



**Mawira & 7 others v Kajuju (Miscellaneous Application
E058 of 2022) [2023] KEHC 3210 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS APPLICATION E058 OF 2022
EM MURIITHI, J
APRIL 14, 2023**

BETWEEN

**EVANS MAWIRA 1ST APPLICANT
SAMUEL KIOGORA 2ND APPLICANT
PIERRA KANANA CHRISTINE 3RD APPLICANT
GILBERT MBAABU 4TH APPLICANT
FAITH NKIROTE 5TH APPLICANT
GERALD KINYUA 6TH APPLICANT
STEPHEN NKOROI 7TH APPLICANT
GRACE NKIROTE 8TH APPLICANT**

AND

MONICA KAJUJU RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated October 3, 2022, brought under Sections 1A, 1B, 3 & 79G of the *Civil Procedure Act*, Order 9 Rule 9 (b), Order 42 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law, the applicants seek that:
 1. Spent
 2. Spent
 3. Pending interpartes hearing of the application, the Honorable Court be pleased to order a stay of execution of the judgment/decreed issued in Nkubu PMCC No 105 of 2018 delivered on August 25, 2022 by the Honorable E M Ayuka, SRM.



4. Pending the Hearing and determination of the intended Appeal, the Honorable Court be pleased to order a stay of execution of the judgment/decreed issued in Nkubu PMCC No 105 of 2018 delivered on August 25, 2022 by the Honorable E.M Ayuka, SRM.
 5. The Honorable Court be pleased to grant leave to the applicants to appeal out of time against the Judgment delivered on August 25, 2022 in Nkubu PMCC No 105 of 2018 (Monica Kajuju V Evans Mawira & 8 Others).
 6. Costs of this Application be in the cause.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Pierra Kanana Christine, the 3rd applicant herein, sworn on even date. She avers that the judgment was delivered on August 25, 2022 in their absence and that of their then advocates on record. They were then advised by their current advocates that the 30 days to file an appeal ended on September 26, 2022. They are aggrieved by the said judgment and are desirous of filing an appeal to challenge it. They now seek leave to appeal out of time and stay of execution against the impugned judgment. They stand to suffer substantial loss if execution is levied against them and in the event the appeal, which is arguable, succeeds, the respondent is a person of straw who is unable to refund the decretal sum. They are ready and willing to give such security as may be ordered by the court, and they urge the court to allow the application as it has been made timeously and in good faith.
 3. The respondent has opposed the application vide her replying affidavit sworn on October 18, 2022. She avers that the instant application is a belated and worthless attempt by the applicants to file an appeal out of time whereas the intended appeal has no merits whatsoever. In her view, no good reason has been given for the delay in filing the appeal, and it was the duty of the applicants to follow up with their advocate on the delivery of the judgment and not vice versa since the case belonged to them and not their advocate. She avers that no evidence has been availed to demonstrate that the applicants obtained the judgment on September 27, 2022 and not on an earlier date. She avers that she is able to refund the decretal sum if paid, in the unlikely event that the intended appeal succeeds. She is amenable to conditional stay being granted upon payment of at least half of the decretal sum to her and the balance to be deposited in a joint interest earning account, otherwise the application ought to be dismissed, because the applicants failed to dislodge her claim in the trial court.
 4. The court on October 6, 2022 granted conditional stay of execution upon deposit of Ksh 400,000 in court.

Submissions

5. The applicants urge that the delay in filing the appeal was not inordinate as it was caused by the fact that they were not apprised when the judgment was delivered, and only became aware of it on September 26, 2022, when the respondent started bragging to them that she would soon execute her judgment against them. They urge that the intended appeal is arguable and the respondent has not shown what harm she will suffer if the application is allowed. They urge that they stand to suffer substantial loss if execution is levied against them, as the respondent will be unable to refund the decretal sum in the event the appeal succeeds, and cite *Edward Kamau & Another v Hannah Mukui & Another* (2015)eKLR, *Republic v County Government of Kiambu & another Ex Parte; Kiambu Farmers Choice Limited* (2021)eKLR, *James Mbatia Thuo & Ephantus Mwangi Kenya Railways Corporation & Attorney General of Kenya* (2018) eKLR and *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* (2018) eKLR.
6. The respondent did not file any submissions.



Analysis and Determination

7. The issues for determination are whether leave to appeal out of time and stay of execution should issue.

Leave to appeal out of time

8. In order to succeed in their application for extension of time to appeal out of time, the applicants must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay must be plausible, that the appeal is arguable and that the respondent will not be unduly prejudiced if the order is granted. See *Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others* (2014)eKLR.
9. This court notes the delay from the date of the impugned judgment on August 25, 2022 to October 4, 2022 when the application was filed. The delay is attributed to the fact that the impugned judgment was delivered in the absence of the applicants and their counsel, which is indeed factual. The court finds that the delay of approximately 2 months is not inordinate and the reason for it has been satisfactorily explained.
10. On the arguability or otherwise of the intended appeal, this court notes that the grounds of appeal raised in the memorandum of appeal faulting the trial court for shifting the burden of proof to the applicants and awarding special damages of Ksh 1,030,727 without proof among others cannot be said to be frivolous.
11. This court thus grants leave to the applicants to appeal out of time.

Stay of Execution

12. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the Civil Procedure Rules, as follows: - “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

No order for stay of execution shall be made under sub rule (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.
- 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.”

Substantial loss

13. The cornerstone consideration for granting stay is substantial loss, which has been espoused by the Court of Appeal (Platt, AG JA) in *Kenya Shell Limited v Kibiru Another* (1986) eKLR as follows: -“.....If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner



stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”

14. The applicants contend that they stand to suffer substantial loss if execution is levied against them and in the event the appeal, which is arguable, succeeds, the respondent is a person of straw who is unable to refund the decretal sum. On her part, the respondent contends that the intended appeal has no merits whatsoever and she is capable of refunding the decretal sum if the appeal succeeds.
15. The court is mindful of the need to strike a balance between the respondent’s right, as the successful litigant, to enjoy the fruits of her judgment, and the applicants’ undoubted right to appeal against the trial court’s decision.

Delay

16. The judgment sought to be appealed against was delivered on August 25, 2022 while the instant application was filed on October 4, 2022. This court finds that the delay of approximately 2 months does not constitute undue delay.

Security

17. The court appreciates the applicants’ willingness to offer security for the due performance of the decree, and the respondent’s inclination to accept payment of at least half the decretal sum, as security, and deposit of the balance in a joint interest earning account.

Orders

18. Accordingly, for the reasons set out above, the court allows the applicants’ application dated October 3, 2022 in the following terms:
 1. Leave to appeal out of time is hereby granted.
 2. An order for stay of execution of the Judgment and Decree in Nkubu PMCC No 105 of 2018 pending the hearing and determination of this appeal is hereby issued.
 3. The Record of Appeal shall be filed within 60 days from the date hereof.
 4. The applicants shall within thirty days (30) days from the date hereof pay to the Respondent the sum of Ksh 500,000/= and deposit the balance of Ksh 530,727 in court.
 5. In the event of default of the aforementioned conditions, the stay of execution shall lapse and be of no effect.
 6. The costs of the application shall abide the outcome of the Appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 14TH DAY OF APRIL, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mwirigi Kaburu & Co. Advocates for the Applicants.

M/S Mithega & Kariuki Advocates for the Respondents.

