



**Munyithia v Kaindu (Suing as the Legal Representative of the Estate of Cecilia Mutanu Kaindu)
(Miscellaneous Application E224 of 2023) [2024] KEHC 12202 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12202 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E224 OF 2023**

**FR OLEL, J
OCTOBER 9, 2024**

BETWEEN

DUNCAN KIMANTHI MUNYITHIA APPELLANT

AND

FELISTUS KANINI KAINDU RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CECILIA
MUTANU KAINDU**

RULING

A. Introduction

1. The Application before this court is the Notice of Motion application dated 15th July 2024 brought pursuant to the provisions of Section 3A, 79G of the *Civil Procedure Act*, Order 22 rule 22, Order 42 rule 6, Order 50 rule 6, Order 51 rule (1) & (3) of the Civil procedure Rules and Article 159(2),(a) & (d) of *the Constitution* of Kenya and all other enabling provisions of law. The Applicant seeks the following prayers, that;
 - a. Spent
 - b. This honourable court be pleased to grant leave to the Applicant to lodge an Appeal and file a Memorandum of Appeal out of time against the Judgement and decree of the Honourable Paul Matanda Wechuli Senior Resident Magistrate against the Applicant on 25th April 2024, in Kithimani CMCC case No 250 of 2021.
 - c. Spent.
 - d. This Honourable court be pleased to grant a stay of execution of the Judgement and/or decree issued by Honourable Paul Matanda Wechuli Senior Resident Magistrate against the Applicant on 25th April 2024 pending hearing and determination of the intended Appeal.



- e. This Honorable Court allows the Applicant's security to the court to be in the form of a Bank Guarantee from Family Bank.
 - f. That costs of this Application abide the outcome of the Appeal.
2. The Application is supported by the grounds on the face of the said application and the supporting affidavit of the Appellant/Applicant, who depones that judgment was entered against him on 25th April 2025, where he was found to be 100% liable for the said accident and the court proceeded to assess damages in favour of the respondent as follows; loss of dependency Kshs.5,453,812.80/=, pain and suffering Kshs.10,000/=, loss of expectation of life Kshs.100,000/= and Special damages Kshs.77,050/= plus costs and interest in favour of the respondent herein.
 3. Being aggrieved by the said Judgement, he had instructed his advocates on record to file an appeal, but there had been a delay in filing the same occasion by poor communication. The proposed appeal was meritorious and had a high chance of success given that liability had been wrongly determined and the damages awarded were exaggerated/ astronomical and if the same was paid out to the respondent, in the event his appeal was successful, he was unlikely to recover the same. As regards security, the applicant offered to provide a bank guarantee from Family Bank Ltd. He urged the court to find that his application was merited and that it was in the best interest of Justice to grant the same.
 4. The application was opposed by the respondent, who filed her replying affidavit dated 23.08.2024. she stated that the orders sought were discretionary and not available to persons who had not demonstrated what substantial loss they would suffer if stay orders were not granted. The said application was also brought in bad faith to delay the course of justice and more so to delay payment of the decretal sum to her as a successful litigant. The respondent also faulted the appellant for failing to give a plausible explanation as to why they had not filed the appeal on time and since the extension of time was an equitable remedy, it would not be available to the applicant as he was not a deserving party.
 5. The respondent also pointed out that the bank guarantee provided was only valid for twelve months from 6th July 2023 and the same expired on 6th July 2024, thus not a good security. But in the unlikely event that the court was inclined to grant the orders sought, the respondent did pray that the court directs the applicant to pay out half the decretal sum of Kshs.2,939,842/= to her and the other half be deposited in a joint interest-earning account held jointly by the counsels herein pending determination of the said Appeal.
 6. The respondent did pray that the court finds that this application is not merited and proceeds to dismiss the same.

B. Analysis & Determination

7. I have carefully considered the Application and corresponding affidavits thereto on record and find that the court has to determine two issues, whether to extend the time to allow the applicant to Appeal and if approved, whether to allow for stay of the trial court decree pending Appeal.

Extension of Time

8. Order 50 rule 6 of the civil procedure Rules does provides that;

“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 powers to enlarge time upon such terms (if any) as the justice of the case may require, and such enlargement



maybe ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”

9. The basis for applying for an extension of time was discussed in the Court of Appeal case of Susan Ogutu Oloo & 2 Others v Doris Odindo Omolo (2019) eKLR where it was held:-

“In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC (2014) eKLR Sup Ct Application No 16 of 2014.*

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted”.

10. In Imperial Bank Ltd (in receivership) & Ano Vs Alnasir popat and 18 others the court observed that;

“some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercised its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a parties opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; public interest issues implicated in the appeal or intended appeal and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration it must be born in mind that it is not really the role of a single judge to detriment definitely the merits of the appeal. That is for the full court if and when it is ultimately presented with the appeal.”

11. The reasons advanced by the applicant for seeking an extension of time are weak and he does not provide clear reasons as to why there was poor communication between him and his counsel on record. Be that as it may, this is a fresh appeal and this application was filed about 2 months after the delivery of the judgement sought to be Appealed against. Undoubtedly the appellant has a right to have his appeal heard on merit especially given that both liability and quantum are challenged. This right has to be balanced with the respondent’s right to the quick dispensation of justice and to enjoy the fruits of her judgement.

12. The court therefore has to balance the two contrasting rights and is guided by the provisions of Article 159(2)(d) of *the Constitution* and Sections 1A and 1B of the *Civil Procedure Act* in administering justice. The focus being on substantive justice, rather than procedural technicalities, and the just, efficient and expeditious disposal of cases. At this point the court appreciates the sentiments expressed by the High Court in John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another [2016] eKLR that:

“..... However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice



in *the Constitution* as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief.”

13. I do therefore extend time to allow the appellant to file his Appeal and grant him 14 days to do so.

Stay Pending Appeal.

14. Order 42 rule 6 of the Civil Procedure Code provides three conditions to be fulfilled before one can be granted orders of stay of execution and they can be summarized as follows;

- a. That substantial loss may result to the applicant unless the order is made.
- b. Application has been made without unreasonable delay.
- c. Security as the court orders for the due performance.

15. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
- b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.
- c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put the security of costs as ordered will cause the order for stay of execution to lapse.

16. The time within which the Appeal was filed, does not apply under the circumstances herein, given that leave to Appeal out of time has been granted. Further, concerning the fact that the appellant stands to suffer substantial loss, I do find that the decretal amount is an enormous amount and the respondent has not filed any affidavit of means to confirm that she will be in a position to refund the said decretal amount if paid out entirely. See *G. N. Muema P/A (516) Mt View Maternity & Nursing Home Vs Miriam Maalim Bishar & Another* (2010) eKLR, *National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another* (2006) eKLR.

17. On the security, the Appellant has indicated that he is ready and willing to abide by this court's orders as to security for due performance of the decree. In particular, he has offered to provide a bank guarantee for the entire amount pending the hearing and determination of this Appeal. The respondent has opposed this and averred that she should be paid half the decretal sum and the other half be deposited in a joint interest-earning account held by joint counsels Pending Appeal.

18. The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only



consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See Attorney General Vs Halal Meat Produces Limited Civil Application No. Nairobi 270 of 2008; Kenya Shell Ltd Vs Kibiru & another (Supreme); Mukuma Vs Abuoga (1988) KLR 645.

C. Disposition

19. Considering all relevant factors and in order not to render the intended appeal illusory, I do grant orders for an extension of time and stay of execution on the following terms;
 - a. Leave is granted to the Applicant to file and serve his memorandum of Appeal within the next 14 days after delivery of this ruling.
 - b. The Appellant/Applicant is directed to pay the respondent a sum of Kshs.1,500,000/= and provide a bank guarantee for a similar amount, which bank guarantee will be specific to this Appeal and valid for the entire period of the Appeal.
 - c. This condition is to be met within 60 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
20. The costs of this Application is awarded to the respondent and is assessed at Kshs.15,000/= all inclusive.
21. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 9TH DAY OF OCTOBER 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 9TH DAY OF OCTOBER 2024

In the presence of: -

Ms Sirma for Appellant

No appearance for Respondent

Susan Court Assistant

