



**M'arimi & another (Applying as Legal Representatives of the Estate of Moses Kiri
Mati - Deceased) v Alice (Next of Kin and Personal Representative of the Estate of Alice
Ruguru Njue) (Miscellaneous Civil Application E041 of 2024) [2024] KEHC 12429 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12429 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CIVIL APPLICATION E041 OF 2024
LM NJUGUNA, J
OCTOBER 16, 2024**

BETWEEN

**GERVASIUS MATI M'ARIMI 1ST APPLICANT
GODFREY MUCHENI MATI 2ND APPLICANT
APPLYING AS LEGAL REPRESENTATIVES OF THE ESTATE OF MOSES
KIRIMI MATI - DECEASED**

AND

**DAVID GICOVI ALICE RESPONDENT
NEXT OF KIN AND PERSONAL REPRESENTATIVE OF THE ESTATE OF
ALICE RUGURU NJUE**

RULING

1. The applicants filed a notice of motion dated 02nd July 2024, being supported by the grounds set out on its face and the facts deposed in the supporting affidavit thereof. The orders sought are as follows:
 1. Spent;
 2. Spent;
 3. That pending inter-parties hearing of this application, the honourable court be pleased to grant temporary stay of execution of the judgment delivered on 26th April 2024 in Embu CMCC No. E044 of 2020;
 4. That the applicant be granted leave to file an appeal out of time against the judgment delivered on 26th April 2024 in Embu CMCC No. E044 of 2020;



5. That pending hearing and determination of the intended appeal, the honourable court be pleased to grant stay of execution of the judgment and decree in Embu CMCC No. E044 of 2020; and
 6. That the costs of the application be in the cause.
2. The applicants deposed that their insurer delayed in instructing their advocate to lodge the appeal and by the time it was issuing the instructions, the time for appeal had already passed. That the delay in filing appeal was not deliberate and it is excusable. That the appeal has high chances of success and for that reason, the applicants urged the court to grant leave to appeal out of time. It was their averment that they will suffer substantial loss if the respondent is left to execute for the decretal amount of Kshs.720,000/=, thus they prayed for stay of execution pending appeal.
 3. The applicants' insurer also swore an affidavit in support of the application, through its senior legal officer, Maureen Gichimu. In the said affidavit, she stated that she was on annual leave between the dates 23rd April 2024 and 31st May 2024 and the person who was relieving her for the period failed to instruct the advocate on time. That the delay is inadvertent and she urged the court to allow the application.
 4. The application was opposed through a replying affidavit in which the respondent deposed that he cannot execute against a judgment that he has appealed against. That the applicant is not being truthful by failing to inform the court that there is a pending appeal Embu HCCA no. E045 of 2024 which the respondent has lodged to challenge the findings of the trial court. That this court ordered that the appeal be served within 21 days from 16th July 2024 and he did serve on 25th July 2024. He stated that the application is a nonstarter and an abuse of the court process.
 5. Through a supplementary affidavit, the applicant stated that the fact that the respondent filed Embu HCCA no. E045 of 2024, does not mean that the court cannot grant the orders prayed for. That he was served with the appeal on 25th July 2024 but the time for filing a cross-appeal had still lapsed, hence it was still necessary to seek leave to appeal.
 6. The court directed the parties to file their written submissions but only the applicants complied.
 7. In their submissions, the applicants relied on Order 42 Rule 6 of the Civil Procedure Rules and Section 75G of the *Civil Procedure Act*. He argued that the reason for the delay in appealing is sufficient and should be excused as they relied on the case of Charles N. Ngugi v. ASL Credit Limited (2022) eKLR and Stecol Corporation Limited v Susan Awuor Mudemb (2021) eKLR. That the period of delay was about 2 months from when the statutory period lapsed. Regarding stay of execution, they relied further on the cases of Nicholas Stephen Okaka & another v Alfred Waga Wesonga (2022) eKLR and Ena Investment Limited v Benard Ochau Mose & 2 others (2022) eKLR where the courts held that stay should be granted where the provisions of Order 42 Rule 6 of the Civil Procedure Rules are satisfied. He urged the court to grant stay of execution as a way of preserving the subject matter as was held in the case of RWW v. EKW (2019) eKLR.
 8. The issue for determination is whether the application has merit.
 9. The applicants seek stay of execution pending appeal as well as leave to appeal out of time. Stay of execution orders may be sought when the court is satisfied of the parameters set out in Order 42 Rule 6(2) of the Civil Procedure Rules 2010 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.

10. The court may also grant leave to appeal out of time if there is a satisfactory explanation for the delay if the same is inordinate. Section 79G of the [Civil Procedure Act](#) provides as follows:

“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 a good and sufficient cause for not filing the appeal in time.”

11. For both orders to be granted, the court has to determine whether the delay is inordinate or if it has been sufficiently explained. The applicants and their insurer stated that the delay in filing the appeal arose from the insurer’s legal officer’s delay in instructing the applicants’ advocate. The impugned judgment was delivered on 26th April 2024 and the application herein was filed on 12th July 2024 per the court’s record. There is a delay in seeking the orders herein but I do not think that the delay is inordinate. Whatever delay there is has been sufficiently explained by the applicants and their insurer.

12. The respondent deposed that he lodged an appeal Embu HCCA no. E045 of 2024 against the impugned ruling and the same was served upon the applicant on 25th July 2024. He stated that he is not planning to execute for the decretal amount owing to the appeal he already filed. The applicants countered this position, stating that the timeline for filing a cross-appeal had lapsed and that, either way, they needed leave of court to lodge their appeal. Order 42 Rule 1 of the Civil Procedure Rules provides that no appeal shall operate as stay of execution, thus the applicants are right in seeking stay of execution from this court.

13. That if an order for stay of execution is not granted and the respondent is left to execute, the appeal will be rendered nugatory and he urged the court to grant stay of execution to preserve the subject matter. The apprehension that the respondent will execute is usually not enough proof of substantial loss as was held in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR, that:

“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.”



14. However, it is important that in the case of an appeal, the subject matter is preserved through stay so that the proceedings are not rendered a triviality. In the case of *RWW v. EKW* (2019) eKLR, the court held thus regarding stay pending appeal:

“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 judgment. 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.”

15. Considering the foregoing, there is already on record an appeal filed in Embu HCCA no. E045 of 2024 where the memorandum of appeal was filed on 20th May 2024 and it is scheduled to be mentioned on 13th November 2024. The applicants herein wish to file a cross-appeal to challenge the findings of the trial court on liability. It is prudent that the application be allowed so that the applicant’s cross-appeal sees the light of day. In any event, there is already an appeal lodged by the respondent, thus the parties’ rights to appeal go in tandem. In the case of *Kamuti v Kariuki (Miscellaneous Civil Cause E001 of 2023)* (2023) eKLR the court observed that:

“The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out unless for a good reason.”

16. Therefore, the application is meritorious and it is hereby allowed with orders as follows:

- a. The applicants are hereby granted leave to cross appeal out of time against the judgment and decree delivered on 26th April 2024 in Embu CMCC No. E044 of 2020;
- b. The cross-appeal to be filed and served within 14 days of this ruling.
- c. An order is hereby issued for stay of execution of the judgment delivered on 26th April 2024 in Embu CMCC No. E044 of 2020 pending hearing and determination of the appeal and cross-appeal, if any; and
- d. Each party to bear its own costs.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

..... for the Applicant

..... for the 1st Respondent

..... for the 2nd Respondent

