and determination of the application and the intended/proposed appeal herein.
  5. That as a condition for stay of execution pending the hearing and determination of this Appeal/intended appeal (as the case may be), 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 this Honorable Court allow the intended Appellants'/Applicants' to furnish the Court with reasonable security in the form of a Bank Guarantee.

6. That the costs of this Application abide the outcome of the intended Appeal.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Mary Wanjiku, the 2<sup>nd</sup> Applicant herein sworn on even date. She contends that the Respondent instituted this suit against the Applicants following a road traffic accident which occurred on or about 21/4/2023. They are dissatisfied with the judgment of the trial court awarding the Respondent Ksh.291,200 together with costs and interest which they intend to appeal against. The Respondent has since filed a declaratory suit against their insurer and unless stay of execution and leave to appeal out time are granted, they will suffer irreparable harm and loss. If execution proceeds, their intended appeal, which is arguable with high chances of success, will be rendered nugatory. They are apprehensive that if the decretal amount is paid to the Respondent, he will not be in a position to refund the same if the appeal is successful. Their insurer is willing to furnish the court with a Bank Guarantee from Family Bank as security for costs. They pray for the application, which has been made in good faith and without undue delay, to be allowed so that they can prosecute their intended appeal, as any prejudice that will be occasioned to the Respondent, if any, can be compensated with payment of costs.
3. The Respondent, Dickens Mutwiri opposed the application through his replying affidavit sworn on 13/2/2024. He terms the application as frivolous, malicious and meritless, as the Applicants have failed to demonstrate the substantial loss they stand to suffer if the orders sought are not issued. He further faults the Applicants for failing to reasonably and justifiably explain the reason for the delay in filing their appeal. He accuses the Applicants of filing their memorandum of appearance but failing to participate during trial, and urges the court to dismiss the application with costs. He urges that a bank guarantee does not constitute proper security as it is a mere guarantee and the decretal sum ought to be accruing interest.

### **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 Salat v Independent Electoral & Boundaries Commission & 7 others* (2014) eKLR.
6. The judgment sought to be appealed against was made on 21/9/2023 while the instant application was filed on 30/1/2024. That delay of approximately 4 months cannot be termed as inordinate and inexcusable.
7. On the arguability or otherwise of the intended appeal, the grounds raised in the annexed Memorandum of Appeal fault the trial court for awarding special damages of Ksh.41,200, future medical expenses of Ksh.50,000 without proof, general damages of Ksh.200,000 and non-consideration of the Applicant's submissions. This court finds that the intended appeal is 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.



8. From the Respondent's response to the application, no prejudice has been disclosed.
9. For the reasons set out above, this court deems it fit to enlarge time to lodge the appeal out of time.

### **Stay of Execution**

10. 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**

11. 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 Applicants have expressed their fears of losing the decretal sum to the Respondent whose source of income is unknown. The Respondent has not even attempted to rebut that apprehension by the Applicants, and the court considers that the Applicants have indeed demonstrated the likelihood of suffering substantial loss.

### **Security**

12. The Applicants have indicated their willingness to offer security for the due performance of the decree in form of a Bank Guarantee from Family Bank, which is a reputable financial institution. 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. The Court has also considered that the intended appeal, is squarely on quantum and since liability is not disputed, the Respondent will inevitably be awarded some amount of money, following the conclusion of the appeal.

### **Undue Delay**

13. The Court has already found above that the delay in the matter was for a period of 4 months which cannot be termed as unreasonable.
14. As to the prayer for stay of any further proceedings of the declaratory suit, this court, after carefully balancing the rights of the Respondent under the declaratory suit to enforce settlement of the decretal sum by the Applicants' insurer on the one hand, and the Applicants' undoubted right to appeal on the other hand, orders this appeal to be heard and determined first.

### **Orders**

15. Accordingly, for the reasons set out above, this Court allows the application dated 15/1/2024 in the following terms: -
  1. The Applicants are granted leave to appeal out of time against the judgment and decree made in Meru SCC No. E199 of 2023.



2. The proceedings in Meru SCC No. E366 of 2023 Dickens Mutwiri v Directline Assurance Company Limited together with all consequential orders are hereby stayed pending the hearing and determination of this appeal.
3. Stay of execution of the judgment/decreed of 21/9/2023 is hereby granted on condition that the Applicants pay to the Respondent Ksh.100,000 and deposit with the Court a Bank Guarantee for the payment of the balance of Ksh.191,200 within thirty (30) days from the date hereof.
4. The Record of Appeal shall 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 lapse and be of no effect.
6. 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. H. Kirimi for the Respondent.

