



**Kairithia v RM (Minor) Suing through his father and next friend Kepha Nyakenyanya Mogaka
(Miscellaneous Application 1 of 2024) [2024] KEHC 7129 (KLR) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7129 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS APPLICATION 1 OF 2024**

TA ODERA, J

JUNE 3, 2024

BETWEEN

DAVID MWORIA KAIRITHIA APPLICANT

AND

**RM (MINOR) SUING THROUGH HIS FATHER AND NEXT FRIEND KEPHA
NYAKENYANYA MOGAKA RESPONDENT**

RULING

1. The applicant filed the application dated 5.1.24 on 5.1.24 seeking the following orders:
 1. Spent.
 2. Spent
 3. Leave to the applicants to file appeal out of time from judgment in Kisii MCCC No. E173 of 2022 dated 15.11.2023.
 4. Stay of execution of the judgment plus costs and interests pending hearing and determination of the intended appeal.
 5. As a condition for the said stay, the applicant be allowed to deposit security in the form of a bank guarantee issued by Family Bank Limited.
 6. Costs of the application.
 - a. The application is based on the grounds that the advocate in personal conduct of the matter went on maternity leave without informing the firm Kimondo Gachoka & Co advocates who represents the applicant herein of the judgment in the lower court.
 - b. That they became aware of the Judgment when they were served with a demand of the decretal sum and costs.



- c. That the Bill of costs was not served upon them.
- d. That the delay was further occasioned by the court registry which could not trace the file in good time and typing of the judgment and is thus excusable.
- e. That the applicant was aggrieved by the said judgment and intends to appeal against it on quantum.
- f. That's the intended appeal is meritorious with high chances of success.
- g. The applicant is ready and willing to provide a bank Guarantee pending hearing.
- h. That if the application is not allowed then the applicant will suffer substantial loss.

The application is based on the affidavit of Everlyne Ogato Advocate in which she reiterated the issues raised on the grounds of the application and annexed copy of the demand letter from the advocate of the respondent(E0-1-4).

Respondent filed a replying affidavit of Caroline Jepkorir Kibiwot advocate who is in conduct of the matter and she deponed that the applicant has not satisfied conditions for granting stay of execution since loss has not been established, there was inordinate delay in filling the application and the grounds cited for obtaining extension of time are untruths and misrepresentation also that the appeal is not arguable. Further that no injustice will be suffered by the applicant if the appeal is not allowed and that the application is meant to delay and deny the respondent from enjoying fruits of the judgment.

Also that the bank guarantee offered by the applicant is not a suitable security since the bank is not a party to the suit and so the decretal sum cannot be recovered from it.

In the alternative she deponed that the applicant should pay respondent half of the decretal sum and deposit the remaining half in a joint interest earning account in the name of both advocates on record.

I have considered the able submissions by both counsel and the cite cases and the law.

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

Order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) provides as follows:

- (1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.

- (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.”

2. On leave to appeal out of time, it is clear that the applicant delayed to file the intended appeal by one and a half months as the judgment was delivered on 15.11.23 and the application was filed on 5.1.24. The applicant says that the delay was caused by the advocate who was in conduct of the matter who did not inform their office of the judgment. However, the said advocate has not been named. The applicant also says that the registry also delayed by failing to retrieve the file in good time and also delayed supply of the copy of the judgment. There is no certificate of delay from the court administrator to support this contention. In *Rajesh Rughani v Fifty Investments Limited & another* [2016] eKLR it was held follows: “*Rajesh Rughani v Fifty Investments Limited & another* [2016] eKLR stated as follows: “In *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR this court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation.” The applicant seems to be economical with the truth in this matter. Though the draft memorandum of appeal raises an arguable issue of quantum there is no ground established as to why the appeal was not filed within time. It is trite law that justice delayed is justice denied and a decree holder is entitled to enjoy the fruits of his judgment. I agree with the respondent that the intended appeal is an afterthought meant to delay the execution of the judgment.

Since the prayer for leave to appeal out of time has failed then I need not delve into the issue of stay of execution. The application is devoid of merit and I proceed to dismiss it with costs to the applicant.

T.A ODERA

JUDGE

3.6.24

Delivered Virtually in open Court in the Presence of:

Kitindio: Hold brief for Chirchir for respondent

N/A for appellant /applicant

Oigo: Court assistant.

