



**Kenyatta National Hospital v Kipkemoi t/a Robric Enterprises (Civil Miscellaneous Application E789 of 2022) [2023] KEHC 3096 (KLR) (Civ) (14 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3096 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL MISCELLANEOUS APPLICATION E789 OF 2022**

**AN ONGERI, J**

**APRIL 14, 2023**

**BETWEEN**

**KENYATTA NATIONAL HOSPITAL ..... APPLICANT**

**AND**

**ROSEMARY KIPKEMOI T/A ROBRIC ENTERPRISES ..... RESPONDENT**

**RULING**

1. The application coming for consideration in this ruling is the one dated December 8, 2022 seeking the following orders:
  - i. That the application herein be certified as urgent and service of the same be dispensed with in the first instance and be heard *ex-parte* in the first instance.
  - ii. That pending hearing and determination of this application, this honourable court be pleased to issue an order of stay of execution of the judgment and decree in Milimani CMCC No 8090 of 2018, Rosemary Kipkemoi T/A Robric Enterprises v Kenyatta National Hospital.
  - iii. That this honourable court be pleased to grant leave to the applicant to appeal out of time against the judgment and decree dated September 12, 2022 in Milimani CMCC No 8090 of 2018, Rosemary Kipkemoi T/A Robric Enterprises v Kenyatta National Hospital.
  - iv. That upon grant of prayer (3) above, this honourable court be pleased to stay execution of the judgment and decree in Milimani CMCC No 8090 of 2018, Rosemary Kipkemoi T/A Robric Enterprises v Kenyatta National Hospital pending hearing and determination of the intended appeal.
  - v. That the costs of this application abide the outcome of the intended appeal.



2. The application is based on the grounds on the face of it and supported by the affidavit of Calvin Nyachoti. In it the applicant averred that it was unaware that judgement was entered by the lower court and only came to know of its existence when they were served with an application seeking for the firm of Chege & Sang Company advocates to come on record for the respondents on November 10, 2022. The trial court in its judgement did not determine the amount to be paid to the respondent and the formula to be used in the calculation thereof. The respondent's advocate however extracted a decree where the principle amount was determined to be Kshs 6,043,000 together with interest of Kshs 3,023,817.
3. The applicant claimed that they were not involved in the calculations of the figure aforementioned as required by order 21 rules 2, 3,4 and 5 of the *Civil Procedure rules*. That the decretal amount is colossal and since the respondent is a person of unknown financial means and the applicant is apprehensive that if the decretal amount is paid to the respondent and the appeal is successful, the respondent will be unable to refund the decretal amount rendering the appeal nugatory.
4. The applicant indicated that it is willing and ready to deposit security this court deems fit and will abide by any conditions that this court sets pending the hearing and determination of the appeal herein.
5. The respondents were served with the application but did not file any replying affidavit.
6. The applicant filed written submissions and in it argued that the case in the trial court proceeded for hearing on June 30, 2021 and August 23, 2021 and thereafter the parties filed written submissions. On September 3, 2021 the court set a judgement date for September 28, 2021 but on the said date the same was not ready and the parties were notified that it would be delivered on notice. The applicant's advocate did not receive the said notice and only came to learn of its existence on November 10, 2022. In support it cited *Velos Enterprises Limited v Paragon Electronics Limited* [2018] eKLR where the Court of Appeal held;

“I have found as a fact that the applicant had no notice of delivery of ruling whose delivery date had been deferred. Ruling was delivered in the absence of the applicant and no information on delivery of that ruling was conveyed to the applicant by the court or by counsel for the respondent. The applicant did not know that ruling had been delivered until its bankers relayed information when garnishee proceedings were served on them. It is therefore surprising that learned counsel for the respondent submits that the application before me was filed with inordinate delay. That cannot be because counsel for the respondent did not produce any evidence to show that they had informed the lawyers on record for the applicant that ruling had been delivered. I accept what Mr Walter Amoko, learned counsel, in affidavit in support of urgency says – that the applicant learnt of delivery of ruling after July 25, 2017 when garnishee proceedings were served on I & M Bank Limited. The motion before me was filed on July 31, 2017, less than a week later. There was no delay.”

7. It was therefore the applicant's submission that the delay of one month was not unreasonable considering the facts. It argued that the appeal is arguable and that the respondent has not shown that if the application is allowed she would suffer irreversible prejudice. That any inconvenience to the respondent can be adequately compensated for by an award of costs.
8. The respondent did not file any submissions.
9. The issues for determination in this application are as follows:
  - i. Whether the applicant should be granted leave to appeal out of time.



- ii. Whether the applicant is entitled to stay of execution pending appeal.
  - iii. Who pays the costs of the application.
10. On the issue of leave to appeal out of time, the legal provision in section 79G;  
Time for filing appeals from subordinate courts
- 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. The three conditions for extension of time are as follows
- i. The court has to consider the length of the delay.
  - ii. The reasons for the delay
  - iii. The chances of the appeal succeeding.
  - iv. The degree of prejudice likely to be suffered by the Respondent.
12. In the current case, I find that the application is not opposed and further that there is a valid reason for the delay.
13. I grant the applicant 30 days leave to file the intended appeal.
14. On the issue of stay of execution, the governing section is order 42 rule 6 which states as follows:
- (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 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.
15. It is the duty of this court to balance the applicant’s right to appeal and in the case of *Mohammed Salim t/a Choice Butchery v Nasserpuria Memon Jamat* (2013) eKLR the court upheld the decision of *Portreitz Maternity v James Karanga Kabia* civil appeal No 63 of 1991 and stated that:-
- “That right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause



for depriving the plaintiff of that right.” he respondent’s right to enjoy the fruit of her judgment.

16. I grant the applicant leave to appeal on condition that half the decretal sum ordered on December 10, 2022 is deposited in court within 30 days of this date.

17. The intended appeal to be expedited.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 14<sup>TH</sup> DAY OF APRIL, 2023.**

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**A. ONGERI**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent

