



**Njagi v Wakagwe (Miscellaneous Civil Case E008 of 2024)  
[2024] KEHC 7042 (KLR) (14 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7042 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
MISCELLANEOUS CIVIL CASE E008 OF 2024  
FN MUCHEMI, J  
JUNE 14, 2024**

**BETWEEN**

**SAMUEL NG'ANG'A NJAGI ..... APPLICANT**

**AND**

**GEORGE KIMANI WAKAGWE ..... RESPONDENT**

**RULING**

1. The application dated 23<sup>rd</sup> January 2024 seeks for orders of leave to file an appeal out of time against the judgment in Thika Small Claim Court SCCCOMM No. E1018 of 2022 delivered on 15<sup>th</sup> May 2023. The applicant further seek for orders of stay of execution in respect of the said judgment pending the hearing and determination of the intended appeal.
2. The respondent opposed the application through a Replying Affidavit sworn 23<sup>rd</sup> February 2024.

**Applicant's Case**

3. The applicant states that judgment in Thika SCCCOMM No. E1018 of 2022 was delivered on 15<sup>th</sup> May 2023 and being aggrieved with the said judgment, the applicant is desirous to lodge an appeal against the said judgment but the statutory period within which to file an appeal already lapsed. The applicant states that he instructed the firm of Messrs Marai Mwaura & Co. Advocates, his former advocates to lodge an appeal within the stipulated timelines but they inadvertently failed to do so. The respondent proceeded and executed a decree and warrants of attachment dated 19<sup>th</sup> September 2023 which were issued to Chador Auctioneers. The applicant states that he came to learn of the impending execution upon being served with an application dated 1<sup>st</sup> December 2021 seeking breaking orders filed by the respondent through Chador Investments Auctioneers.
4. The applicant is apprehensive that the respondent will execute the decree and sell his household goods which will render the intended appeal nugatory.



5. The applicant avers that he has an arguable appeal with overwhelming chances of success. He further states that no prejudice shall be suffered by the respondent which cannot be compensated by way of damages.

### **The Respondent's Case**

6. The respondent opposes the application on the premise that it is misconceived, vexatious, an afterthought and an abuse of the court process. The respondent further argues that the application is res judicata as the issues raised were determined by a court of competent jurisdiction.
7. The respondent states that on 15<sup>th</sup> May 2023, the learned trial magistrate in Thika Small Claims Court No. E1018 of 2023 rendered judgment in his favour in the sum of Kshs 231,400/-. On 19<sup>th</sup> September 2023, the respondent states that his advocates extracted, executed a decree and warrants of attachment and issued them to Chador Auctioneers which were served on the applicant's advocates on record, M/s Marai Mwaura & Company Advocates. The warrants were further re-issued on 16<sup>th</sup> January 2024.
8. In execution of the decree on 30<sup>th</sup> September 2023, the auctioneers visited the applicant's premises for proclamation and met the applicant. Upon the lapse of seven (7) days of proclamation, the auctioneers visited the applicant's premises to effect attachment but were unsuccessful as the applicant denied them access as was stated in the auctioneer's supporting affidavit of Eliud Chai Wambu in the application dated 1<sup>st</sup> December 2023.
9. The respondent thus states that between the period after the judgment was delivered on 15<sup>th</sup> May 2023 through subsequent process of decree and warrant extraction and execution, the applicant was aware that there no appeal filed by his advocates and he did nothing to bar the execution of the decree and warrants despite having all reasonable opportunity to do so.
10. The respondent argues that the applicant slept on his rights to appeal within the stipulated time and his application is just an afterthought and mere delay tactic aimed to deny the respondent the fruits of his judgment.
11. The respondent states that the intended appeal lacks any chances of success for it fails to address what apparent error the honourable trial court undertook that would ultimately overturn the judgment. Furthermore, it is the cardinal duty of the applicant as a client to follow up proceedings with his counsel and he cannot therefore say that his former advocates acted negligently yet he has not presented any evidence of a complaint against the said advocates to the Advocates Disciplinary Committee. Nevertheless, the applicant has not satisfied the requirement of depositing the decretal amount in court as performance of the decree. Thus, the respondent urges this court to order the applicant do deposit the decretal sum of Kshs 231,400/- in court in the event the court allows the current application.
12. The respondent avers that execution is already underway and the applicant shall not suffer any prejudice. Further, the application is misconceived and has been overtaken by events.
13. The applicant filed a Further Affidavit dated 12<sup>th</sup> April 2024 and reiterates what he deposed in his supporting affidavit. The applicant further states that the issues raised are not res judicata as the current application seeks stay of execution of the judgment in Small Claims Case No. 1018 of 2022 delivered on 15<sup>th</sup> May 2023. Additionally, the applicant states that he has deposited the decretal amount in court pursuant to the court orders dated 26<sup>th</sup> January 2024.



## The Applicant's Submissions

14. The applicant relies on Section 79G of the *Civil Procedure Act* and the cases of *Salat v Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR; *Paul Wanjobi Mathenge v Duncan Gichane Mathege* (2013) eKLR; *Henry Mukora Mwangi v Charles Gichina Mwangi* Civil Appeal No. 26 of 2024; *Mwangi v Kenya Airways Ltd* (2003) KLR 486 and *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Appl. No. 255 of 1997 (unreported) and urges the court to exercise its discretion in his favour and extend time within which he can file his appeal. The applicant submits that failure to file the appeal in time was not intentional but was due to the inaction by his former advocates in failing to lodge the appeal despite him instructing them to do so. The applicant further submits that although it is his duty as a litigant to diligently follow on his matter, he urges the court not to visit the mistakes of his advocates on him. To support his contentions, the applicant relies on the decision in *CFC Stanbic Limited v John Maina Gitbaiga & Another* [2013] eKLR.
15. The applicant further relies on the case of *Machira t/a Machira & Co. Advocates v East Africa Standard* [2002] eKLR and submits that he shall suffer substantial loss as the decretal sum and costs stands at Kshs 286,600/- which is quite significant for him.

## The Respondent's Submissions

16. The respondent submits that judgment was delivered on 15<sup>th</sup> May 2023 and the applicant was granted 30 days to appeal, but failed to comply. On 19<sup>th</sup> September 2023, four months down the line, the respondent proceeded to extract the decree and warrants of attachment against the applicant. It is further argued that the applicant does not deserve stay of execution of the judgment as he excessively slept on his rights. Further, on 30<sup>th</sup> September 2023, the respondent submits that his duly appointed auctioneers proceeded to the applicant's premises for proclamation and met the applicant. The auctioneers returned to the applicant's premises after 7 days to effect attachment but they were unsuccessful as the applicant denied them access to the premises.
17. The respondent relies on Order 42 Rule 6 of the *Civil Procedure Rules* and the cases of *Visbram Ravji Halai v Thornton & Turpin* Civil Application No. Nai 15 of 1990 [1990] KLR 365 and *Selestica Ltd v Gold Rock Development Ltd* (2015) eKLR and submits that the applicant is not deserving of the stay orders as he was aware that his advocates did not file an appeal since he was served with the judgment notice and the subsequent process of decree and warrant extraction and execution yet the applicant chose to do nothing to stop execution.
18. The respondent further submits that the applicant did not give plausible reasons on the reason for delay as there was a series of events that took place succeeding the judgment and the time lapse cannot be rectified by the applicant stating that his advocates did not act in good time. The respondent argues that the applicant has a duty to follow up on his case with his advocates and he would have been alert the moment he realized that execution had commenced in September 2023.
19. The respondent argues that granting stay of execution to the applicant 8 months after the judgment would be prejudicial to him as he followed the due process in achieving the fruits of his judgment and further would encourage an indolent applicant who never took the judgment seriously.
20. The respondent relies on Section 79G of the *Civil Procedure Act* and the case of *Republic v Kenya Anti-Corruption Commission & 2 Others* [2009] eKLR and submits that the applicant exhibited unreasonable delay in filing the application as judgment was delivered on 15<sup>th</sup> May 2023. The respondent further argues that the applicant has not proved to the court what steps he took the moment he realized that his advocates did not act in his best interests. The applicant did not present



any evidence of a complaint against the said advocates at the Advocates Disciplinary Committee thus justifying the fact that the applicant is colluding in falsehoods in an attempt to mislead the court and delay the process.

21. The respondent further relies on the case of *Itute Ingu v Ismael Mwakavi Mwenda* (1994) eKLR and submits that the reasons of mistake of the counsel ought to be interrogated by looking into the nature or quality of the mistake.
22. Relying on the cases of *Nicholas Kiptoo arap Korir Salat v IEBC & 7 Others* [2014] eKLR and *Stanley Kaboro Mwangi & 2 Others v Kanyamwi Trading Company Limited* (2015) eKLR, the respondent submits that the applicant's reason that his advocates did not lodge an appeal in good time does not amount to a satisfactory reason. The respondent take is that litigants have the right to approach court on their own and assert their position in their cases when they feel their representatives are not advancing their cases right. It was further argued that ignorance of the law is no defence. Therefore, the respondent submits that the applicant cannot use that as an exonerating factor so as to appeal out of time. Further, there is no evidence as to what the applicant did to cure the advocates' inaction within time.
23. The respondent submits that the appeal lacks any chance of success for it fails to address what apparent error the honourable trial court undertook that would ultimately overturn the judgment. The respondent further states that the grounds of appeal do not demonstrate an arguable appeal that raises triable issues with high chances of success.
24. The respondent states that he took all the steps to finalize on the judgment issued in his favour and he incurred further costs in pursuing execution of the decree. The respondent submits that justice must come to an end and entertaining an indolent party get his rights would amount to injustice on the other party.

### **Issues for determination**

25. The two main issues for determination herein are:-
  - a. Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;
  - b. Whether the applicant has met the prerequisite for grant of stay of execution pending appeal;

### **The Law**

#### **Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;**

26. Section 79G of the *Civil Procedure Act* states:-

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 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.
27. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicant must satisfy the court that that he has good and sufficient cause for



filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

28. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.

29. Similarly in the case of *Paul Musili Wambua v Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

30. Bearing in mind the foregoing principles, it is noted that judgment herein was delivered on 15<sup>th</sup> May 2023 and the applicant filed the current application on 23<sup>rd</sup> January 2024. This is approximately eight (8) months outside the time limited for filing an appeal. The applicant has attributed the delay in filing his appeal to his former advocates failing to lodge an appeal yet he instructed them to do so within the stipulated time. The applicant appeals to the court not to visit the mistakes of his advocate upon him.

31. Whereas it is true that mistakes of an advocate should not be visited on a litigant, it is also correct to state that suits belong to the parties not their advocates. Thus where a litigant has instructed an advocate in a matter, he or she has an obligation to follow up on instructions given to ensure that they were executed and executed in good time. This principle was enunciated in the Court of Appeal in *Habo Agencies Limited v Wilfred Odhiambo Musingo* (2015) eKLR where the court stated:-



It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.

32. Similarly in *Bi-Mach Engineers Limited v James Kaboro Mwangi* (2011) eKLR, the court reiterated the duty of an applicant to follow up on instructions given to an advocate and expressed itself as follows:-

The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up on the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy.

33. The applicant has not produced any proof of what steps he undertook after instructing his advocates to lodge an appeal. That notwithstanding, the respondent has stated that his duly appointed auctioneers on 30<sup>th</sup> September 2023, visited the applicant at his premises for proclamation and they met the applicant. It is not in dispute that the auctioneers returned to the applicant's premises after seven days to effect attachment but the auctioneers were unsuccessful as the applicant denied them access. The applicant in his affidavit deposes that he learnt of execution when the respondent filed an application for breaking orders on 1<sup>st</sup> December 2023. Evidently, the applicant is being untruthful as he never contested the fact that he was aware of the judgment and execution as early as 30<sup>th</sup> September 2023 when the auctioneers visited his premises. Even with the knowledge of execution, the applicant chose not to do anything, Thus it is evident that the applicant slept on his rights of appeal. It is therefore my considered view that the applicant has not given any plausible reasons for the delay in filing the appeal.

34. I have perused the draft Memorandum of intended Appeal as well as the judgment of the court below. Evidently the appeal does not raise pertinent issues of law. As such, I find that the applicant has not established to the satisfaction of the court why time should be enlarged to enable him file his appeal.

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the *Civil Procedure Rules* for stay of execution pending appeal.

35. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-

1. "No appeal or second appeal shall operate as a stay of execution or proceedings 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 orders set aside.
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 1<sup>st</sup> 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.



36. Thus under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), an applicant should satisfy the court that:
1. Substantial loss may result to him/her unless the order is made;
  2. That the application has been made without unreasonable delay; and
  3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
37. Substantial loss was clearly explained in the case of [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR:-
- “No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the [CPR](#). This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
38. The applicant states that he stands to suffer substantial loss as the respondent will execute the judgment and decree as he has already extracted a decree and warrants of attachment.
39. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show that execution shall irreparably affect him or alter the status quo to his detriment therefore rendering the appeal nugatory. It is therefore my considered view that the applicant has not attempted to demonstrate that he stands to suffer substantial loss.

**Has the application has been made without unreasonable delay.**

40. Judgment was delivered on 15<sup>th</sup> May 2023 and the applicant filed the instant application on 23<sup>rd</sup> January 2024. It has taken the applicant eight (8) months between the date judgment was delivered in the trial court and the time when he filed the instant application. It is therefore my considered view that the delay of 8 months is inordinate and inexcusable. It is notable that during the delay period, the respondent did not make any effort to settle the decree.

**Security of costs.**

41. The purpose of security was explained in the case of [Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others](#) [2014] eKLR the court stated:-
- “The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the [Civil Procedure Rules](#) acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.



42. Evidently, the issue of security is discretionary and it is upon the court to determine the same. Pursuant to the court's orders issued on 26<sup>th</sup> January 2024, the applicant states that he deposited the decretal sum of Kshs 231,000/- in court but did not provide evidence of compliance of the deposit order issued by the court on 26<sup>th</sup> January 2024.
43. It is trite law that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR the court stated:-
- The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”
44. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondents their right of enjoying their judgment. Upon perusal of the memorandum of appeal, the grounds therein do not raise any arguable points of law.
45. Consequently, it is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal.
46. Accordingly, I find that this application dated 23<sup>rd</sup> January 2024 lacks merit and is hereby dismissed with costs.
47. It is hereby so ordered.

**RULING DELIVERED, DATED AND SIGNED AT THIKA THIS 14<sup>TH</sup> DAY OF JUNE 2024.**

**F. MUCHEMI**

**JUDGE**

