



**Nduruhu v Gude (Miscellaneous Application E064 of 2023)
[2024] KEHC 6841 (KLR) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6841 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
MISCELLANEOUS APPLICATION E064 OF 2023**

GMA DULU, J

MAY 8, 2024

BETWEEN

FREDRICK MWENDA NDURUHU APPLICANT

AND

MWAMANENO HAMISI GUDE RESPONDENT

RULING

1. Before me is an application by way of Notice of Motion dated 3rd November 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 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 the court be pleased to grant leave to the applicant/intended appellant to appeal out of time against the judgment of the Principal Magistrate in Voi Civil Suit No. E042 of 2021 and judgment delivered on 10th August 2023.
 3. That there be a stay of execution of the judgment and decree in Civil Suit No. E042 of 2021 and judgment delivered on 10th August 2023 pending hearing and determination of this application and intended appeal.
 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 appellant/applicant be and is hereby ordered to deposit half of the decretal sum to the respondent or any other conditions this court may deem fit.
 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 an award of Kshs. 759,540/= was made by the trial court; that the 30 days statutory period for filing appeal had lapsed; and that the application was filed without unreasonable delay.
4. The application was filed with a supporting affidavit sworn by Lilian Githinji as Legal Counsel of Directline Insurance Company Ltd on 3rd November 2023 amplifying the grounds of the application, and which annexed the draft Memorandum of Appeal.
5. The application has been opposed through a replying affidavit sworn on 20th November 2023 by the respondents, in which it was deponed that the judgment was delivered in the presence of counsel for the applicants; that no good reason has been given for delay in filing appeal; that on 15th November 2023 the respondent's initiated process of filing declaratory suit; and that the application herein is an afterthought.
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 respondents.
7. Having considered the application, and submissions on both sides, I am of the view that the applicant has explained the delay, which is not inordinate.
8. With regard to the request for leave to appeal out of time, it is governed by the provisions of Section 79G of the *Civil Procedure Act*. The statutory period for filing appeals to the High Court from subordinate courts is 30 days. However, this court has powers to enlarge that time. I will enlarge that time by 10 days from today.
9. With regard to the request for stay of execution, such requests are governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, especially Rule 6(2). There is no requirements for such applications before the High Court for the court to consider chances of success of the appeal, in granting stay of execution.
10. As I stated earlier above in this ruling, the application was filed without unreasonable delay.
11. Turning now to the issue of likelihood of the applicant suffering substantial loss, I have perused the grounds of appeal, and they are primarily on quantum of damages. I thus find that the applicant is likely to suffer substantial loss only if the entire amount is paid, and on success of the appeal, the respondent is not able to refund the money paid. I will thus grant conditional stay of execution, on payment of part of the decretal amount.
12. With regard to provision of security, the applicant has offered to deposit part of the decretal amount. In my view, the part payment of the decretal amount serves as adequate security.
13. Consequently, I order as follows:-
 - a. I enlarge time to file appeal herein. The appeal will be filed within ten (10) days from today.
 - b. I grant stay of execution of judgment or decree herein pending hearing and determination of appeal as requested, provided the applicant pays to the respondent through counsel, part of the decretal amount of Kshs. 300,000/= within 45 days from today.
 - c. In default of (a) or (b) above, the stay orders granted herein will automatically lapse and have no effect.

SUBPARA d.



The costs of this application will follow the determination of the appeal to be filed.

DATED, SIGNED AND DELIVERED THIS 8TH DAY OF MAY 2024 AT VOI IN OPEN COURT VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistant

Mr. Ndolo for applicant

Mr. Kazungu for respondent

