



**Muthoni v M'Ncebere & another (Suing as the personal and legal representative of the Estate of Edward M'Ncebere - Deceased) (Miscellaneous Application E040 of 2024) [2024] KEHC 11098 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11098 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
MISCELLANEOUS APPLICATION E040 OF 2024  
EM MURIITHI, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**FLORENCE MUTHONI ..... APPLICANT**

**AND**

**ISAAC KIMATHI M'NCEBERE & LUCY AKOU (SUING AS THE PERSONAL AND LEGAL REPRESENTATIVE OF THE ESTATE OF EDWARD M'NCEBERE - DECEASED) ..... RESPONDENT**

**RULING**

1. By a Notice of Motion under certificate of urgency dated 4<sup>th</sup> March 2024, brought under Sections 1A and 1B of the *Civil Procedure Act*, Order 17 Rule 1 (1), Order 50 Rule 6 and Order 51 of the *Civil Procedure Rules* and all other enabling provisions of the law, the Applicant seeks that:
  1. Spent
  2. The Applicant be granted leave to lodge an Appeal out of time against the judgment delivered on 31<sup>st</sup> August, 2022 Githongo S.R.M.C.C No. 11 of 2018 Isaac Kimathi M'ncebere & Lucy Akou (Suing as the personal and Legal Representative of the estate of Edward M'ncebere-Deceased) -Vs- Florence Muthoni.
  3. There be a temporary stay of execution of decree emanating from the judgment that was delivered on 31<sup>st</sup> August, 2022 in Githongo S.R.M.C.C No. 11 of 2018 Isaac Kimathi M'ncebere & Lucy Akou (Suing as the personal and Legal Representative of the estate of Edward M'ncebere-Deceased) -Vs- Florence Muthoni pending inter-partes hearing of this application.
  4. There be a stay of execution of decree emanating from the judgment that was delivered on 31<sup>st</sup> August, 2022 in Githongo S.R.M.C.C No. 11 of 2018 Isaac Kimathi M'ncebere & Lucy Akou



(Suing as the personal and Legal Representative of the estate of Edward M’ncebere-Deceased)  
-Vs- Florence Muthoni pending the hearing and determination of this Appeal.

5. This Honorable Court do issue such further orders or directions that it may deem fit to grant in the interest of justice.
6. The costs of this application be in the cause.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Florence Muthoni, the Applicant herein sworn on even date. She contends that the Respondents sued her in Githongo S.R.M.C.C No. 11 of 2018 seeking damages for an accident that occurred on 12/8/2017 and judgment was delivered on 31/8/2022. The delay in instructing her advocates to lodge an appeal out of time is inadvertent and not intentional. She had lodged consolidated appeal No. E133/2022, but the court, vide its ruling of 29/2/2024 directed that the appeals be filed separately, thus necessitating this application. She therefore prays for leave to appeal and stay of execution, as her intended appeal raises pertinent issues with high chances of success. Unless the orders sought are granted, the Respondents, who have no known source of income, might proceed to execute to her detriment. The application has been brought promptly without unreasonable delay and she is willing to abide by reasonable stay conditions set by the court.
3. Isaac Kimathi M’Ncebere, one of the Respondents herein, opposed the application vide his replying affidavit sworn on 13/3/2024. He terms the application as an abuse of the court, a waste of the precious judicial time, a waste of his time and resources, vexatious, frivolous and urges the court to bring the 7 year long litigation herein to an end by dismissing the application with costs. According to him, the Applicant has had sufficient time to file the appeal but she did not as she is only interested in delaying his enjoyment of his hard earned judgment. After delivery of the lower court judgment, the Applicant filed a consolidated appeal which was dismissed. The Applicant has filed applications for stay of execution which have all been dismissed and the instant application is not only res judicata but it is meant to obstruct justice. He accuses the Applicant of unreasonably delaying in filing her appeal, which delay has not been reasonably explained.
4. The application was urged orally in court and a ruling reserved.

### **Analysis and Determination**

5. The issues for determination are whether leave to appeal out of time and stay should be issued.

### **Leave to appeal out of time**

6. The principles for consideration on an application for extension of time to appeal out of time are that, the power is discretionary but the applicants must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay are plausible, that the appeal is arguable and not frivolous and that the respondent will not be unduly prejudiced by the order being made. See *Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others* (2014) eKLR.
7. The judgment sought to be appealed against was made on 31/8/2022 while the instant application was filed on 6/3/2024. The court notes that the Applicant filed consolidated appeal No. E133/2022, and the court vide its ruling of 29/2/2024 directed the Applicant to file distinct appeals in respect of each file, which necessitated this application.
8. The court thus finds that the delay, although inordinate has been sufficiently explained.



9. On the arguability or otherwise of the intended appeal, the grounds raised in the annexed consolidated memorandum of appeal fault the trial court for inter alia awarding excessive damages for loss of dependency.
10. This court finds that the intended appeal is indeed arguable, which is not one which must necessarily succeed and neither is it for the court to go into the merits of the intended appeal.
11. From the Respondents' response to the application, no prejudice has been disclosed.
12. For the reasons set out above, this court deems it fit to enlarge time to lodge the appeal out of time.

### Stay of Execution

13. Order 42 Rule 6 of the *Civil Procedure Rules* empowers a court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided under Rule 6 (2) as follows:

“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.”

14. There is no doubt that the filing of this application was unreasonably delayed, but that delay is attributable to factors beyond the Applicant's control. Whereas the Applicant contends that if the decretal amount is paid to the Respondents, whose financial capability is unknown, the same might not be recoverable in the event of a successful appeal, the Respondents assert that they are entitled to enjoy the fruits of their litigation.

### Orders

15. Accordingly, for the reasons set out above, this court will allow the application dated 4/3/2024 on the terms of the ruling of 29/2/2024 in Civil Appeal No. E133/2022 as follows:-
  1. The Applicant is granted leave to appeal out of time against the judgment delivered on 31<sup>st</sup> August, 2022 in Githongo S.R.M.C.C No. 11 of 2018 Isaac Kimathi M'ncebere & Lucy Akou (Suing as the personal and Legal Representative of the estate of Edward M'ncebere - Deceased) -Vs- Florence Muthoni.
  2. Stay of execution of decree emanating from the judgment that was delivered on 31<sup>st</sup> August, 2022 in Githongo S.R.M.C.C No. 11 of 2018 *Isaac Kimathi M'ncebere & Lucy Akou (Suing as the personal and Legal Representative of the estate of Edward M'ncebere-Deceased) -Vs- Florence Muthoni* pending the hearing and determination of this Appeal is hereby issued:
    - i. On condition that the Applicant deposits Ksh. 1,000,000/- (one million) with the court within 14 days from today's date.
    - ii. The record of Appeal to be filed within 60 days from the date hereof.
    - iii. In the event of default of any of the aforementioned conditions, the stay hereby granted shall lapse and be of no effect.
16. The costs of this application which included relief for extension of time to file appeal shall in terms of order 50 Rule 6 of the Civil Procedure Rules be paid by the applicant to the Respondent.



Order accordingly.

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances

Ms. Masudi for the Applicant.

Ms. Auma for Mr. Mutembei the Respondent.

