



REPUBLIC OF KENYA



**Miriti & another v Njeru (Miscellaneous Application
E073 of 2023) [2024] KEHC 5781 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5781 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION E073 OF 2023
LM NJUGUNA, J
MAY 15, 2024**

BETWEEN

FRANCIS NJUE MIRITI 1ST APPLICANT

MOLLY BRIDGET NJUE 2ND APPLICANT

AND

REGINA MUENI NJERU RESPONDENT

RULING

1. The applicant has filed a notice of motion dated 12th December 2023, being supported by the grounds set out on the face of the application as well as the facts deposed in the supporting affidavit thereof. The orders sought are as follows:
 - a. Spent;
 - b. That this honourable court be pleased to grant leave to the applicants/intended appellants to appeal out of time against the judgment of the trial court in *Embu CMCC No. E042 of 2020* delivered on 20th June 2023;
 - c. Spent;
 - d. That upon this honourable court granting leave to the applicants/intended appellants to appeal out of time, this honourable court be please to grant stay of execution of the judgment/decree of the honourable court in *Embu CMCC No. E042 of 2020* delivered on 20th June 2023 pending hearing and determination of the intended appeal;
 - e. That the honourable court be pleased to direct the applicants/appellants to deposit a bank guarantee for the entire decretal sum in court;
 - f. Spent; and



- g. That the costs of this application abide the outcome of the appeal.
2. It is the applicants' case that the respondent has commenced execution for the decretal sum and that if stay orders are not granted, they will be prejudiced since they have an arguable intended appeal. That they have delayed in filing the appeal because the court registry took long to avail to them a certified copy of the judgment for their perusal. That if the court denied them leave to appeal out of time, they will have been condemned unheard and their rights under articles 47, 50 and 159 of the Constitution and section 4 of the Fair Administrative Actions Act will have been denied. That if the orders sought are not granted, the appeal, which has high chances of success, will be reduced to an academic exercise. They argued that if the respondent is left to execute and the appeal is successful, it may be difficult for them to recover the decretal sum from the respondent. They offered security in the form of a bank guarantee for the full decretal sum.
 3. The respondent's advocate filed a replying affidavit in which he deposed that the application is calculated at denying the respondent enjoyment of the fruits of her judgment in *Embu CMCC No. E042 of 2020*. That the applicants have not demonstrated that the respondent would be unable to repay the decretal amount if the appeal succeeds. That they have not demonstrated that the respondent is in the process of executing the decree by annexing a proclamation to the application.
 4. He stated that the application has been brought 6 months after the impugned judgment and there is no justifiable explanation for this delay. It is also his argument that the applicants have not demonstrated their efforts to obtain a copy of the judgment from the court. He urged the court not to grant these equitable remedies sought since the application is an afterthought. That if the court would be inclined to grant the orders, it should do so on condition that the respondent deposits half of the decretal sum plus the assessed costs and interests in court within 14 days and the balance within a further 14 days.
 5. The parties informed the court that they were negotiating a settlement but the same was not forthcoming. The court directed them to file their written submissions but none of them complied.
 6. The issue for determination is whether the application meets the threshold for issuance of orders for stay of execution and leave to appeal out of time.
 7. In considering whether or not to grant stay of execution, the court is expected to look at the circumstances and test them against the provisions of the law before applying its discretion in the matter. On this prayer, I am guided by Order 42 Rule 6(2) of the Civil Procedure Act which provides:

“(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.”
 8. Following the trial court's decree issued on 05th September 2023, the respondent moved to execute for the decretal sum of Kshs.568,610/=. The applicants produced a copy of a warrant of attachment dated 29th November 2023, which is what probably prompted them to file the application herein. The impugned judgment was delivered on 20th June 2023. The applicants deposed that they will suffer substantial loss if the stay order is not granted as the respondent will proceed to execute for the decretal sum. No other detriment has been demonstrated. Execution is a lawful process that may only be



stopped by stay orders as was held in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR.

9. The application for stay was filed 6 months after the impugned judgment was delivered and the applicants stated that the delay was occasioned by the court registry in availing a certified copy of the judgment. However, they have not demonstrated their efforts to follow up on the certified copy of the judgment through a letter requesting for the same. An order for stay of execution may be granted on condition that the applicants provide security for performance of the decree, which the applicants have offered to provide.
10. On the issue of whether the court should grant the applicants leave to appeal out of time, the applicants must satisfy the court that the application for leave was brought timeously and without delay, but if there is delay then it is for good reason. They must also demonstrate that if the court does not grant the order sought then the applicant will suffer prejudice because the appeal makes an arguable case. This prayer is to be granted on a discretionary basis and may be denied where the court is of the view that there is no good reason why the appeal was not filed within time.
11. The timelines for filing of appeals are set under Section 79G of the *Civil Procedure Act* as follows:

“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.”
12. The application herein was filed 6 months after delivery of the impugned judgment. The applicant stated that the delay in filing the appeal was caused by a delay in the court registry in issuing them with a certified copy of the judgment. As earlier stated, there is no proof that since the judgment was delivered, the applicants were following up on a certified copy of the judgment.
13. The court is not an alien to the fact that sometimes delay in filing the appeal may occur and it will be guided by the proviso in the above-cited provision of the *Civil Procedure Act* in applying its discretion on the matter, depending on the reasons given for the delay in appealing. In the case of *Edith Gichungu Koine Vs Stephen Njagi Thoitih* (2014) eKLR the court held thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but not 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.”
14. It is already stated that there is a 6-month delay in filing the application and for the reasons provided. The applicants had an opportunity to appeal within the stipulated timelines but failed to do so. They have not demonstrated that they made sufficient efforts to follow up on the certified copy of the judgment for purposes of the appeal. The applicants have also produced a copy of the memorandum of appeal which challenges both liability and quantum findings by the trial court.
15. In consideration of both prayers for stay of execution and leave to appeal out of time, Article 48 of the *Constitution* of Kenya 2010 guarantees every person right of access to justice. Further, Article 50(1) of the *Constitution* provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another



independent and impartial tribunal or body. I am therefore inclined to grant the orders only on the strength of the Constitution.

16. This court also endeavours to balance the rights of the respondent to enjoy the fruits of her judgment with the rights of the applicants to be heard on appeal. I am reminded of the role of the court in administration of justice as stated in the case of *Kamuti v Kariuki* (Miscellaneous Civil Cause E001 of 2023) (2023) observed that:

“The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out unless for a good reason.”

17. In the end, having considered the pleadings and relevant laws, I find that the application has merit and it is hereby allowed with orders as follows:

- a. The applicant is hereby granted leave to appeal out of time against the judgment of the court in *Embu CMCC No. E042 of 2020* delivered on 20th June 2023 and the same to be filed within 21 days from the date of this ruling;
- b. Once filed, the appeal to be prosecuted within 120 days after filing of the same;
- c. Execution of the judgment and subsequent orders in *Embu CMCC No. E042 of 2020* delivered on 20th June 2023 is hereby stayed pending hearing and determination of the appeal on condition that the applicants deposit the full decretal sum into a joint interest-earning account in the names of both the advocates for the applicant and the respondent within 30 days of this ruling, failing which the respondent may proceed to execute; and
- d. Costs of this application shall abide the outcome of the appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF MAY, 2024.

L. NJUGUNA

JUDGE

..... for the 1st Applicant

..... for the 2nd Applicant

..... for the Respondent

