



Tsiambaba v Ochieng (Suing as a personal representative and administrator of the Estate of the Late Willyce Onyango Ochieng (Deceased) (Miscellaneous Application 055 of 2023) [2024] KEHC 9326 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9326 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS APPLICATION 055 OF 2023**

JK SERGON, J

JULY 25, 2024

BETWEEN

EDWARD ANDOLI TSIAMBABA APPLICANT

AND

JUDITH AKOTH OCHIENG (SUING AS A PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE LATE WILLYCE ONYANGO OCHIENG (DECEASED) RESPONDENT

RULING

1. The application coming up for determination is a notice of motion dated 11th October, 2023 seeking the following orders;
 - (i) Spent
 - (ii) Spent
 - (iii) That this honourable court be pleased to grant leave to the applicant to appeal out of time against the judgement of the Honourable E.W Karani Senior Resident Magistrate delivered on 17.3. 2023 vide Kericho CMCC No. 86 of 2018.
 - (iv) That this Honourable Court be pleased to order a stay of execution of the judgement delivered on 17.3.2023 against the applicant vide Kericho CMCC Number 86 of 2018 Judith Akoth Ochieng suing as a personal representative and administrator of the estate of Willyce Onyango Ochieng (deceased) v Edward Andoli Tsiambaba pending hearing and determination of the intended appeal.



- (v) That upon prayer (iv) above being granted, this Honourable Court be pleased to order that the applicant provides security for the decretal sum of Kshs. 3,000,000/= in the form of a bank guarantee pending hearing and determination of the intended appeal.
- (vi) That costs of this application abide in the outcome of the intended appeal
2. The application is supported by grounds on the face of it and the supporting affidavit of George Nyambane an advocate practising in the firm of Kimondo Gichoka and Company Advocates, the advocates on record for the applicant.
 3. He avers that they recently learnt that the trial court delivered a judgement on 17.3.2023 without notice to the applicant and/or his counsel and the respondent awarded a sum of Kshs. 4,380,000/= . He further avers that they were made aware of the instant matter when they were served with the respondents Bill of Costs on 21.9.2023 scheduling the matter for taxation on 17.10.2023.
 4. He avers that upon perusal of the judgement together with their client, the applicant herein is aggrieved by the judgement of the trial court on both liability and quantum and were therefore seeking leave to appeal out of time.
 5. He avers that there being no stay of execution in force, the applicant is exposed to execution proceedings potentially rendering the intended appeal nugatory. The applicant was therefore seeking a stay of execution of the judgement delivered on 17.3.2023 for a sum of Kshs. 4,380,000/= against the applicant vide Kericho CMCC Number 86 of 2018 Judith Akoth Ochieng suing as a personal representative and administrator of the estate of Willyce Onyango Ochieng (deceased) v Edward Andoli Tsiambaba pending hearing and determination of the intended appeal.
 6. He avers that the applicant and his insurer are ready, able and willing to offer security in the form of a bank guarantee for the decretal amount of Kshs. 3,000,000/=.
 7. He avers that the applicant stands to suffer substantial and irreparable loss and damage as there is a likelihood that the applicant will be unable to recover the decretal amount from the respondent, should the respondent be allowed to execute and thereafter the intended appeal succeeds.
 8. He avers that the applicant has an arguable appeal which has high chances of success.
 9. He avers that the respondent will not suffer any prejudice or any damage that cannot be compensated by an award of costs. He further avers that the decretal sum awarded in the judgement having been substantial, it was only fair and just that the applicant be allowed to appeal before being condemned to settle the amount.
 10. He avers that it is only fair and in the interests of justice that the instant application for leave to file an appeal out time and stay pending appeal be allowed.
 11. The respondents filed a replying affidavit in response to the appellants application for stay pending appeal which was sworn by Judith Akoth Ochieng the respondent.
 12. The respondent avers that on 17.3.2023 when the matter came up for judgement, the judgement was delivered in the presence of both the plaintiff's and the defendant's advocates.
 13. The respondent avers that the applicants were granted 30 days stay of execution which have since lapsed and therefore the respondent was at liberty to execute at any time.
 14. The respondent avers that judgement was delivered on 17.3.2023 and the applicant wants to be granted leave to file an appeal out of time being eight months after the delivery of the judgement on the grounds



that there not aware judgement had been delivered, this was a delay tactic that the applicant is using to deny her what is rightfully due to her as the decree holder. The respondent was adamant that the application ought to be dismissed and the applicant ordered to comply with the lower court orders.

15. The matter came up for inter partes hearing on 20th May, 2024 and the counsel representing the parties made oral submissions which this court has considered.
16. Mr. Nyambane Learned Counsel for the Appellant reiterated that they are seeking for the orders sought in the application dated 11. 10. 2023 to wit leave to file an appeal out of time and stay of execution pending appeal.
17. Mr. Kirindo the Learned Counsel representing the respondent submitted that they opposed the application and would be relying on the averments in their replying affidavit.
18. I have considered the application for leave to appeal out of time, stay of execution pending appeal, grounds thereof, supporting affidavit and annexures. I have also considered the replying affidavit and submissions by both counsel for their respective clients. The main issue for determination is whether the applicant has demonstrated that the orders to appeal out of time and stay of execution pending appeal are merited.
19. On the issue of leave to file an appeal out of time, the relevant provision is section 79G of the [Civil Procedure Act](#) which provides that: “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.”

20. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in [Thuita Mwangi v Kenya Airways Ltd](#) [2003] eKLR. They include the following:
 - (i) The period of delay;
 - (ii) The reason for the delay;
 - (iii) The arguability of the appeal;
 - (iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
 - (v) The importance of compliance with time limits to the particular litigation or issue; and
 - (vi) The effect if any on the administration of justice or public interest if any is involved.
21. The judgement was delivered on 17th March, 2023 while the present application was filed on 11th October 2023, seven (7) months after the judgement by the trial court. The appellant has submitted that the delay was occasioned by the fact that the said judgement was delivered without notice and that they were made aware of the instant matter when they were served with the respondents bill of costs on 21.9.2023 scheduling the matter for taxation on 17.10.2023. The respondent on the other part submitted that when the trial court rendered its decision both advocates were present. I find that there is no evidence on record to support the assertions by both parties, however, I am inclined to exercise discretion in favour of the appellant on the grounds of arguability of the appeal. The instant matter



stems from a fatal accident claim, the matter was heard and determined and the trial court awarded a substantial award. The appellant herein is aggrieved by the judgement of the trial court on both liability and quantum and I therefore find that he should be allowed to ventilate the same in a superior court of record.

22. On the issue of stay of execution pending appeal, 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 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.
23. In the instant case, the appellants aver that they stand to suffer substantial loss of over Kshs. 4,380,000/= if stay of execution is not granted and that the respondent is a man of straw and would therefore be unable to refund the decretal sum in the event the appeal succeeds. The respondent on her part did not furnish this Court with sufficient material as to her ability to repay the decretal sum in case the appeal succeeds.
24. As to whether the instant application was filed without unreasonable delay I have considered that the judgement was delivered on 17. 3. 2023 and the application filed on 11. 10. 2023, after a period of eight (8) months, the applicants submitted the judgement was delivered without notice to them or their advocate and said that it was not indolence on their part. I am therefore inclined to accommodate the applicants and consider the other grounds for stay pending appeal.
25. The appellants have also pleaded that they are able to comply with any order as to security of costs as they have secured a bank guarantee for a sum of Kshs. 3,000,000/=. As to security of costs, the appellants’ have made provision for a bank guarantee meaning, they are able and willing to comply with that condition on security for the due performance of the decree appealed from. However, this court is not bound by the type of security offered by an applicant. In Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another [2018] eKLR the court observed as follows; “Where the Applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the Respondent the fruits of judgement. My view is that it is sufficient for the Applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.” Therefore this court can therefore make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.
26. The appellants stated that respondent will not suffer any prejudice or any damage that cannot be compensated by an award of costs. In matters for stay of execution pending appeal, the courts are duty bound to balance the interests of the appellant and those of the respondent. In RWW v EKW [2019] eKLR, considered the purpose of a stay of execution order pending appeal, 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 judgement. 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.”

27. In light of the foregoing, the notice of motion dated 11th October, 2023 is hereby allowed giving rise to the following orders;
- (i) Leave is hereby granted to the applicant to file an appeal out of time against the judgement of the Honourable E.W Karani Senior Resident Magistrate delivered on 17.3. 2023 in Kericho CMCC No. 86 of 2018.
 - (ii) The applicant to file and serve his Memorandum of Appeal within fourteen (14) days hereof.
 - (iii) I hereby order a stay of execution of the judgement delivered on 17.3.2023 against the appellant in Kericho CMCC Number 86 of 2018 Judith Akoth Ochieng suing as a personal representative and administrator of the estate of Willyce Onyango Ochieng (deceased) v Edward Andoli Tsiambaba pending hearing and determination of the appeal.
 - (iv) I hereby order that the appellant deposit half the decretal sum, a sum of Kshs. 2,190,000/= in a joint interest earning account in a reputable bank in the name of both advocates within thirty (30) days of this ruling.
 - (v) In default of complying with order number four (iv), the orders staying execution shall lapse and the respondent shall be at liberty to execute.
 - (vi) That costs of this application shall abide in the outcome of the appeal.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 25TH DAY JULY, 2024.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

No Appearance

Page 3

