



REPUBLIC OF KENYA



**Maina & another v Mwakio (Miscellaneous Civil Application  
E044 of 2023) [2024] KEHC 6930 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6930 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
MISCELLANEOUS CIVIL APPLICATION E044 OF 2023**

**GMA DULU, J**

**MAY 9, 2024**

**BETWEEN**

**REUBEN MAINA ..... 1<sup>ST</sup> APPLICANT**

**MALIK BOEKI COMPANY LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PAMPHIL MWAKIO ..... RESPONDENT**

**RULING**

1. Before me is an application by way of Notice of Motion dated 28<sup>th</sup> July 2023 filed through counsel Kimondo Gachoka & Company Advocates under Section 1A, 1B, 3 and 3A, 79G and 95 of the [Civil Procedure Act](#) (Cap.21), and Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 and 3 of the [Civil Procedure Rules](#).
2. The prayers in the application are as follows:-
  1. (Spent).
  2. That this court be pleased to grant leave to the applicant/intended appellant to appeal out of time against the judgment of the Magistrate in Voi CMCC No. E100 of 2022 and judgment delivered on 28.4.2023.
  3. That the court be pleased to stay execution of the judgment and decree in Voi CMCC No. E100 of 2022 and judgment delivered on 28.4.2023 pending the hearing and determination of this application and the intended appeal herein.
  4. 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 Ltd or deposit the entire amount in a joint account.



5. That the costs of this application abide the outcome of the intended appeal.
3. The application has grounds on the face of the Notice of Motion that a judgment had been delivered in the sum of Kshs. 205,500/= plus costs; that the delay in filing appeal was due to late receipt of copy of judgment; that if the orders sought are not granted the applicant is likely to suffer substantial loss and damage.
4. The application was filed with a supporting affidavit sworn on 28<sup>th</sup> July 2023 by Nannungi Mariat Legal Counsel of Directline Assurance Company Ltd the insurers of the applicant, which amplifies the grounds and annexes a draft Memorandum of Appeal.
5. The application is opposed through a replying affidavit sworn by the respondent on 10<sup>th</sup> August 2023 in which it was deponed that no sufficient reason was given for the delay in filing appeal, and also that the respondent stands to suffer great prejudice if the application is granted.
6. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Kimondo Gachoka & Company Advocates for the applicants, as well as the submissions filed by Njoroge Mwangi & Company for the respondent.
7. This is an application for enlargement of time to file appeal as well as an application for stay of execution of judgment or decree pending determination of appeal. It is opposed.
8. Under Section 79G of the *Civil Procedure Act* (Cap.21), the statutory period for filing appeals from subordinate courts to the High Court is 30 days. However, under the same section of the statute this court has discretion to enlarge time to file appeal, if satisfied that there are reasonable grounds to do so.
9. The delay in filing the application was two (2) months, after the period of 30 days for filing appeal had lapsed. In my view, that was not inordinate delay. I will thus enlarge time to file appeal, within ten (10) days from the date of this ruling.
10. With regard to the request for stay of execution, it is governed by the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules*. I have already found that the application was filed without unreasonable delay.
11. Will the applicant suffer substantial prejudice if the stay orders sought are not granted? In my view, the applicant will suffer substantial prejudice only if the stay is not granted, and the entire decretal amount is paid to the respondent, and is not repaid if the appeal succeeds. As the appeal is primarily on quantum of damages, I will grant stay of execution orders subject to payment by the applicant of part of the decretal amount.
12. With regard to provision of security, the applicant has offered to deposit the decretal amount in a joint bank account, or to provide a Bank Guarantee. In my view, the part payment by the applicant of the decretal amount will serve as sufficient security.
13. I thus allow the application in the following terms:-
  - i. I enlarge time to file appeal herein. The appeal will be filed within ten (10) days from today.
  - ii. I grant stay of execution of judgment or decree herein pending hearing and determination of the intended appeal, on condition that the applicant pays the respondent through counsel part of the decretal amount Kshs. 90,000/= within 45 days from today.
  - iii. In default of (i) or (ii) above, the stay of execution order herein granted will automatically lapse and be of no effect.



iv. The costs of this application will abide the decision in the appeal.

**DATED, SIGNED AND DELIVERED THIS 9<sup>TH</sup> DAY OF MAY 2024 IN OPEN COURT AT VOI VIRTUALLY.**

**GEORGE DULU**

**JUDGE**

In the presence of:-

Alfred/Trizah – Court Assistants

Mr. Ndolo for applicant

Mr. Kazungu for respondent

