



**Nyangunu v Kahara & Gichuru (Administrator of the Estate of the Late Samauel Kahara Gichuru)
(Civil Miscellaneous Application E43 of 2024) [2024] KEHC 4696 (KLR) (3 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL MISCELLANEOUS APPLICATION E43 OF 2024**

FR OLEL, J

MAY 3, 2024

BETWEEN

JOHN NJOROGE NYANGUNU APPELLANT

AND

**ROBERT GACHURU KAHARA & MILCAH WANGECHI GICHURU (THE
ADMINISTRATOR OF THE ESTATE OF THE LATE SAMAUUEL KAHARA
GICHURU) RESPONDENT**

RULING

A. Introduction

1. The Application before this court for determination is the notice of motion application dated 19th February 2024 brought pursuant to the provisions of Article 159 of *constitution*, Section 1A, 1B, 3A 79G and 95 of the *Civil procedure Act*, Order 42 rule 6 of the Civil procedure Rules and all other enabling provisions of law. The Applicant seeks the following prayers, that;
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. The draft Memorandum of Appeal attached hereto be deemed as duly filed and adopted by this Honourable court
 - e. The Honourable court be pleased to order an interim stay of execution of the Judgment/decree in Mavoko MCCC/E1062/2022 pending the hearing and determination of this Appeal
 - f. That costs of this Application be provided for.



2. The Application is supported by the grounds on the face of the said application and the supporting affidavit of one Kenneth Murithi dated 19.02.2024, Wherein he depones that he was a legal officer working at Britam Insurance Kenya Ltd, the insurers of the Applicant herein. In November 2023, they had undertaken departmental restructuring within the insurance company, and unfortunately a number of files including this file had been misplaced and consequently inadvertently not acted on. They later discovered that the Judgment in Mavoko MCCC/ E1062/2022 had been delivered on 14th November 2023, and their client condemned to settle Kshs.1,542,320/=. Upon reviewing the file, they had seen the need to Appeal as no liability had been apportioned as against the other suit motor vehicle involved in the said accident, but needed leave to Appeal out of time.
3. The delay in filing this appeal was premised on an honest mistake and was highly regrettable. The appeal proposed to be filed raised serious triable issues and it was only just and fair to allow the prayers sought. Further there was need to also stay the decree of the primary suit as it was highly likely that the respondents would initiate execution proceedings and that would render the Appeal proposed to be filed to be rendered nugatory. No prejudice would be occasioned to the respondents if the orders sought were granted.
4. The application is opposed by the respondents, who did file their replying affidavit, sworn by their advocate Kisiangani Edddah dated 15.03.2024. He did aver that this application was an afterthought, constituted an abuse of the process of the court and was aimed at denying the respondents the fruits of their judgment. The explanation proffered for the delay in filing this Appeal was weak and the grounds of appeal raised were also frivolous and did not present any serious question for the Appellate court determination. Further the applicants had not demonstrated any substantial loss they would suffer if the orders of stay of execution were not granted. The applicants were also faulted for not offering any security as is required in law. The respondents thus prayed that this application be dismissed with costs.
5. The applicants did file a Supplementary affidavit in response thereto and emphasized that this application was not filed as an afterthought, was not frivolous and nor was it their intention to delay and/or stop the respondents from benefiting from the judgment delivered. The proposed appeal raised valid issues for determination and it was important to preserve the subject matter to avoid the risk of the intended Appeal being a mere academic exercise. The applicants further proposed to be allowed to deposit half of the decretal sum being Kshs.787,386/= in court within 60 days as security for the Appeal.

B. Analysis & Determination

6. I have carefully considered the Application and corresponding affidavits thereto on record. Order 50 rule 6 of the civil procedure Rules does provide that;

“where a limited time has been fixed for doing any act or taking any proceedings under these rules or by summary notice or by order of the court, the court shall have powers to enlarge time upon such terms(if any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”
7. The basis for applying for extension of time was discussed in the Court of Appeal case of *Susan Ogutu Oloo & 2 Others v Doris Odindo Omolo* (2019) eKLR where it was held:-

“In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The



guiding principles on the issue of extension of time was laid out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC* (2014) eKLR Sup Ct Application No 16 of 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted”.

8. In *Imperial Bank Ltd (in receivership) & Ano v Alnasir popat and 18 others* the court observed that;

“some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercised its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; public interest issues implicated in the appeal or intended appeal and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration it must be borne in mind that it is not really the role of a single judge to detriment definitely the merits of the appeal. That is for the full court if and when it is ultimately presented with the appeal.”

9. The decree sought to be appealed against was issued on November 14, 2023 and the application for extension of time was filed on 19.02 2024, which is a period of about two (2) months excluding the period when time does not run in December into January. This period cannot be said to be inordinate. Further the applicant has adequately explained the reason as to why there was a delay, which reason though suspect, is plausible. Under the circumstance it is therefore proper to grant the Applicant leave to file their appeal out of time.

10. Stay of execution pending appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules*. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant. See *Amal Hauliers Limited v Abdulnasi Abukar Hassan* (2017) eKLR & *Butt v Rent Tribunal* (1982) KLR 417.

11. The court having granted the Applicant leave to appeal out of time will not deal with the first limb of undue delay. On the likelihood of suffering substantial loss, and security of the appeal, The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See *Attorney General v Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd v Kibiru & another (Supreme)*; *Mukuma v Abuoga* (1988) KLR 645.

12. The law is that where the Applicant succeeds, he/she should not be faced with a situation in which he would find himself unable to get back his money. Likewise, the Respondent who has a decree in his



favour should not, if the applicant is eventually unsuccessful in his intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. See Court of Appeal in *Ndubiu Gitahi v Warugongo* (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100.

13. The Appellants contention that there were two motor vehicles involved in this accident, and that liability was not properly apportioned is a valid ground of Appeal which the court will have to determine on merits. The respondents too have not filed an affidavit of means to prove that indeed they are capable of refunding the decretal sum, if paid out and the primary decree is overturned. Finally, the applicants have also offered to deposit part of the security into court to cover for their obligation under the decree challenged. I do therefore find that the application for stay pending Appeal is merited.

Disposition

14. Taking all relevant factors into consideration, especially the fact that the appeal is both on issue of quantum and liability, I do grant the following orders that;
- a. That the Applicant is granted leave to Appeal out of time and will file and serve the Memorandum of Appeal within the next 14 days.
 - b. An order of stay of execution of the decree issued in Mavoko MCCC / E1062/2022 is hereby issued pending the hearing and determination of the Appeal filed on condition that the Appellant do deposit half of the decretal sum (Kshs.787,386/=) in court within the next 45 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
15. The costs of this Application will be in the cause.
16. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 3RD DAY OF MAY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 3RD DAY OF MAY, 2024

In the presence of: -

No appearance for Applicant

No appearance for Respondent

Sam Court Assistant

