



**Miyianda v Munyotu (Suing as Legal Representative of of the Estate of Dennis Munyotu Ngetu-Deceased) (Miscellaneous Civil Application E007 of 2022) [2023] KEHC 640 (KLR) (6 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 640 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
MISCELLANEOUS CIVIL APPLICATION E007 OF 2022**

**F GIKONYO, J**

**FEBRUARY 6, 2023**

**(CORAM: F.M. GIKONYO J.)**

**BETWEEN**

**EDWIN ONSERIO MIYIENDA ..... APPLICANT**

**AND**

**DANSON NGEMU MUNYOTU ..... RESPONDENT**

**SUING AS LEGAL REPRESENTATIVE OF OF THE ESTATE OF DENNIS  
MUNYOTU NGETU-DECEASED**

*(Being an application for leave to file an appeal out of time and  
Stay of execution of the judgment/decree of Hon G.N Wakabiu  
(CM) delivered on July 28, 2021 in Narok CMCC No 72 of 2018.)*

**RULING**

1. The significant orders sought in the notice of motion dated June 13, 2022 and filed on June 15, 2022 are: -
  - i. Leave to file an appeal out of time ;
  - ii. Stay of execution of the judgment delivered by on July 28, 2021 in Narok CMCC 72 of 2018 pending the hearing and determination of the intended appeal; and
  - iii. Cost of the application to be provided for.
2. The application is premised upon the grounds set out in the application and the supporting affidavit sworn by Edwin Onserio Miyianda on June 13, 2022.



3. The applicant's case is that he wishes to appeal against the judgment/decree of Hon G.N Wakahiu (CM) delivered on July 28, 2021 in Narok CMCC No 72 of 2018 but the permitted time has lapsed. The delay in filing the appeal was occasioned by the fact that the applicant was not aware of the suit. The judgment was delivered on July 28, 2021, but the applicant only got knowledge of it on May 2, 2022 through a notice to show cause. He avers that summons in the said suit was served only on the applicant's insurers who defended the suit in the name of the applicant but without the involvement of the applicant.
4. The applicant contends that the trial court's judgment on the decretal sum of Kshs 8,928,627 was inconsistent with the evidence and law. According to the applicant, the intended appeal raises pertinent issues and has a high chance of success and therefore will be rendered nugatory if a stay of execution is not granted.
5. The respondent opposed the application *vide* a replying affidavit sworn by Danson Ngemu Munyotu on June 24, 2022.

### **Directions Of The Court**

6. The application was canvassed by way of written submissions. Both parties have filed their written submissions.

### **Applicant's Submissions**

7. In his submissions, the applicant emphasized the cause of failure to file the appeal in time has been explained; and that the delay herein was not out of indolence or culpability on the part of the applicant.
8. The applicant argues that the respondent has no basis to complain of any prejudice as against the applicant since the delay herein was substantially contributed to by the respondent; and now the applicant is a victim of their actions. He stated that, had the applicant been personally served, he would have filed appeal in time.
9. The applicant submitted that his appeal is exclusively on quantum which they say is inordinately high-over 8million- and constitutes a proper, valid and merited legal complaint in law and fact.
10. According to the applicant, execution for such considerable sum of money, in ordinary economic standards is certainly going to have crippling and irreparable economic repercussions on the applicant who is a mere individual.
11. The applicant submitted that immediately after being served with the notice to show cause on May 2, 2022 he made a prompt and diligent inquiries from his insurers and visited the courts registry. The said efforts culminated in filing the application just over a month; he implores the court not find any indolence on the part of the applicant.
12. The applicant urged this court to consider conditions which would be reasonably attainable as a matter of access to justice and need to ensure that the applicant is constitutional right of appeal is not frustrated by the very decree sought to be appealed against. He, therefore, proposed that half of the decretal sum be deposited in a joint interest-earning account in the names of counsel for both parties.
13. The applicant has relied on the following authorities;
  - i. Section 79 G and 95 [CPA](#)
  - ii. Order 42 rule 6(2) (b) [CPR](#).



- iii. [\*Samvir Trustee Limited v Guardian Bank Limited Nairobi\*](#) (Milimani) HCCC 795 of 1997
- iv. [\*Machira v East African Standard \(No 2\)\*](#) (2002) 2 KLR63
- v. [\*James Wangalwa & another v Agnes Naliaka Cheseto\*](#) [ 2012] eKLR
- vi. [\*Housing Finance Company of Kenya v Sharok Kher Mohammed Ali Hirji & another\*](#) [2015] eKLR

### **Respondent's Submission**

- 14. The respondent submitted that the intended appeal does not raise any serious issue for consideration by this court since the decision of the trial court was well reasoned and no evidence was adduced by the defence. The award is within the range applied by most courts hence the appeal is a waste of time.
- 15. The respondent further submitted that the application does not meet the legal threshold for the grant of stay pending appeal as no substantial loss has been demonstrated by the applicant whose basis for contending that his financial capability is unknown is based on assumptions. The respondent averred that since execution had not yet commenced the orders sought herein are unwarranted and that in any case, the mere fact that execution has been commenced does not amount to substantial loss, that process being a lawful process.
- 16. The respondent has submitted that the applicant has not offered to provide security.
- 17. The respondent submitted that the applicant has neither demonstrated to this court that there exists arguable appeal with high chances of success nor satisfied the pre-requisite conditions set out in order 42 rule 6 [\*CPR\*](#) to enable the grant of stay of execution of decree pending the hearing and determination of the intended appeal. The intended appeal has no chance of success.
- 18. The respondent submitted that if the court is inclined to grant a stay of execution, to let the same be conditional on depositing into court security for costs in the sum of the entire decretal amount or alternatively depositing half of the decretal sum into a joint interest-earning account in the name of both the applicant's and the respondent's advocate.
- 19. In the end, the respondent submitted that the application and the intended appeal lacks merit were misleading, brought in bad faith, and ought to be dismissed with costs.
- 20. The respondent relied on the following authorities;
  - i. Section 79G, and 1A (2)[\*CPA\*](#).
  - ii. Order 42 rule 6(1) (2) [\*CPR\*](#).
  - iii. [\*Vishram Ravji Halai v Thornton & Turpin\*](#) civil application No Nai 15 of 1990 [1990] KLR 365
  - iv. [\*Attorney General v Halal Meat Products Ltd\*](#) civil application No Nai 270 of 2008; [1986] KLR
  - v. [\*Kenya Shell Ltd v Kibiru & another\*](#) [1986] KLR 410
  - vi. [\*Mukuma v Abuoga\*](#) [1988] KLR 645
  - vii. [\*Kenya Commercial Bank Limited v Kenya Planters Co-Operative Union\*](#) civil application No Nai 85 of 2010.
  - viii. [\*Samvir Trustee Limited v Guardian Bank Limited Nairobi\*](#) (Milimani)HCCC 795 of 1997



- ix. [\*Mwaura Karuga T/A Limit Enterprises v Kenya Bus Services Ltd & 4 others\*](#) [2015] eKLR.
- x. [\*Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd\*](#) [2019] eKLR.
- xi. [\*Nduhiu Gitabi v Warugongo\*](#) [1988] KLR 621;1KAR 100; [1988-92] 2 KAR 100

### Analysis And Determination

21. I have considered the application for stay, grounds thereof, supporting affidavit, and annexures. I have also considered the replying affidavit, the annexures thereof and submissions together with case law cited by both counsel for their respective clients.

### Issues For Determination

22. The court should determine: -  
Whether the applicant should be granted:
  - i. Leave to appeal out of time; and
  - ii. Stay of execution pending appeal.

### Of Leave To Appeal Out Of Time

23. Under section 79G of the [\*Civil Procedure Act\*](#), the court may admit an appeal out of time where sufficient cause has been shown. Extension of time to file appeal is, therefore, a matter of judicial discretion, except, exercised upon defined principle of law.
24. Important considerations here include; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and the degree of prejudice to the respondent if the application is granted. (See [\*Leo Sila Mutiso v Rose Hellen Wangari Mwangi\*](#) - civil application No Nai 255 of 1997 (unreported) and [\*Thuita Mwangi v Kenya Airways Limited\*](#) [2003] eKLR.
25. Is there good cause shown for not filing appeal in time?
26. The judgment of the trial court was delivered on July 28, 2021. The application was filed on June 15, 2022 which is more than ten (10) months from the date of the judgment. However, the applicant deposed that he became aware of the judgment on May 2, 2022 when he was served with the notice to show cause. The failure to serve the judgment notice was not denied by the respondent. In the circumstances, the delay herein is barely over one month, which, in ordinary measure, is not inordinate or excessive.
27. In any event, the delay has been explained; and is sufficiently expressive that the applicant acted swiftly and took steps to file this application.
28. Whereas the respondent claims that the applicant's advocate appointed by the insurer was present and that the advocates for the parties were in active correspondences throughout the case, this did not remove the respondent's duty to serve the applicant (plaintiff) personally with the summons.
29. Another important aspect; the applicant is exercising his constitutional right of appeal ([\*Vishva Stone Suppliers Company Limited v RSR Stone \[2006\] Limited\*](#) [2020] eKLR (Nambuye J.A) while quoting with approval the case of [\*Richard Nchapi Leiyagu v IEBC & 2 others\*](#) (*supra*); [\*Mbaki & Others v Macharia & Another\*](#) [2005] 2EA 206 and the Tanzanian case of [\*Abbas Sberally & Another v Abdul Fazaiboy\*](#), civil application No 33 of 2003.)



30. I have considered the attached memorandum of appeal; notably, it is an appeal on quantum which is never frivolous per se.
31. Last but not least; prejudice which the parties may suffer in granting extension of time should be seen in light of the circumstances of the case. The respondent is partly to blame for the delay herein. It will, therefore, be great prejudice to foreclose the applicant's right of appeal on account of such delay. I do not see any prejudice to the respondent arising from the exercise of the right to appeal; I grant the appellant leave to file appeal.
32. For the above reasons, the court is satisfied that leave is deserved. Accordingly, the applicant shall file appeal within 21 days of today.

#### **Of stay of execution**

33. Stay of execution pending appeal is provided for in order 42 rule 6(2) of the [Civil Procedure Rules](#) as follows:

“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.
34. The above are some of the considerations in determining whether there is sufficient cause to grant stay of execution.

#### **Application timeous**

35. From my analysis on good or sufficient reason above, the application was filed without unreasonable delay. I will therefore examine the merits or otherwise of the application on the basis of substantial loss and suitable security.

#### **Of substantial loss**

36. The applicant should show that he will suffer loss that is of real worth, not merely nominal (*Sewankambo Dickson v Ziwa Abby* HCT-00-CC MA 0178 of 2005).
37. The applicant claims that his appeal will be rendered nugatory unless stay of execution is granted- this he stated is substantial loss. He did not, however, state clearly the manner payment of a money decree would render his appeal nugatory.
38. The respondent does not see any loss occurring to the applicant.

#### **Of security**

39. The foregoing notwithstanding, I see a meeting of the mind; deposit of security. The appellant proposes to deposit security in form of half the decretal sum in a joint interest earning account. The respondent proposes a deposit of the entire decretal sum as security or alternatively half of the decretal sum.



40. It is now generally agreed that, in calling for security for purposes of stay of execution pending appeal: -

“...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals –especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts”. (the High Court of Uganda at Kampala decision *supra*)

41. The court particularly noticed that the respondent in their submissions were not averse to a deposit of half of the decretal sum herein as security. This is quite assuring as provision of security, in essence, serves to avert prejudice to the right of the respondent to realize the judgment. Thus, the law; ‘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’.

42. In light thereof, I grant stay of execution of decree made in Narok CM CC No. 72 of 2018 on the following conditions:

- a. The applicant shall deposit half decretal sum into an interest earning account in a reputable commercial Bank, to be held by both advocates for the parties to this appeal, within 30 days of this ruling;
- b. The applicant to file and serve a record of appeal within thirty (30) days of this ruling;
- c. Costs shall be borne by the applicant.
- d. The purpose and subject matter of the proceedings is spent; the file is closed.

43. I so order.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**F. GIKONYO M.**

**JUDGE**

In the presence of:

1. Atisi for the Applicant
2. Kasimbu for the Respondent
3. Kasaso - CA

