



REPUBLIC OF KENYA



**Njoroge v Nganga (Civil Miscellaneous Application E234 of 2023)  
[2024] KEHC 14521 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 14521 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL MISCELLANEOUS APPLICATION E234 OF 2023  
DO CHEPKWONY, J  
OCTOBER 11, 2024**

**BETWEEN**

**JEREMIAH NGANGA NJOROGE ..... APPLICANT**

**AND**

**RAPHAEL GITAI NGANGA ..... RESPONDENT**

**RULING**

1. What is before this court for determination is the Notice of Motion application dated 13<sup>th</sup> December, 2023 which seeks the following orders:
  - a. Spent.
  - b. That this Honourable Court be pleased to grant the Applicant leave to appeal out of time against the Judgment delivered by Hon. P. M. Mugure on the 11<sup>th</sup> October, 2023.
  - c. That this Honourable Court be pleased to issue an order for stay of execution of the Judgment entered and delivered herein against the Applicant on the 11<sup>th</sup> October, 2023 pending the hearing and determination of the intended appeal.
  - d. That this Honourable Court be pleased to find that the Memorandum of Appeal being Kiambu HCCA No. of 2023 filed within time and be deemed to properly filed on record.
  - e. That the costs of this application abide the outcome of the Appeal.
2. The Application is based on the grounds set out on its face and the Supporting Affidavit of Jeremiah Nganga Njoroge sworn on 13<sup>th</sup> December, 2023. It is the Applicant's case that Judgment was delivered against him on 11<sup>th</sup> October, 2023 for the decretal sum of Kshs 3,160,383/= and thereafter, a thirty (30) days stay of execution was granted which lapsed. According to the Applicant, he was dissatisfied with the Judgment but the timelines within which to file an appeal lapsed which delay, the avers, was occasioned by the inability to obtain a copy of the judgment within time.



3. The Applicant holds that the appeal is arguable as it raises points of law and thus has high chances of success. It is the Applicant's contention that the Respondent may proceed and levy execution since the thirty (30) days stay of execution have lapsed, hence the appeal may be rendered nugatory if the court does not intervene. The Applicant further holds that the Respondent is a person of unknown means and therefore, he may not be in a position to refund the money if the appeal succeeds.
4. The Applicant holds that he is ready to furnish the court with bank guarantee as security to court, that the application has been filed without undue delay, that the Respondent will not suffer any prejudice. He thus urges the court to allow the application.
5. The Application is opposed through the Replying Affidavit of Raphael Gitau Nganga sworn on 30<sup>th</sup> January, 2024. He confirms the delivery of the judgment but avers that the Applicant had until 11<sup>th</sup> November, 2023 to file an appeal and the reason for the delay in filing the same has not been backed by any proof. He holds that the application is premature since his Advocate is yet to extract the Decree for execution.
6. The Respondent holds that the application lacks merits since the trial court rendered judgment on merits and he is thus entitled to the fruits of his judgment. The Respondent's contention is that the Applicant has not proved how he will suffer irreparable loss if the decretal sum is paid. He further holds that should the court be inclined to allow the application; the Applicant should be ordered to pay half of the decretal sum to his Counsel as part settlement and deposit the other half in a joint interest-earning account to be held in the names of both firm of advocates. Otherwise, the Respondent urges the court to dismiss the application with costs.

### **Analysis and Determination**

7. The law on time to file appeals and extension of time to file appeal is provided under 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.”
8. In the case of *Edith Gichungu Koine –vs- Stephen Njagi Thoithi* [2014]eKLR, the court set out the factors to be considered in granting order for leave to appeal out of time as follows:-

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
9. These factors were further discussed by the Court of Appeal in the case of *Thuita Mwangi -vs- Kenya Airways Ltd* [2003] eKLR. being:
  - 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.”
10. The Application herein which is dated 13<sup>th</sup> December, 2023 is against the Judgment which was delivered on 11<sup>th</sup> October, 2023. The Appeal ought to have been filed by 11<sup>th</sup> November, 2023 but this application was filed close to one month later which period, the court finds was not such inordinate delay. The court has also considered the reasons given for the delay and found the same substantive. Therefore, the application for leave to appeal has merit and ought to be allowed.
11. The next issue for determination is whether the court should grant stay of execution orders. The law on stay of execution is enshrined under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:-
- Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:
- “No order for stay of execution shall be made under sub rule (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”
12. On the purpose of an application for stay of execution pending appeal the court in [RWW -vs- EKW](#) [2019] eKLR, held:-
- “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.
13. It is trite law that for a court to grant stay of execution three conditions must be met:-
- a. The application has been made without unreasonable delay.
  - b. The Applicant will suffer Substantial loss
  - c. The Applicant has offered security for due performance of the decree.
14. On the first condition, the court has already found that the application was made without unreasonable delay.
15. On the second condition of substantial loss, the applicant has stated that it is likely to suffer substantial loss and it has attached a letter from the Respondent dated 4<sup>th</sup> December, 2023 to show they are



threatening to proceed with execution. The court in the case of *Kenya Shell Limited –vs- Benjamin Karuga Kibiru & Another* [1986] eKLR held:-

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”

16. It is worth-noting that since the Applicant has attached evidence of the substantial loss he is likely to incur if execution were to be allowed to proceed before he is heard, the court finds that this condition has been fulfilled.

17. Lastly, for consideration is the issue of security for the due performance. In this case, the Applicant has only offered to provide a bank guarantee as a form of security. However, this court finds that the bank guarantee is not a sufficient security in such case. In the case of *Nyang'au –vs- Choi & 2 Others* (Civil Appeal E088 of 2021) [2022] KEHC 3015 (KLR) (2 June 2022) (Ruling), the court declined the issuance of a bank guarantee as security holding that it would be difficult for the bank which is not a party to the suit, to honour it and proceeded to hold that:-

“Whereas he had also met the third condition of being granted an order for stay of execution, this court took the view that security in the form of a bank guarantee was not suitable. There was a possibility of a bank that had given a bank guarantee not honoring the same. Not being a party to a suit would make it difficult for a successful party to enforce any orders he or she might get concerning such a bank guarantee. This court therefore determined that the security to be furnished herein would be in form of money.”

18. However, the Respondent although opposed to the Applicant being granted stay of execution orders, appeared to soften his stance when he urged that if the court were inclined to grant a stay then the Applicant should pay him ½ the decretal sum and deposit the other half in a joint interest-earning account in the names of both counsel for the parties herein.

19. Therefore, although the Applicant in this case has not fulfilled all the three conditions for a stay of execution orders to issue, it would be in the interest of justice for the court to allow the application. However, the same as per the provisions of Section 3A of *Civil Procedure Act*, the application is allowed on condition that:-

- a. The Applicant deposits half the decretal sum in court within thirty (30) days from the date of this ruling.
- b. The Applicant to file and serve a Record of Appeal within forty-five (45) days from the date hereof.
- c. The Deputy Registrar of this court to call for and avail the original record of proceedings in Limuru Civil Suit No.250 of 2018, Raphael Gitau Nganga –vs- Jeremiah Nganga Njoroge.
- d. Mention on 27<sup>th</sup> December, 2024.
- e. Failure to comply with orders (a) and (b) above, the application shall stand dismissed and the Respondent be at liberty to execute.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024.**



**D. O. CHEPKWONY**  
**JUDGE**

