



Mutinda v Muthini (Suing as legal representative of the Estate of the Late Athanas Kaloki Muthini) (Miscellaneous Application 123 of 2024) [2024] KEHC 7302 (KLR) (19 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7302 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION 123 OF 2024**

**FR OLEL, J
JUNE 19, 2024**

BETWEEN

COSMAS MUTINDA APPELLANT

AND

JULINA NDUNGE MUTHINI (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE ATHANAS KALOKI MUTHINI) RESPONDENT

RULING

A. Introduction

1. The Application before this court is the Notice of Motion application dated 15.05.2024 brought pursuant Section 3A, 79G of the [civil procedure Act](#), Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6, Order 51 Rule 1& 3 of the [Civil Procedure Rules](#), Article 159(2)(a)&(d) of the [constitution of Kenya](#) and all other enabling provisions of law. The Applicant seeks the following prayers, that;
 - a. Spent
 - b. That this honorable court be pleased to grant leave to the Applicant to lodge an Appeal and file a memorandum of Appeal out of time against the judgment and decree of the Honorable D.N. Sure, Principal Magistrate, in Kangundo PMCC NO E094 of 2021 dated and delivered on 26th March, 2024.
 - c. Spent.
 - d. That this Honourable court be pleased to grant a stay of execution of the Judgment/ decree issued by of the Honorable D.N. Sure, Principal Magistrate, in Kangundo PMCC NO E094 of 2021 dated and delivered on 26th March, 2024, pending the hearing and determination of the intended Appeal.



- e. That this Honorable court allows the Applicants security to be in the form of a Bank guarantee from the Family Bank.
 - f. Spent.
 - g. That the costs of this Application abide the outcome of the Appeal.
2. The Application is supported by the grounds on the face of the said application and the supporting affidavit of one Cosmas Mutinda dated 13.05.2024 wherein he deposed that judgment had been delivered in the absence of the parties, and they had learnt of the same after time to Appeal had lapsed. Upon review of the said judgment, they were desirous to prefer an Appeal as against the same on both grounds that liability was wrongly arrived at, and the quantum awarded was high. The application was made in good faith and the respondent would not suffer any prejudice should the orders sought be allowed. Finally, it was also deposed that they were willing to provide a bank guarantee as security for the decretal sum appealed against.
 3. The application is opposed by the respondent, who did file her replying affidavit dated 06.05.2024. She averred that she had a valid decree of Kshs.2,787,402.00/= and had extracted warrants of execution and instructed Betabase auctioneers to enforce the same. She was therefore opposed to any orders of stay of execution being granted as that would deny her the right to enjoy the fruits of the judgment delivered in her favour. She urged the court to allow execution to proceed as she was a person of means and would be in a position to refund the amount paid out in the event, the appeal was successful.
 4. The applicants were clearly indolent and merely sprang into action by the consequential execution proceedings that woke them up from their slumber. The appeal as filed had no merit as the trial Magistrate had properly evaluated the evidence tendered and arrived on the correct decision. The respondent further deposed that the applicant had not made out a strong case for the court to exercise discretion in their favour and had not proved that they would suffer substantial loss, if the decree was settled. The application as filed was therefore unmerited and the same was fit for dismissal.

B. Analysis & Determination

5. I have carefully considered the Application and corresponding affidavits thereto on record. Order 50 rule 6 of the [civil procedure Rules](#) does provides 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.”
6. 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”.

7. 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 ventilate 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 determine definitely the merits of the appeal. That is for the full court if and when it is ultimately presented with the appeal.”

8. The applicant in this matter did depone that judgment was delivered in their absence and were desirous to appeal as against the same. The delay in this matter is basically about two weeks and undoubtedly the reasons advanced for the delay are valid. This being a *afresh* appeal the appellants have a right to have their appeal heard on merit especially on the issue of quantum awardable. This right to has to be balanced with the respondent's right to quick dispensation of justice and to enjoy the fruits of her judgment.

9. The court therefore has to balance the two contrasting rights and is guided by the provisions of Article 159(2)(d) of the *Constitution* and Section 1A and 1B of the *Civil Procedure Act* in administering justice. The focus being on substantive justice, rather than procedural technicalities, and the just, efficient and expeditious disposal of cases. At this point the court appreciate the sentiments expressed by the High Court in *John Gachanja Mundia v. Francis Muriira Alias Francis Muthika & Another* [2016] eKLR that:

“..... However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in the Constitution as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief.”

10. I do therefore allow the Applicant leave to file his Appeal out of time and grant him leave to do so within 14 days of delivery of this ruling.

11. On the second limb, 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 Abdunasi Abukar Hassan* (2017) eKLR & *Butt v Rent Tribunal* (1982) KLR 417

12. 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 her 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.

13. 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 Gitabi v Warugongo* (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100.
14. Leave to Appeal has been granted herein. The respondent has alleged that she is in a position to refund the decretal sum if paid out, but did not file an affidavit of means to prove the same. The decretal sum is substantial and if paid out, there is real likelihood that the same may not be recovered and as a result the applicant will suffer substantial loss. The applicant has also offered to provide a bank guarantee to cover as security of the Appeal.

Disposition

15. Taking all relevant factors into consideration, I allow this Application herein on the following terms;
 - a. The Appellant is granted leave to file his Appeal out of time, and the same is to be filed within the next 14 days from the date of delivery of this ruling.
 - b. The Appellant/Applicant do pay the respondent Kshs.1,000,000/= being part payment of the decretal sum and also provide a bank guarantee for the balance of the decretal sum, which guarantee will be specific to this Appeal, and shall be valid for the entire Appeal period, until its determination.
 - c. This condition is to be met within 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.
16. The costs of this Application will be in the cause.
17. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF JUNE, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 19TH DAY OF JUNE, 2024.

In the presence of:-

No appearance for Appellant

Mr. Munguti for Respondent

Sam Court Assistant

