



**Simiyu v Okello (Miscellaneous Civil Application E073 of 2024)
[2024] KEHC 5833 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5833 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E073 OF 2024**

RE ABURILI, J

MAY 23, 2024

BETWEEN

MICHAEL WASILWA SIMIYU APPLICANT

AND

SHARON AKINYI OKELLO RESPONDENT

RULING

1. The applicant Michael Wasilwa Simiyu vide his application dated 22nd March, 2024 seeks from this court two main prayers namely: leave to appeal out of time from the judgment and decree in Winam Senior Principal Magistrates' Court Civil Suit No. E102 of 2022 rendered on 21/12/2023; and that there be stay of execution of decree in the said matter wherein he is the defendant judgment debtor.
2. The grounds upon which the application is predicated are that after delivery of judgement, the applicant deliberated on whether to appeal or not and that it was only on 15th March 2024 that instructions to appeal were issued to the advocate, by which time the time for appeal had lapsed; that the delay is not inordinate and that the intended appeal has high chances of success. Further, that the respondent is a person of straw hence the applicant shall suffer irreparably and that the appeal shall be rendered nugatory if the decretal sum is paid out to her and the appeal succeeds as it will be impossible to recover from her the decretal sum. The applicant also stated that he is willing to furnish security for the due performance of decree on terms as may be ordered by this court.
3. The application is supported by an affidavit sworn by counsel for the applicant Mr. Duncan Otieno Njoga reiterating the grounds, annexing draft copy of the intended memorandum of appeal and the letter of instructions to appeal the judgment from the instructing client, the insurance company.
4. The respondent filed a replying affidavit vehemently opposing the application on both limbs and deposing that on the date of judgment, both counsel for the parties were present hence the delay is inordinate and inexcusable. It was deposed that post judgment negotiations took place and the



applicant and respondent even recorded a consent on costs but that the applicant ignored the consent and tried to reduce the general damages award and that after the respondent declined is when the applicant rushed to this court, which application is intended to deny the respondent the fruits of her judgment lawfully obtained.

5. parties' advocates engaged in post judgment negotiations and that it was not until the said negotiations for reduction of the award made to the respondent to Kshs 2000,000 an all-inclusive figure collapsed that the applicant instructed counsel to appeal by which time the time for filing of the appeal was already spent. Further, that in any event, the delay is not inordinate as the period between 21st December and 13th January is excluded from computation of time.

Determination

6. I have considered the application which was argued orally and the issues herein are whether the applicant has established justification for delay in lodging appeal? If above in affirmative is stay of execution of lower court order pending appeal merited? And what is the order as to costs?

7. On leave to appeal out of time, Section 79G of the *Civil Procedure Act* provides:

“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 good and sufficient cause for not filing the appeal in time.”

8. The applicant's request to file appeal out of time may only be accepted if he satisfies this court that he had good and sufficient cause for not filing the appeal out of time. The supreme court of Kenya in the case of *County Executive of Kisumu vs County Government of Kisumu & others* [2017] eKLR citing with approval its earlier decision in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others* Application No. 16 of 2014 [2014] eKLR reiterated the considerations to be made in such a case to be as follows:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”



9. The applicant’s reason for the delay in lodging the appeal is that, after the judgment was delivered in the month of December 2023, the parties were engaged in post judgment negotiations where the applicant wanted the damages awarded to be reduced to Kshs 200,000 all-inclusive but the negotiations collapsed when the respondent declined the offer hence the need to appeal arose.
10. Further, that the delay is not inordinate in view of the fact that from 21st December 2023 and 13th January 2024, time stopped running.
11. I have considered the arguments for and against the prayer for leave to appeal out of time. No doubt, the main issue to be canvassed on appeal is on quantum of damages payable. Whereas the applicant seeks for payment of Kshs 200,000 all-inclusive of costs and interest, the respondent has stuck on the damages awarded which are Kshs 300,000 plus costs and interest.
12. The delay in filing the appeal is not inordinate as the period between 21st December and 13th January is when time stops running. That being the case, this is a suitable case where the court should accord the applicant the opportunity to ventilate his grievances on appeal.
13. In the end, I find the prayer for leave to appeal out of time to be merited. It is hereby allowed.
14. On the prayer for stay of execution of decree pending appeal, Order 42 Rule 6(2) of the *Civil Procedure Rules* provides:
 - “(2) No order for stay of execution shall be made under sub rule (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.”
15. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the court of Appeal gave guidance on how a court should exercise discretion in an application for stay of execution and held that:
 - “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.



5. On stay of execution pending appeal, the court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
16. On whether the application has been filed expeditiously, I have already pronounced myself on the prayer for leave to appeal out of time and allowed the applicant to file the appeal out of time.
17. On whether substantial loss will be suffered by the applicant if stay is not granted, I find that the applicant should not be left with a bare appeal should the said appeal succeed on quantum on the contested amount awarded as the respondent has not demonstrated that she is in a position to refund the entire amount if the appeal succeeds and she has already been paid, which amount will include her advocate’s costs. That situation would render the appeal nugatory.
18. On whether security for due performance of decree has been offered, the Court retains the discretion to order what security to be deposited having regard to the circumstances of each case, even if no such security is offered.
19. In the end, I find that the prayers for leave to appeal out of time and stay of execution of decree in Winam SPM CC No. E102 of 2022 pending hearing and determination of the intended appeal are merited and the same are hereby allowed on the following conditions:
 - a. That the appeal shall be filed and served within ten days of the date hereof.
 - b. There is hereby granted a stay of execution of decree in Winam SPMCC E102 of 2022 pending the hearing and determination of the intended appeal.
 - c. That the applicant shall pay to the respondent through her advocates on record the sum of Kshs 200,000 only being part of the decretal sum and which the applicant intended to pay the respondent in full settlement of decree during the post judgment negotiations, within 21 days of this ruling.
 - d. The balance of the decretal sum shall await the hearing and determination of the appeal.
 - e. The applicant shall pay costs of this application assessed at Kshs 10,000 to the respondent within 21 days of today.
 - f. In default of any of the conditions above, the leave granted and stay issued shall lapse and the respondent shall be at liberty to execute decree for recovery of the whole of the decretal sum.
20. This file is closed.
21. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF MAY, 2024

R.E. ABURILI

JUDGE

