



**Nyaga v Njue & another (Miscellaneous Application  
48 of 2023) [2024] KEHC 4800 (KLR) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4800 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
MISCELLANEOUS APPLICATION 48 OF 2023**

**LM NJUGUNA, J**

**MAY 8, 2024**

**BETWEEN**

**ROBERT MBOGO NYAGA ..... APPLICANT**

**AND**

**PURITY WANJA NJUE ..... 1<sup>ST</sup> RESPONDENT**

**LUCY WANJIRU MWAURA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant filed a notice of motion dated 08<sup>th</sup> September, 2023, being supported by the grounds set out on its face and the facts deposed in the supporting affidavit thereof. The orders sought are as follows:
  1. Spent;
  2. That the honourable court be pleased to issue temporary stay of execution in Siakago CMCC No. E011 of 2020 pending hearing and determination of this application;
  3. That the honourable court be pleased to issue stay of execution in Siakago CMCC No. E011 of 2020 pending hearing and determination of the intended appeal;
  4. The applicant be granted leave to appeal out of time, the judgment delivered on 07<sup>th</sup> July 2023 and the consequential orders emanating therefrom; and
  5. The costs of this application be provided for.
2. The applicant deposed that the intended appeal has high chances of success since the general damages awarded by the trial court were inordinately high. That there is an inadvertent and excusable delay in filing the appeal because the applicant was indisposed and was not able to instruct counsel within good



- time. That the delay in appealing is not inordinate, hence he prayed that he be allowed to appeal out of time.
3. In opposition of the application, the respondents filed 2 replying affidavits through their advocates. Counsel for the 1<sup>st</sup> respondent stated that the application is an abuse of the court process since the applicant has filed a similar application before the trial court and the same is awaiting determination. That the 2-months delay in filing the appeal has not been explained, hence he cannot benefit from the equitable remedies sought.
  4. He urged the court to treat the applicant as one who has approached the court of equity with unclean hands since he failed to inform the court that he has already moved the trial court seeking similar orders. He annexed copies of the similar application filed before the trial court. That the applicant is on a forum-shopping expedition and he is denying the 1<sup>st</sup> respondent from enjoying the fruits of her judgment. He urged that if this court will find it fit to grant the stay of execution orders, the same should be balanced with an order that the full decretal sum be deposited into a joint interest earning account held by the advocates of the parties herein.
  5. Counsel for the 2<sup>nd</sup> respondent deposed that the applicant moved the trial court seeking the same orders sought herein and that the matter was yet to be determined, a fact that he has failed to bring to the attention of this court. That it is suspect that the applicant was indisposed and unable to instruct his counsel to file an appeal on time yet he managed to instruct counsel to file a similar application before the trial court. He produced copies of the notice of motion filed before the trial court, the interim orders issued pending determination of the same and grounds of opposition to the application. He stated that the applicant is undeserving of the equitable remedies sought and he urged the court to dismiss the application.
  6. The court directed the parties to file their written submissions and they all complied. The 1<sup>st</sup> respondent had indicated to the court that she would not be filing submissions but rather, she would associate herself with the submissions by the 2<sup>nd</sup> respondent.
  7. The applicant relied on the cases of *Stanley Kangethe Kinyanjui v. Tony Ketter & others (2013)* eKLR and *Raila Odinga v. IEBC & 4 Others (2013)* eKLR as cited in the case of *Shabbir Ali Jusab v. Anaar Osman Gamrai & Another (2014)* eKLR and urged the court to allow him to appeal out of time since he was indisposed and unable to instruct his advocate on time.
  8. The 2<sup>nd</sup> respondent submitted that there is a delay in filing the appeal but there is no evidence tendered by the applicant for the delay, except for the fact that he says he was indisposed. That the respondents have annexed to their replying affidavits, copies of a similar application filed before the trial court, showing that the application was filed 4 days after the impugned judgment was delivered. That since the time the similar application was filed before the trial court and when this application was filed, there is an unexplained period. She urged the court to dismiss this application.
  9. The issue for determination is whether the applicant deserves to be granted the orders sought.
  10. Stay of execution orders may be sought when the court is satisfied of the parameters set out in Order 42 Rule 6(2) of the *Civil Procedure Rules* 2010 as follows:
    - (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.

11. The applicant seeks stay of execution pending appeal as well as leave to appeal out of time. His reason for delay in appealing is that he was indisposed and was not able to instruct his advocate accordingly within good time. This is his position in the application, the supporting affidavit and the written submissions. The respondents, through the replying affidavits, stated that the impugned judgement was delivered on 07<sup>th</sup> July 2023. That vide an application dated 11<sup>th</sup> July 2023, 4 days after delivery of the judgment, the applicant sought orders for stay of execution pending appeal. They produced copies of the said proceedings including temporary stay orders granted by the trial court. The applicant made no mention of these similar proceedings pending before the trial court. As at the time of filing this application, the said application was still pending determination before the trial court.

12. According to Order 42 Rule 6(1) of the *Civil Procedure Rules*, the reliefs sought herein may be sought either from the court that passed the impugned decree or from the court to which the appeal of the impugned decree lies. The provision does not mean that the application can be made in both courts at the same time. It states:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

13. In light of the circumstances, it would amount to abuse of the court process to grant stay of execution since the matter was already placed before another court bearing jurisdiction to determine it. In any event, the trial court’s finding on stay pending appeal may end up being the subject of an appeal before this very court. Therefore, given that the same order has been sought before a subordinate court, this court cannot and will not entertain this application to that extent.

14. As to whether the applicant should be allowed to appeal out of time, this order may be made based on the discretion of the court while considering certain factors. 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.”

15. There is a delay in appealing and the applicant has stated that he was indisposed, therefore not able to instruct counsel in good time. He has not offered any explanation to corroborate his indisposition at the time. I also note that he was granted interim stay pending determination of the application before the trial court. I am not persuaded that the applicant’s indisposition is sufficient ground to grant leave to appeal out of time. However, the order may be granted purely in the interest of justice and in the



spirit of Article 48 of *the Constitution* of Kenya 2010 which guarantees every person right of access to justice.

16. Therefore, I find that the application has partially succeeded and prayer (4) of the application is hereby granted as prayed. The appeal to be filed within 14 days from today.
17. Prayer 3 is hereby disallowed.
18. Costs of the application shall be to the respondent.
19. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 08<sup>TH</sup> DAY OF MAY, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondents

