



**Gichane v Kahandi & 2 others (Miscellaneous Civil Application
E087 of 2022) [2023] KEHC 1006 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1006 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CIVIL APPLICATION E087 OF 2022
RB NGETICH, J
FEBRUARY 16, 2023**

BETWEEN

FRANCIS KIHARA GICHANE APPELLANT

AND

MARGARET GATHONI KAHANDI 1ST RESPONDENT

EPHANTUS IRUNGU MWANGI 2ND RESPONDENT

MARTIN MATHENGE 3RD RESPONDENT

RULING

1. The applicant filed the motion dated April 28, 2022 seeking the stay of execution of the judgment and decree in Ruiru CMCC No. E189 of 202 which was delivered on March 28, 2022, as well as leave to appeal out of time.
2. The application is supported by the annexed affidavit of Marire Tonny Sworn on April 28, 2022. She deposes that the appeal has a high chance of success and the delay in filing the appeal is not intentional as it was occasioned by delay in obtaining copies of the judgment and instructions; that the applicant is apprehensive that if the 1st respondent is paid, he would not be in a position to refund the decretal amount in the event the intended appeal is successful; and the 1st respondent will not suffer prejudice if stay order is granted.
3. In Response, counsel for the 1st respondent Mr. Peter Ruigu filed affidavit sworn on June 14, 2022. He deponed that the decree issued by the trial court is a monetary one and cannot be rendered nugatory unless it is prove that the respondent is of straw means. He averred that the respondent will suffer from delayed justice if stay orders are granted to the applicant and urged the court to order deposit of half the decretal sum of Kshs. 993,622/= to the advocate's firm and the other half is deposited in a joint interest-earning account in the name of both advocates.



4. The application proceeded by way of written submissions.

Applicant's Submissions

5. Counsel for the applicant filed written submission dated November 30, 2022. In the submissions, counsel reiterated the contents of the supporting affidavit and submitted that the annexed attachment as proof that the 1st respondent is not a person of means cannot be authenticated; and further submitted that the applicant has complied with the conditional orders of the court by depositing the decretal amount 1,987,244/= into court on May 25, 2022 as security for performance of decree. Counsel submitted that the application was filed on April 28, 2022, a period a day when stay of execution was bound to lapse and points out that the delay is not inordinate.
6. On the issue as to whether the court should grant leave to appeal out of time, counsel submitted that the same is rendered moot by the fact that the appeal has already been admitted and urged the court to allow the applicant to prosecute the appeal.

Respondent's Submissions

7. Counsel for the respondent filed submissions dated December 13, 2022 and in the submissions, reiterated the contents of the replying affidavit and further submitted that the 1st respondent will suffer from the delay in enjoying the fruits of the judgment and urged the court to dismiss the application for stay of execution.

Analysis and Determination

8. I have considered the averments in the affidavits and submissions filed and find that the main issue for determination is whether the applicant explained delay in filing appeal and whether he has met threshold for grant of stay orders sought. I note that the appeal was admitted for hearing on September 20, 2022. It was however necessary for the applicant to seek leave to have appeal filed deemed as duly filed. In view of the fact that it has been admitted to hearing, I proceed to deem it as duly filed
9. In respect to prayer for stay of execution of judgment or decree of the trial court pending the hearing and determination of the intended appeal, the same is provided under Order 42 Rule 6(2) of the [Civil Procedure Rules](#) which provides as follows: -
 - 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. In the current application counsel submitted that the delay in filing the intended appeal was not inordinate. He submitted that the current application was filed on April 28, 2022 while judgment was delivered on March 28, 2022. The delay of thirty (30) days is not inordinate. They filed the current application on the day when stay was to lapse in the trial court.
11. I will not deal with the merit of the appeal at this point. The parties herein need to be given opportunity to present their respective arguments in support and against the appeal. Pending the hearing of appeal, this court is called upon to determine whether to grant stay of execution or not.



12. The 1st respondent has demonstrated to the court that she is not a woman of straw means. She has annexed a tabulation of income received from her rental apartment. There is no fear that this appeal is likely to be rendered nugatory if it succeeds.
13. On the issue of security, the applicant deposited the decretal amount of Kshs. 1,987,244/= in court on May 25, 2022 for the due performance of the decree.
14. From the foregoing, I am persuaded to exercise discretion and allow the application dated April 28, 2022.
15. **Final Orders:**
 1. This appeal is deemed duly filed.
 2. I hereby stay execution of the judgment and decree delivered on March 28, 2022, in Ruiru CMCC No. E189 of 2021 do issue.
 3. Costs to abide by the outcome of the appeal.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU

THIS 16TH DAY OF FEBRUARY, 2023

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RACHEL NGETICH

JUDGE

In the presence of:

Martin – Court Assistant

Mr. Omondi for Appellant/Applicant

No appearance for Respondent

