



**Ndungu v Irungu (Miscellaneous Application E094 of 2023)  
[2024] KEHC 8688 (KLR) (15 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8688 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS APPLICATION E094 OF 2023  
SM GITHINJI, J  
JULY 15, 2024**

**BETWEEN**

**GEORGE NDUNGU ..... APPLICANT**

**AND**

**JAMES MUKUHA IRUNGU ..... RESPONDENT**

**RULING**

1. This ruling relates to the Applicant’s Notice of Motion dated 20/7/2023 seeking the following orders; -
  1. Spent.
  2. Spent.
  3. That this honourable court be pleased to order a stay of execution of the judgment of the Honourable Senior Principal Magistrate’s Court at Kilifi in CMCC No. E100 of 2021 delivered on 13.6.2023 by the Honourable S.D Sitati (SRM) pending the hearing and determination of the intended appeal.
  4. That this honourable court be pleased to grant the Applicant leave to file an appeal out of time.
  5. That as a condition for stay of execution pending the hearing and determination of this appeal/ intended appeal, this honourable court be pleased to direct that the applicant/appellant be and is hereby ordered to provide/issue security for the entire decretal sum/amount in the form of a Bank Guarantee to be issued by Family Bank Limited.
  6. That the honourable court be pleased to give directions on the appeal.
  7. That costs of this application abide the outcome of the appeal.
2. The application is premised on the grounds on the face of it and the supporting affidavit of George Ndungu, the applicant herein sworn on 20/7/2023. The applicant’s case is that he wishes to appeal



against the judgment of Hon. S.D. Sitati (SRM) delivered on 13/6/2023 in Kilifi PMCC E100 of 2021 but the permitted time to do so has since lapsed. The Applicant stated that the delay in filing the appeal was occasioned by unavailability of the typed judgment in good time. The Applicant is apprehensive that the Respondent has taken out warrants of attachment and proclamation and that execution may commence at any time. The Applicant contends that his intended appeal will be rendered nugatory if stay of execution is not granted since the Respondent's means of income is unknown.

3. The Respondent filed a Replying Affidavit which he swore on 11/8/2023 stating that the prayer for stay is spent as it was granted ex-parte on condition that the decretal sum is deposited in court within a specified period. He added that the reasons given for the delay were spurious and lacking in basis.
4. The application was canvassed by way of written submission which I have carefully perused. I have considered the application, the grounds, supporting affidavit, replying affidavit and written submissions for and against the application as well as the cited authorities. In my view, the main issue for determination is whether the application has merit and therefore whether the orders sought should be granted.

### **Determination**

5. Section 75G of the [Civil Procedure Act](#) provides that:

79G. 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.”

6. The Supreme Court in [Mombasa County Government v Kenya Ferry Services & 2 others \(Application 29 of 2018\)](#) [2019] KESC 50 (KLR) (25 February 2019) stated as follows: -

“Concerning extension of time, this Court has already set the guiding principles in the Nick Salat Case as follows:

... it is clear that the discretion to extend time is indeed unfettered. 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.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

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 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. where there is a reasonable cause for the delay, the same should be expressed to the satisfaction of the Court;



5. whether there will be any prejudice suffered by the respondents, if 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”

7. In this case, the impugned judgment was delivered on 13/6/2023 and the application for extension of time lodged on 25/7/2023, approximately 12 days after the statutory time had lapsed. The Applicant’s explanation for the delay was that he was not able to obtain a typed copy of the judgment in good time. I have perused the documents exhibited by the Applicant; there is no evidence that the Applicant or his advocate made any efforts to obtain a copy of the judgment as claimed. I do not even see a certificate of delay to substantiate the Applicant’s allegations.

8. In the forgoing, I find no basis to exercise the discretion in favour of the Applicant. Therefore, having declined to grant leave to appeal out of time, I see no reason warranting stay of execution. The notice of motion application dated 20/7/2023 lacks merit, it is hereby dismissed with costs.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 15<sup>TH</sup> DAY OF JULY, 2024.**

.....

**S.M. GITHINJI**

**JUDGE**

In the absence of; -

1. Mr Njiru for the Applicant.
2. Mr Kazungu for the Respondent

Parties be notified.

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**S.M. GITHINJI**

**JUDGE**

**15/7/2024**

