



**Stepal Builders Company Limited & another v Mwaniki alias Margret  
Mori Mwaniki alias Margeret Mori Mwaniki alias Margeret Mori Mwaniki  
alias Mori Mwai Mwaniki alias Margret Muri alias Mori Mwaniki (Civil  
Appeal E076 of 2023) [2024] KEHC 6022 (KLR) (21 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6022 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E076 OF 2023**

**RM MWONGO, J**

**MAY 21, 2024**

**BETWEEN**

**STEPAL BUILDERS COMPANY LIMITED ..... 1<sup>ST</sup> APPELLANT**

**PAUL MUTISYA MULI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MARGARET MORI MWANIKI ALIAS MARGRET MORI MWANIKI ALIAS  
MARGERET MORI MWANIKI ALIAS MARGERET MORI MWANIKI  
ALIAS MORI MWAI MWANIKI ALIAS MARGRET MURI ALIAS MORI  
MWANIKI ..... RESPONDENT**

**RULING**

1. The applicant's motion dated 7<sup>th</sup> September, 2023 seeks the following orders:
  1. That this Honourable Court be pleased to enlarge the time within which the Applicants may file an Appeal against the Judgment delivered on 21<sup>st</sup> June 2023 in Wang'uru CMCC No. E016 of 2020.
  2. That this Honourable Court grant leave to the Applicants to file their Appeal in terms of the annexed Memorandum of Appeal marked 'A'.
  3. That consequently, this Honourable Court be pleased to grant stay of execution of the judgment and decree delivered on 21<sup>st</sup> June 2023 in Wang'uru CMCC No. E016 of 2020 pending the hearing and determination of the Applicants' intended Appeal in this matter.
2. The application is based on the grounds on the face of the application and the supporting affidavit of Christopher Mukhovi. In the supporting affidavit, the applicant, avers, inter alia, that;



- i. That Judgment in Wang’uru CMCC No. E016 of 2020 was delivered on the 21<sup>st</sup> June, 2023 and the court awarded the Respondent Kshs.1,200,000/=in general damages.
  - ii. That being dissatisfied with the terms of the judgment, they instructed their lawyers to file an Appeal in terms of the draft Memorandum of Appeal marked 'A'.
  - iii. That the delay in filing the said Appeal was on account of inadvertence owing to the time taken to consider various opinions and get the requisite administrative approvals before deciding to appeal the judgment.
  - iv. That the applicants Advocates have applied for certified copies of the proceedings and judgment for purposes of appeal in the said matters and are therefore ready to prosecute the appeal on behalf of the Applicants.
  - v. That following the delivery of judgment, the court granted the Applicants 30 day stay of execution which has since lapsed; and that no prejudice will be suffered by the respondent,
  - vi. That the applicants are willing to furnish security in the form of a bank guarantee as a condition for the grant of stay of execution pending the hearing and determination of the intended appeal.
3. The respondent opposes the application through her replying affidavit in which she avers, inter alia:
1. That the application is geared to delay the enjoyment of the fruits of my successful litigation, and thus should be dismissed with costs, as no reasonable explanation for the delay has been given.
  2. That the Appellants/Applicants insurer despite being fully aware that the judgment in Wang’uru PMCC No. E016 of 2020 was delivered on June 21, 2023, waited until September 5, 2023, about seventy-seven (77) days later, to advise the firm of Kiare, Kariuki and Associates to appeal against the same.
  3. That the Appellants/Applicants have failed to demonstrate what substantial loss they would suffer if the prayer for stay is not allowed.
  4. The parties filed written submissions as directed, which I have taken into account herein.

### **Issues for Determination**

5. Only two issues are for determination:
  1. Whether leave to appeal out of time should be granted.
  2. Whether stay of execution should be granted.

### **Analysis and Determination**

6. The application seeks orders for: enlargement of time for purposes of filing an appeal out of time and stay of execution pending the hearing and determination of the matter.

### **Whether leave to appeal out of time should be granted**

7. The applicants urge the court to enlarge the time within which they may file an appeal against the Judgment delivered on 21st June 2023 in Wang’uru CMCC No. E016 of 2020. They are the judgment



debtors in the amount of Ksh.1,200,000/= and submit that the intended appeal is arguable, has high chances of success and this court has unfettered discretion in granting leave to file an appeal out of time.

8. The applicable law for enlargement of time is Section 95 of the *Civil Procedure Act* and order 50 rule 6 of the *Civil Procedure Rules*. In *Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2015] eKLR, the Supreme Court held that the discretion to extend time is indeed unfettered, and stated:

“It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”

9. The applicants depose that the delay in filing the said appeal was on account of inadvertence owing to the time taken to consider various opinions and get the requisite administrative approvals before deciding to appeal the judgment.
10. The respondent deposes that the Appellants/Applicants insurer despite being fully aware that the judgment in Wang’uru PMCC No. E016 of 2020 was delivered on June 21, 2023, waited until September 5, 2023 to file the intended appeal, without good reason.
11. The question is whether this court considers the delay of 3 months as reasonable. I think the delay is not excessive nor are the reasons for the delay unreasonable. In addition, the appeal is certainly arguable.

#### **Whether stay of execution should be granted**

12. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:

“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.”

13. In *RWW v EKW* [2019] eKLR, the purpose of a stay of execution order pending appeal, was considered in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

14. The Applicants submit that they will be prejudiced if this court was to deny them orders for stay of execution as the Respondent is likely to obtain warrants of attachment. The applicants submit that they are willing to furnish a bank guarantee or any security as this court orders.



15. The Respondent's submission is that the Court is not bound by the type of security offered by the Applicants. The respondent urged for the half of the decretal sum to be released to them and the other half to be deposited in a joint interest earning account.
16. In *James Wangalwa v Agnes Cheseto* [2012] eKLR Gikonyo J, said that security should be availed as a sign of good faith and that it is the court that decides the nature of the security that should be given.
17. Having considered all the foregoing I think that this is a case where leave to appeal out of time should be granted.

### **Disposition**

18. In light of the foregoing, I determine as follows:
  - 1) The prayer for stay of execution is allowed.
  - 2) Leave to appeal is granted on the following conditions that:
    - a) The appellant shall deposit the decretal sum in court within 30 days of today's date.
    - b) The draft Memorandum of Appeal shall be deemed to be duly filed thirty days from today's date.
    - c) The Record of Appeal shall be filed and served within 45 days of today's date and,
    - d) Thereafter, submissions on the appeal shall be filed within fifteen (15) days of filing the Record of Appeal.
  - 3) In default of compliance with any timeframe, execution may proceed.
  - 4) The appeal shall be heard expeditiously.
  - 5) Mention before Deputy Registrar on 26<sup>th</sup> June 2024 for directions on hearing during the August Service Week.
19. Orders accordingly.

**DATED AT KERUGOYA THIS 21<sup>ST</sup> DAY OF MAY 2024**

.....  
**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. Awuor for Applicant
2. No representation - Ngare for Respondent
3. Court Assistant, Murage

