



REPUBLIC OF KENYA



**Marion & 3 others v Macharia (Miscellaneous Civil Application
E032 of 2022) [2024] KEHC 5447 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5447 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
MISCELLANEOUS CIVIL APPLICATION E032 OF 2022**

J WAKIAGA, J

MAY 2, 2024

BETWEEN

SAMUEL GICHIRI MARION 1ST APPELLANT
QASIM AND YAHYA LTD 2ND APPELLANT
DAVID KAMAU IRUNGU 3RD APPELLANT
**JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND
TECHNOLOGY 4TH APPELLANT**

AND

BENSON MURIUKI MACHARIA RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 15th July 2022, the Applicants moved the Court for leave to file an Appeal out of time and for stay of execution of the Judgement and Decree of issued in Muranga CMCC No 119 of 2020 pending the hearing and determination of the intended Appeal.
2. The said application was supported by the annexed affidavit sworn by David Kamua Irungu in which it was deposed that the Judgement of the trial Court was delivered in their absence and that they came to learn of the same on 19th June 2022 upon perusal of the Court file.
3. It was contended that being aggrieved by the said Judgement, it took them time to instruct their Advocates to Appeal against the same on 6th July 2022 and therefore the need for leave noting that the intended Appeal was merited with an overwhelming chance of success. It was deposed further that the Appeal will be rendered nugatory should the Respondent be paid the decretal sum as he will not be in a position to refund the same should the Appeal succeed.



4. It was deposed further that the Applicants were willing to furnish reasonable security including but not limited to a Bank guarantee for the whole decretal sum.
5. The Respondent filed a Preliminary Objection and grounds of opposition in which it was contended that there was no evidence in support of the reasons for the delay to file the Appeal and that the Appellant from the record of proceedings of the lower Court had caused numerous adjournments and was only intent on occasioning prolonged delays.
6. The grounds were supported by an affidavit sworn by the Respondent in which it was deposed that it was only fair and just that he be allowed to enjoy the fruits of his Judgement since the intended Appeal was not arguable nor had any chance of success. It was finally deposed that should the application be allowed, then he should be awarded cost.
7. Directions were issued on the hearing of the application by way of written submissions and on behalf of the Applicant it was submitted that the Court has jurisdiction to grant the Order sought under Order 42 of the Civil Procedure as was stated in the case of *Global Tours Ltd v* and that the sole question was whether it was in the interest of justice to order for stay.
8. It was contended that the draft Memorandum of Appeal raised issues that merit the Courts consideration, being whether the trial Court considered the issue of stare decisis in arriving at the award. It was submitted that an arguable Appeal does not mean one which will succeed as was stated in *Judicial Commission of Inquiry into the Goldenberg affairs & 3 others v Kilach* [2003] eKLR and *Danis Mogambi Mangare v AG*.
9. It was contended that the Appeal will be rendered nugatory should the Respondent proceed with execution and that the purpose of stay was to preserve the subject matter as was stated in *Butt v Rent Restriction Tribunal* [1982]KLR 417, *Stanley Karanja Wainaina v Ridon Anyangu Mutubwa* [2016] eKLR and *Housing finance Company of Kenya v Sharok Kher Moham ed Ali Hirji & Another* [2015] eKLR.
10. It was submitted that the Bank guarantee offered by the Applicant was an appropriate security as was stated in the cases of *Water Resources Management Authority v Krystalline Salt limited* [2018] eKLR and *Shanzu Beach Resort limited v Crown Marble & Quartz Ltd* [2020] eKLR.
11. On behalf of the Respondent, it was submitted that the Memorandum of Appeal had the name of David Nyaga Gichangi who was a complete stranger to the Respondent and was not privy to the original suit and that the Appeal was not arguable. It was contended that the Applicant had not given any explanation for the gross delay and did not meet the requirements set out in Order 42 Rule 6 as was stated in *Antoine Ndiaya v African Virtual University* [2015] eKLR and *Nicholas kiptoo Arap Salat V IEBC and 7 others*.
12. It was submitted further that the Applicant had not demonstrated any substantial loss the same was likely to suffer and that mere allegation of the same was not enough as was stated in *David Kipkoskei Kimeli v Titus Barmasai* [2019] eKLR and further it had not been demonstrated that the Respondent will not be able to refund the decretal sum in support of which reliance was placed on *Kenya Red Cross Society v Mbondo Katheke Mwanja* [2019] eKLR.
13. It was contended that the Applicant had not met the requirements of Section 79G of the *Civil Procedure Act* as the same had not provided sufficient and good cause for not filing the Appeal in time as was stated in *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR.



Determination

14. There are two limbs to the application herein, that is leave to file an Appeal out of time and stay of execution pending the determination of the intended Appeal.
15. Leave to file an Appeal out of time is provided for under Section 79G of the *Civil Procedure Act* to the extent 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. The Court in deciding whether sufficient and good grounds have been established as per the case of *Edith Gichungu Koine v Stephen Njagi Thoitih* [2014] eKLR should consider the period of delay, the reason for the delay, the degree of prejudice to the Respondent if the application is granted and whether the matter raises issues of public importance.
16. In this matter the Applicants contend that the delay was caused by the fact that the Judgement was delivered in the absence of the parties and that they only learned of the Judgement when the time had since lapsed. This matter of fact has not been contested by the Respondent and therefore find that the Applicant has established sufficient and good ground to enable the Court exercise discretion in their favour which I hereby do, by granting leave to the Applicant to file and serve Appeal out of time.
17. On the second limb of the application, it is noted that there is no Appeal yet on record upon which the Court may exercise the jurisdiction under Order 42 and would therefore decline to grant stay of execution at this stage.
18. In the final an analysis I hereby grant leave to the Applicant to file and serve Appeal out of time, which Appeal shall be filed and served within the next seven days from the date herein, with cost being in the cause and it is ordered.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF MAY 2024

J. WAKIAGA

JUDGE

In the presence of :

Ms Wangu for the Respondent

Mr. Njoroge for the Applicant

Jackline – Court Assistant

