



**Njoroge & another v Sang (Miscellaneous Cause 46 of 2022)
[2023] KEHC 2556 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2556 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS CAUSE 46 OF 2022
JK SERGON, J
MARCH 23, 2023**

BETWEEN

GEORGE MWANGI NJOROGE 1ST APPLICANT

DANIEL MWANGI 2ND APPLICANT

AND

FAITH CHEPKOECH SANG RESPONDENT

RULING

1. The 1st and the 2nd Applicants filed a Notice of Motion dated November 15, 2022 supported by the grounds laid out on its face and the facts stated in the affidavit of Daniel Mwangi seeking for the following orders:
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to Grant Leave to the Applicant herein to file/or lodge an Appeal out of time against the Judgement of the Honourable E.w Karani Senior Resident Magistrate Vide Kericho CMCC NO. 41 OF 2020 rendered and/or delivered on 19th July, 2022.
 4. That consequence to prayer no.3 being granted, the Honourable court be pleased to grant an Order for stay of Execution of the Judgement and Decree in respect of Kericho CMCC NO. 41 OF 2020 pending the hearing and determination of the intended Appeal.
 5. That the cost of the Application abides the outcome of the intended Appeal.



2. To oppose the said motion, the respondent put in grounds of opposition dated December 6, 2022 drawn by her advocate.
3. The instant motion was canvassed by way of Written submissions.
4. The Applicants vide their Written Submissions dated January 22, 2022 argued that the 3 months delay was not inordinate because of the delay in obtaining a copy of the Judgement from the lower court's registry as the physical file could not be traced since at the time the judgement was delivered, the main court registry had been closed and the relocation of files was being done further delaying the obtaining of the original title.
5. It was the Applicant's further argument that the respondent would not be prejudiced as the applicant was willing to furnish a bank guarantee for the entire decretal amount to act as security and that in any case the Respondent can be compensated by an award of costs.
6. It was the Appellants submissions that the draft memorandum of appeal annexed in support of the application had arguable grounds with high chances of success.
7. In retort, the Respondent submitted that the applicant failed to give good and sufficient cause for delay in filing Appeal as they did not file any document or proof to show that the physical file could not be traced hence the application as filed was an afterthought, an abuse of court process and misuse of judicial process.
8. The respondent further submitted that the appellant's main aim was using the court to delay the finalization of the matter in order to frustrate/embarrass and or cause great prejudice to the respondent.
9. The respondent contended that the applicant prayer for stay of execution be dismissed with costs since the same had not been submitted on.
10. I have considered the grounds laid out on the body of the motion; the facts deponed in the supporting affidavit; the grounds of opposition and the rival written submissions.

The orders being sought in the motion are two-fold:

First is the order seeking for enlargement of time to appeal and leave to appeal out of time against the impugned Judgment.

Section 79G of the *Civil Procedure Act* provides as follows:

“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.

11. Furthermore, section 95 of the *Civil Procedure Act* and Order 50 rule 6 of the *Civil Procedure Rules* give courts power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
12. The Court of Appeal in the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR listed the conditions to be met in deciding whether to extend the period for filling an appeal out of time and which shall guide my reasoning and findings hereunder.



13. Under the first condition touching on length of delay, the applicants state that the delay in bringing the instant motion is not inordinate as there are genuine reasons for the same. The respondent avers that there is no good and sufficient reason for the delay.
14. While it is apparent from the record that no copy of the impugned judgement was availed to this court, it is not in dispute that the judgment was delivered July 19, 2022; while the motion was brought close to four (4) months later. In my mind, while there has clearly been a delay in filing the motion, I do find the delay to be explained.
15. Concerning the reasons for the delay, the applicants explained that the delay was occasioned by the fact that at the time the judgement was delivered, the main court registry had been closed and relocation of files was being done and that the lower court file had gone missing.
16. The Respondents through her advocate states that the Applicant has not given good and sufficient cause for the delay in filing the appeal.
17. Upon considering the explanation given by the applicants, I find the same to be reasonable in the circumstances.
18. Relating to the condition on whether or not an arguable appeal exists, it is the applicants' assertion that they have an arguable appeal which raises arguable grounds. The respondent did not address the court on this condition.
19. From my study of the grounds of appeal raised in the draft memorandum of appeal annexed to the motion, I note that the appeal is challenging the finding of the trial court on quantum. I am therefore satisfied that the applicants have demonstrated arguable points of law and fact in their appeal.
20. Upon my perusal of the record, it is apparent that the judgment was in favour of the respondent herein and against the applicants. It therefore follows that the respondent is lawfully entitled to enjoy the fruits of her judgment. Suffice it to say that it would not be in the interest of justice to lock out the applicants who are aggrieved by the judgment of the trial court on damages. I therefore find it reasonable for the applicants to be given the opportunity of challenging the subordinate court's assessment of damages on appeal.
21. In addressing the final condition on prejudice, the applicants state that the respondent does not stand to be prejudiced in a manner that cannot be adequately compensated by way of an award on costs and that they are willing to provide a bank guarantee to act as security for the entire decretal amount pending the determination of the intended appeal. The Respondent on the other hand avers that the applicants through this application are using the court to frustrate/embarrass and/or cause the respondent great prejudice.
22. As I have stated earlier, the impugned judgement was in favour of the Respondent as against the Applicants and it therefore follows that the respondent is lawfully entitled to enjoy the fruits of her judgment. However, I reiterate that it would not be in the interest of justice to lock out the applicants who are aggrieved by the judgement of the trial court and I therefore find it reasonable for the applicants to be given the opportunity of challenging the subordinate court's decision.
23. The second prayer is for stay of execution of the decree pending appeal.
24. From the record I note that the respondent through her advocate in her Written Submissions has stated that this prayer should be dismissed with costs for the reason that the applicants have not submitted on the same. In the absence of any submissions, the Court is bound to consider the grounds stated on the face of the application and the facts deponed in the rival Affidavit.



25. Upon my study of the record, it is apparent that the prayer for stay of execution was pegged on the leave to appeal out of time being granted. None of the parties has addressed the court on this prayer.
26. Order 42, rule 6 (1) and (2) of the *Civil Procedure Rules* sets out the conditions to be satisfied for the grant of stay of execution pending appeal as follows:
27. “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under sub rule (1) unless—
- (a) 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.
28. From the above provision of law, it is clear that an appeal does not operate as stay of execution of orders under a decree and therefore for the court to order a stay of execution of decree appealed against, the applicant must make a formal application.
29. Order 42 rule 6(2) outlines the conditions to be satisfied for the grant of stay of execution pending appeal. The first condition being that the application must have been brought without unreasonable delay. The Applicant avers in the Application that the instant application was filed timely without unreasonable delay. The applicant has actually explained the reasons for the delay in filing the appeal. The reasons can also explain the delay in filing the Stay Application.
30. However, substantial loss is a factual issue, which must be raised and further supported by evidence. The Applicant avers that unless the order for stay is granted, the applicant will suffer substantial loss in that the Respondent is not in a financial position to refund the decretal sum if the Appeal turns successful. The Respondent relied on grounds of Opposition but failed to controvert the assertion that she is not in a financial position to refund the decretal sum when required. I am satisfied that the Applicant should be granted the order for Stay of Execution of the decree pending Appeal
31. The upshot therefore is that the notice of motion dated November 16, 2022 is merited. It is allowed thus giving rise to instance of the following orders:
- i. The Applicants are given leave of 14 days from today’s date to file an appeal out of time.
 - ii. An Order for Stay of Execution of the decree pending appeal is granted on condition that the Applicant provides a Bank Guarantee for the entire decretal sum within 45 days. In default, the Order for Stay shall automatically lapse.
 - iii. Costs to abide the outcome of the intended Appeal

DATED, SIGNED AND DELIVERED AT KERICHO THIS 23RD DAY OF MARCH, 2023.

J.K. SERGON

JUDGE



In the presence of:

.....for the Appellants

.....for the Respondent

