



Muthoni v M’Ttirikia (Suing as the Personal and Legal Representative of the Estate of Salome Mukomaua - Deceased) (Miscellaneous Application E036 of 2024) [2024] KEHC 10953 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEHC 10953 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS APPLICATION E036 OF 2024
EM MURIITHI, J
SEPTEMBER 19, 2024**

BETWEEN

FLORENCE MUTHONI APPLICANT

AND

**GEOFFREY MURUNGI M’TTIRIKIA RESPONDENT
SUING AS THE PERSONAL AND LEGAL REPRESENTATIVE OF THE ESTATE
OF SALOME MUKOMAU - DECEASED**

RULING

1. By a Notice of Motion under certificate of urgency dated 4th 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 31st August, 2022 Githongo SRMCC No 7 of 2018 Geoffrey Murungi M’ttirikia (Suing as the personal and Legal Representative of the estate of Salome Mukomaua-Deceased) v Florence Muthoni.
 3. There be a temporary stay of execution of decree emanating from the judgment that was delivered on 31st August, 2022 in Githongo SRMCC No 7 of 2018 Geoffrey Murungi M’ttirikia (Suing as the personal and Legal Representative of the estate of Salome Mukomaua-Deceased) v 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 31st August, 2022 in Githongo SRMCC No 7 of 2018 Geoffrey Murungi M’ttirikia (Suing as the



personal and Legal Representative of the estate of Salome Mukomaua-Deceased) v 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 Respondent sued her in Githongo SRMCC No 7 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, by 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 Respondent, who has 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. The Respondent, Geoffrey Murungi M’Tirikia, 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 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 Respondent's 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:

“(2) 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 Respondent, whose financial capability is unknown, the same might not be recoverable in the event of a successful appeal, the Respondent insists that he is entitled to enjoy the fruits of his litigation. It is a matter of balance of the right of appeal and preserving the substratum of appeal to avoid substantial loss in terms of order 42 Rule 6 (2) (a) of the *Civil Procedure Rules* against the equally compelling consideration that the successful suit should receive benefit of his judgment without delay.
15. Order 50 Rule 6 of the *Civil Procedure Rules* provides for payment of costs on an application for extension of time, as follows:

“[Order 50, rule 6.] Power to enlarge time.

6. 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 power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

Orders

16. After carefully balancing the rights of the Respondent to enjoy the fruits of his judgment on the one hand, and the Applicant's undoubted right to appeal, despite the delay, on the other hand, this court



will allow the application dated 4/3/2024 on the terms of the ruling of the Court (Cherere J.) 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 31st August, 2022 in Githongo SRMCC No No 7 of 2018 Geoffrey Murungi M'tirikia (Suing as the personal and Legal Representative of the estate of Salome Mukomaua-Deceased) v Florence Muthoni.
2. Stay of execution of decree emanating from the judgment that was delivered on 31st August, 2022 in Githongo SRMCC No 7 of 2018 Geoffrey Murungi M'tirikia (Suing as the personal and Legal Representative of the estate of Salome Mukomaua-Deceased) v Florence Muthoni pending the hearing and determination of this Appeal is hereby issued:
 - i. On condition that the Applicant deposits Kshs 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.
3. 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.

DATED AND DELIVERED THIS 19TH DAY OF SEPTEMBER, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Ms. Masudi for the Applicant.

Ms. Auma for Mr. Mutembei the Respondent.

