



REPUBLIC OF KENYA



KENYA LAW
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**Chege v Ngaine (Civil Appeal E428 of 2022)
[2023] KEHC 3439 (KLR) (Civ) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3439 (KLR)

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

CIVIL

CIVIL APPEAL E428 OF 2022

CW MEOLI, J

APRIL 20, 2023

BETWEEN

JOHN CHEGE APPLICANT

AND

SAMUEL KINYUA NGAINE RESPONDENT

RULING

1. The motion dated 21.06.2022 by John Chege (hereafter the Applicant) is primarily seeking admission of this appeal out of time and that the same be deemed to be properly on record; an order to stay execution of the judgment delivered in Nairobi Milimani CMCC No. 8163 of 2016 in favour of Samuel Kinyua Ngaine (hereafter the Respondent) pending hearing and determination of the intended appeal. The motion is expressed to be brought inter alia under section 1A, 1B, 3A & 95 of the *Civil Procedure Act*, order 22 rule 22 & order 51 rule 1 of the *Civil Procedure Rules*.
2. It is premised on grounds that the Applicant being dissatisfied with the judgment delivered in Nairobi Milimani CMCC No. 8163 of 2016 on 03.02.2021 has purposed to appeal and filed the memorandum of appeal out of time; that the appeal has a high chance of success; that the Applicant's insurer is ready, willing and able to furnish the court with a bank guarantee from a reputable bank as security; that the motion has made in good faith whereas the Respondent will not be prejudiced in any way if the motion is allowed; and that if stay of execution of the judgment is not granted and, the Applicant will suffer great injustice and prejudice.
3. The motion is supported by the undated affidavit sworn by Martha Mugo, counsel on record for the Applicant. The gist of her depositions, other than asserting that judgment was delivered on 03.02.2021, merely restates the prayers in the motion and the additional deposition that a demand payment of the decretal sum has been made by the Respondent. Therefore, unless stay of execution is granted the Applicant will suffer what is described as irreparable loss and damage.



4. The Respondent opposes the motion by way of a replying affidavit dated July 12, 2022. He views the motion as having been made in bad faith with the intent of denying him enjoyment of the fruits of successful litigation as no explanation has been proffered the delay of more than a year to file the instant motion and or appeal. The Respondent asserts that the motion is a dilatory tactic and an afterthought. He further deposes that the Applicant has not demonstrated the loss he would suffer, should the stay orders sought herein be declined. In conclusion, he states that in the alternative, the court if it is to grant the motion ought to impose the condition for provision of security.
5. The motion was canvassed by way of written submissions. Counsel for the Applicant condensed her submissions into three issues. Addressing the question of leave to appeal out of time, counsel raised factual issues not contained the affidavit she swore in support of the motion , and meanwhile called to aid the decision in *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR. Her contention being that the delay in filing the appeal is not so inordinate as to warrant the court declining to exercise its discretion in the Applicant’s favour. Moreover, that the Respondent has not demonstrated that he has been prejudiced by the said delay. And asserting that the Respondent would not suffer prejudice that cannot be sufficiently ameliorated by an award of costs.
6. In asserting that the appeal is arguable, counsel relied on the decision in *Kenya Revenue Authority v Sidney Keitany Changole & 3 Others* [2015] eKLR and stated that there are triable issues raised in the memorandum of appeal that warrant the court’s consideration . Further raising factual matters not contained in her affidavit in support of the motion, counsel cited the case of *Edward Kamau & Anor v Hannah Mukui Gichuki & Another* [2015] eKLR to argue that if stay of execution is not granted the intended appeal will be rendered nugatory and the Applicant will suffer what is described as irreparable loss and damage. In conclusion, the court was urged to allow the motion as prayed.
7. On behalf of the Respondent, counsel relied on the decisions in *Mwangi v Kenya Airways Ltd* [2003] eKLR, *Monica Malel & Anor v R*, Eldoret Civil Appln. No. Nai. 246 of 2008, *Kenya Red Cross Society v Mbondo Katheke Mwanja* [2019] eKLR and *M/s Portreitz Maternity v James Karanga Kabia*, Civil Appeal No. 63 of 1997 to submit that from the Applicant’s affidavit material, the Applicant was aware of the judgment and its terms since the delivery date. That the instant motion has been brought more than one year since the judgment while the Applicant has failed to tender an explanation in his affidavit material, to warrant the court’s exercise of its discretion in his favour. It was further contended that the Respondent will be highly prejudiced by the instant motion as the matter has been pending in court since 2016. He contended that the motion is a delaying tactic.
8. Addressing the court on the question of stay of execution pending appeal, counsel relied on Civil Appeal No E121 of 2021, *Shoko Molu Beka & Anor v Augustine Gwaro Mokamba* to contend that substantial loss is a factual issue which must be raised in the supporting affidavit. That the Applicant has not placed before the court evidential in proof of substantial loss should stay be denied. Concerning provision of security counsel cited the decision in Edward Kamau (supra) in urging the position that the Respondent is entitled to equal treatment before the law and urged the balancing of the parties’ rights. Hence, it is in the interest of justice that the Applicant be ordered to furnish security.
9. The Court has considered the rival affidavit material and submissions made in respect of the motion. First, as a preliminary observation, it is apposite to point out that the so-called supporting affidavit sworn by counsel for the Applicant merely restates the reliefs on the face of the motion.
10. Moving on to the substance of the motion, the Applicant seeks leave to appeal out of time and stay of execution pending hearing and determination of the intended appeal. The principles governing the grant of leave to appeal out of time are settled. The successful applicant must demonstrate “good and



sufficient cause” for not filing the appeal in time. In *Thuita Mwangi* (supra), the Court of Appeal while considering rule 4 of the *Court of Appeal Rules* which was in pari materia with section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

11. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor through the affidavit material. The court’s observation is that the motion was poorly drafted and failed to summon pertinent material bringing it within the principles enunciated in the case of *Thuita Mwangi* (supra). The onus was on the Applicant to swear an appropriate and fitting affidavit in support of the prayer for leave to appeal out of time. The delay in this case is almost 16 months and is clearly inordinate. The Applicant did not deem it necessary to explain the delay in his affidavit and appeared to assume that the court would act in his favour regardless. A court of law makes decisions on the basis of pertinent facts and the law. Submissions cannot be used as a substitute for affidavit evidence where such evidence is required. In the absence of affidavit material in support of the prayer for leave to appeal out of time, the same must fail.
12. Regarding the prayer seeking stay of execution pending hearing and determination of the intended appeal, it is evident on a plain reading of order 42 rule 6(1) of the *CPR* that such an order presupposes the existence of an appeal. Although the provision does not expressly say so, this can be inferred from the rule. Further, an analogy can be drawn from order 42 rule 6 of the *Civil Procedure Rules*, which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given.
13. Equally, the jurisdiction of this court to grant stay of execution under order 42 rule 6 can only be exercised when an appeal by way of a memorandum of appeal has been filed and or admitted out of time. The Court of Appeal in *Abubaker Mohamed Al-Amin v Firdaus Siwa Somo* [2018] eKLR while citing with approval the decision of the High Court in *Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased))* [2017] eKLR concurred with the foregoing reasoning.
14. In the absence of an appeal, the court would be acting in vacuo by considering the Applicant’s prayer for stay of execution pending what is essentially a still-born appeal, the prayer for leave for late admission of the memorandum of appeal having failed. The prayer for stay of execution must equally fail. In the result, the entire motion is found to be without merit and is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF APRIL 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For the Respondent: N/A



C/A: Carol

