



Mwangi v Kinya & another (Suing as the Legal Representatives of the Estate of Martin Mwenda Muturi Deceased) (Miscellaneous Application E045 of 2022) [2023] KEHC 25 (KLR) (11 January 2023) (Ruling)

Neutral citation: [2023] KEHC 25 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS APPLICATION E045 OF 2022
EM MURIITHI, J
JANUARY 11, 2023**

BETWEEN

NICHOLAS KIBE MWANGI APPELLANT

AND

EMMACULATE KINYA 1ST RESPONDENT

MORRIS MUTEMBEI 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MARTIN
MWENDA MUTURI DECEASED**

RULING

1. This is a ruling on two applications respectively dated November 3, 2022 and December 13, 2022 respectively filed by the respondent and the appellant for orders or reconsideration of the application for leave to appeal and stay of execution filed by the appellant herein dated June 30, 2022 and by the appellant for review/variation of the terms of the stay of execution granted in the ruling of the court herein delivered on September 29, 2022 [ruling no 1].
2. Upon considering the two applications and the submissions of counsel thereon, the court accepts that the ruling of September 29, 2022 in error referred to the appeal sought as being an appeal from the decision of the trial court made on June 3, 2022 refusing to set aside the judgment of December 22, 2021. In fact, the application of June 30, 2022 which was before the court sought extension of time to appeal, and stay of execution of, the judgment of December 22, 2021.
3. At paragraph of the ruling of September 29, 2022, this court said:

'4. The appeal before this court is from the exercise of the discretion of the trial court by its ruling of June 3, 2022. I think that the applicant has an arguable case on the issue to be



canvassed on appeal whether the applicants' defence in the trial court should be reopened on account of counsel's mistake in failing to diarize the date for defence hearing. I would therein find a sufficient cause within the meaning of order 42 rule 6(1) of the Civil Procedure Rules to grant stay of execution pending appeal.'

4. The first line of the paragraph is an error.
5. Regrettably, in its order this court gave terms of stay of execution of the judgment of December 22, 2022 but the grant of leave to appeal was not clarified to apply to the judgment of December 22, 2021 or the trial court ruling of June 3, 2022 refusing to set aside the judgment of December 22, 2021. The final order was as follows:

'Order

7. Accordingly, for the reasons, set out above the court directs that the appellant pays to the respondent through his counsel, the sum of Kshs 900,000 and the balance of the decretal sum to be secured by a bank guarantee lodged with this court, all within 30 days from today. In default, the order for stay of execution shall lapse .

Order accordingly.'

6. As regards leave to appeal, the respondent's counsel reiterated the objection to the application dated June 30, 2022 principally on the grounds that the appellant had not explained a seven (7) month delay 'to decide whether to appeal' between the delivery of judgment on December 22, 2021 and the filing of the application for leave to appeal out of time dated June 30, 2022.
7. In dealing with the issue of delay in seeking the setting aside of the judgment, the trial court ruled as follows:

' It is deposed that the application has been filed without unreasonable delay. To my mind, what it means by unreasonable delay is relative. It must be considered with a clear picture of the circumstances of every case. The judgement sought to be stayed and then set aside was delivered on December 22, 2021. The ruling on the plaintiffs bill of costs was delivered on March 17, 2022. Both with the knowledge of the defence counsel. The application herein was filed on April 27, 2022. This was approximately four (4) months after the delivery of the judgement and one month after the ruling on the plaintiffs bill of costs and two days after service of the notice of entry of judgement. It is my position that the application was triggered by the service of the notice of entry of judgement and the intention was to frustrate the intended execution process. There was unreasonable delay in filing the application given the circumstances of this case.'

8. It is clear that as the appellant first sought the setting aside of the judgment, which was unsuccessful, before deciding to appeal, the relevant period of delay is the three months period after the expiry of 30 days allowed under the rules for appeal, before the appellant sought the setting aside of the judgment by the application of April 27, 2022. There was contestation as to whether the appellant was aware of the delivery of judgment on December 22, 2021 or only became aware upon service by the respondent of notice of entry of judgment before execution. The trial court in its ruling of June 3, 2022 found the appellant to have been aware of the delivery of judgment, as shown in the part of the ruling quoted above.



9. With respect, this court does not agree that the delay of three months, or even the 7 months necessitated by the prior application for the setting aside of the judgment is unreasonable and inordinate delay, to disentitle the appellant of a favourable exercise of discretion to extend time to file an appeal. This is particularly so where other substantive considerations of arguability of the appeal and the prospect of substantial loss warrant an extension of time.
10. The court already adverted to the issue of arguability of the appeal, substantial loss and need for security, in its ruling of September 29, 2022 as follows:
 - ' 5. As regard substantial loss, the decretal sum with taxed costs in the fatal accident claim is in the region of Ksh 3,018,058 which cannot be said to be insignificant or insubstantial loss, if recovered in full before hearing and determination of appeal.
 6. On the other hand, the judgment decree-holder is entitled to fruits of the judgment. So, in balancing the interests of the decree-holder and the judgment debtor, the court will make an order for the partial settlement of the judgment to the respondent awaiting the hearing and determination of the appeal. The remainder of the judgment sum shall, in security as required under order 42 rule 6 (2) of the Civil Procedure Rules, be secured by a valid bank guarantor.'
11. In appellant's application of December 13, 2022 seeking variation of this court's order on terms of stay, mere 'inability' to comply with the order is asserted without, as observed by the counsel for the respondent, pointing to any issue of financial inability considering that the bank guarantee offered in lieu therefore is provided by an insurance company and no question of the insurance company being unable to pay is raised.
12. It come out in the oral submissions before the court that the appellant was objecting based on apprehension of part-payment of the decretal sum because of its appeal challenging both liability and the quantum.
13. With respect, the court must observe that there is already a regular judgment of the trial court awarding the decretal sum to the respondent, and the respondent as decree holder should not lightly be deprived of the fruits of the judgment. What the court is required to do in the circumstances where an arguable case is disclosed on the intended appeal is to see that the interests of the successful party and those of the applicant are balanced so that the appeal is not rendered nugatory, if eventually successful, is considered against the need for access by the respondent of the sum awarded or part thereof as is consistent with nugatory principle.
14. This court by its ruling of September 29, 2022 [ruling no 1] ordered the payment of a portion of decretal sum approximating a 1/3 of the decretal sum and there has not been availed any evidence that the respondent would be unable to repay or the appellant would be unable to recover the said sum in the event of a successful appeal.
15. The appellant's application dated December 13, 2022 for variation of the order of the court made on September 22, 2022 for the part payment of the decretal sum and deposit of bank guarantee for the balance is declined. However, the court will extend the time for such payment so that the payment to the respondent is made within 30 days of this ruling.



Orders

16. Accordingly, for the reasons set out above, the court makes the following orders and clarifications on the applications dated June 30, 2022, November 3, 2022 and December 13, 2022:
1. There was no objection to the firm of Kimondo Gachoka & Co Advocates acting for the appellant and that prayer is granted.
 2. For clarity, the appellant is granted an extension of time to file an appeal from the judgment of the court delivered on December 22, 2021, and for that purpose the memorandum of appeal shall be filed within the next fourteen (14) days.
 3. The time for the payment of the sum of Ksh 900,000/- to the respondent through his counsel and deposit into court of a bank guarantee for the balance of the decretal sum is extended by a further 30 days from the date of this ruling.
 4. There shall be a stay of execution of the judgment and decree of the trial court of December 22, 2021 pending the hearing and determination of the appeal, subject to the compliance by the appellant with order no (3) above, and in default the order for stay shall lapse and be of no effect.
 5. The record of appeal shall be filed within sixty (60) days of this ruling, and in default the appeal shall stand dismissed.
17. The costs of the applications dated June 30, 2022, November 3, 2022 and December 13, 2022 shall be costs in the cause to abide the outcome of the appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 11TH DAY OF JANUARY, 2023.

EDWARD M MURIITHI

JUDGE

Appearances

Ms Laboso, Advocate for the Appellant.

Mr Mutegi, Advocate for the Respondent.

