



**Wambugu & another v M'Mbita (Miscellaneous Application
533 of 2018) [2023] KEHC 923 (KLR) (Civ) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 923 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL**

MISCELLANEOUS APPLICATION 533 OF 2018

JN MULWA, J

FEBRUARY 16, 2023

BETWEEN

KANGI WAMBUGU 1ST APPLICANT

MWANGI ANTHONY MUNIU 2ND APPLICANT

AND

MARY KAARI M'MBITA RESPONDENT

RULING

1. On the June 16, 2022, the applicants' application dated February 2, 2021 was allowed at prayer 3 whereof the application dated September 23, 2018 was reinstated for hearing interpartes; and an order of stay of execution of the decree pending hearing and determination of the application granted.
2. By the application dated September 23, 2018, the applicants sought leave to file appeal out of time against the trial court's judgment delivered on the June 4, 2018 and reviewed on the September 25, 2018 in Milimani CMCC No 6116 of 2013. In addition, the applicants sought an order of stay of execution pending hearing and determination of the intended appeal.
3. I have considered the parties' affidavits for and in opposition to the application as well as the written submissions.
4. Issues for determination
 - a) Whether leave should be granted to the Applicants to file appeal out of time.
 - b) If the answer to (a) above is in the affirmative, whether an order of stay of execution pending hearing of the intended appeal should issue.



Extension of time

5. Section 79G of the [Civil Procedure Act](#) provides for 30 days upon which a party ought to file an appeal against a judgment or order. Further, a proviso thereto permits admission of an appeal out of time if the applicant satisfies the court that he has good and sufficient reasons and cause for not filing the appeal in time. The underpinning principles are ably captured in the case *Mutiso v Mwangi* [1997] KLR and the Supreme Court decision in *Nicholas Kiptoo Korir v IEBC & 7 Others* [2014] eKLR that the burden of laying a basis to the satisfaction of the court lies with the applicant and whether the delay has been explained to the satisfaction of the court. In addition, whether the application has been brought without undue delay.
6. The decision lies with the court's discretion upon taking into account the length of the delay, the reasons for the delay, the chances of the appeal succeeding, and the degree of prejudice to the respondent if the application is granted – *Mutiso v Mwangi* (Supra).
7. The court in [Nzoia Sugar Company Limited v West Kenya Sugar Limited](#) [2020] eKLR further held there is no set period of delay in law so long as the delay is explained. The period of delay in this application outside the 30 days statutory period is less than one month from the September 25, 2018 when a review of the judgment was made. I am therefore satisfied that the delay, has been explained to the court's satisfaction, and is not unreasonable.
8. On the chances of success of the intended appeal as seen from the draft memorandum of appeal, particularly on the issue of liability, is a matter that can only be settled on appeal or by consent of parties. It is however arguable and being arguable does not mean that the appeal will be successful. The court in [Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another](#) [2018] eKLR held that all that one is required to demonstrate is the arguability of the appeal; a demonstration that the appellant has a plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict.
9. In my assessment, I am persuaded that the applicant has discharged this burden. Subsequently this arm of the application is allowed upon terms that shall appear at the tail end of the ruling.

Stay of execution pending hearing and determination of the appeal

10. The purpose of stay pending appeal is to preserve the subject in dispute in this case a money decree so that the appellants' rights of appeal are safeguarded should the appeal be successful and not rendered nugatory as ably held in [RWW v EKW](#) [2019] eKLR.
11. The amount, subject of the intended appeal is Kshs 800,000/- being general damages for pain and suffering to the respondent. Order 42 rule 6 of the [Civil Procedure Rules](#) sets the parameters that an applicant must comply with and satisfy the court that:
 - a) Substantial loss may result to the applicant if the order is denied;
 - b) That the application has been made without unreasonable delay
 - c) That such security as the court may order for the due performance of the decree as may be ultimately binding on the applicant.
12. These conditions have been repeatedly upheld in numerous decisions of the superior courts. The award sought to be appealed against is a money decree in the sum of Kshs 800,000/-. It has not been averred that if paid out to the respondent, he would not be able to repay should the appeal be successful. On



his part, the respondent has not deponed that he would be or not be able to repay. Thus it would be in the courts discretion to decide whether the said sum should be secured and if so the manner thereof.

13. Having being satisfied of the conditions (a) and (b) above, the court is of the considered opinion that the applicant must offer sufficient security for the due performance of the decree so as to safeguard the decree holder's interest – *National Industrial Credit Bank Limited v Aquinos Francis Wasike & Another [2006] eKLR.*
14. The court in the case of *Mohammed Salim T/A Choice Butchery v Nasserpuria Memon Jamat [2013] eKLR* rendered that:

' The right of appeal must be balanced against an equally weighty right that the plaintiff to enjoy the fruits of judgment delivered in his favour; that there must be a just cause for depriving the plaintiff that right.'
15. The applicant has expressed its willingness to abide by orders that the court may deem fit to protect the respondents' interests and that goes to the protection of the applicants' interest on recovery of the decretal sum should it be paid out to the respondent and the appeal succeeds. As stated above, the award being contested is Kshs 800,000/-.
16. In my opinion, there is no justification in the circumstances of this application to lock the respondent out of the whole award pending hearing and determination of the appeal.

Consequently, I make the following orders:

- a) That the applicants are hereby granted leave to file an appeal out of time; the memorandum of appeal shall be filed and served within 7 days of this ruling.
- b) That the record of appeal shall be filed within 60 days of this ruling.
- c) That an order of stay of execution pending hearing and determination of appeal is issued subject to the applicants paying to the respondent, through his advocates a sum of Kshs 400,000/- (50%) of the award on general damages within 45 days of this ruling and in default the stay order to lapse automatically.
- d) The costs of this application to be borne by the applicants.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF FEBRUARY 2023.

J. N. MULWA

JUDGE

