



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muindi v Odera (Miscellaneous Application E043 of 2023)  
[2023] KEHC 18126 (KLR) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18126 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS APPLICATION E043 OF 2023**

**FR OLEL, J**

**MAY 23, 2023**

**BETWEEN**

**ROSE MUHONJA MUINDI ..... APPELLANT**

**AND**

**JACOB NYAMBOK ODERA ..... RESPONDENT**

**RULING**

1. The application before this court is the Notice of Motion application dated 14<sup>TH</sup> March 2023 brought pursuant to provisions of Section 3A, & 79G of the *Civil Procedure Act*, order 22 rule 22, order 42 rule 6, order 50 rule 6, order 51 rule 1 and 3 of the *Civil Procedure Rules* and all other enabling provision of law. The two main prayers being sought are prayers (2) ; that this court be pleased to extend time and grant leave to the applicant to file a memorandum of appeal out of time against the judgment and decree of Hon E Kimaiyo Suter, Principal Magistrate against the applicant dated February 2, 2023 in Mavoko civil suit No 577 of 2020 and in pray (4), that this court be pleased to issue a stay of execution of the said decree pending hearing and determination of the intended appeal
2. This application is supported by the grounds on the face of the said application and supporting affidavit of Nyakundi Joyce dated March 14, 2023. The respondent did indicate that they had filed their replying affidavit, but none was in seen in the file as at the time of writing this ruling.
3. The Appellant's advocate averred that the applicant was aggrieved by the judgment entered against her dated February 2, 2023 delivered in Mavoko civil suit No 577 of 2020 by Honourable, E Kimaiyo Suter, Principal Magistrate and was desirous of filing an appeal against the said judgment. The delay in filing this appeal was occasioned by delay in giving instructions to her advocates to file the appeal for she was majorly aggrieved by finding on liability. Further she stated that she had an arguable appeal, which has high chances of success and also the said appeal is meritorious as demonstrated in the Memorandum of Appeal attached to the said application.



4. Further the applicant averred that unless stay of execution is granted, the respondent is likely to set in motion execution process by sending auctioneers to attach her property and that will render the appeal to be nugatory and lead her to suffer substantial loss and damage.
5. Finally, the Applicant stated that she is ready and willing to give security for the decretal sum in form of a bank guarantee from Family Bank and that the Respondent will not be prejudiced if orders sought are granted. The applicant also confirmed that this application has been filed without unreasonable and undue delay.
6. The Respondent advocate one Mr Langat stated in court on 28.03.2023 that they had filed their replying affidavit but the same was not in the court file as and when this matter was being considered by court.

### **Analysis & Determination**

7. I have carefully considered the Application, Supporting Affidavit and the only issues for determination is whether the applicant should be granted leave to appeal out of time and secondly whether the applicant has met the conditions necessary for the grant of stay pending appeal.
8. Applications for extension of time are governed under provisions of, Rule 79G of the [Civil Procedure Act](#), & Order 50 rule 6 of the civil procedure Rules.

Section 79G of the [Civil procedure Act](#) 2010 does provide that

“Every appeal from a subordinate court to the high court shall be filed within a period of 30 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 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.

While order 50 rule 6 of the [Civil Procedure](#) provides that;

“where a limited time has been fixed for doing any act or taking of any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge time upon such terms(if Any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the expiration of time appointed or allowed.”

9. The position in law is that extension of time is not a right of a party. It is an equitable remedy that is only available to deserving parties at the discretion of the court, which discretion has to be exercised judiciously and not on whim, sympathy and/or caprice. The court also has to consider the period of delay, reasons for the delay, chances of appeal succeeding and finally the decree of prejudice to the respondent. See [Salat v Independent Electoral & boundaries commission & 7 others](#) (2014) KLR-SCK, & [Paul Wanjohi Mathenge v Duncan Gichane Mathenge](#) (2013) eKLR.
10. The applicant is aggrieved by a judgment dated 2nd February 2023 delivered by Honourable E Kimaiyo, Principal Magistrate In Mavoko Civil suit No 577 of 2020. They filed this application on March 20, 2023 and stated therein that the reason for the delay was that they got instruction to file the appeal late from the client, who is especially aggrieved by the finding on liability against her.



11. Giving consideration to the above guiding factors and applying them to the facts herein, I do find that this application has been filed within a reasonable period of three weeks after the time allowed to file the appeal had lapse, the reasons advanced for the delay are plausible and the court is inclined to give the appellant the benefit of doubt, the proposed appeal raises triable issues and finally the prejudiced suffered by the respondent can be compensated by way of costs. The prayer for leave to lodge an appeal out of time against the judgment and decree of the dated 2nd February 2023 delivered by Honourable E Kimaiyo, Principal Magistrate In Mavoko Civil suit No 577 of 2020 is allowed.
12. Stay of execution pending appeal is governed by order 42 rule 6 of the *Civil Procedure Rules*. The said rules provide that;  
Order 42 rule 6(1) provides that
  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 from may order but, the court appealed from may for sufficient cause order stay of execution of such a decree or order, and whether the application of r 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 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 of stay of execution shall be made under sub rule (1) unless;
    - a. The court is satisfied that the 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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
13. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant.
  1. As stated in the case of *Amal Hauliers Limited v Abdulnasi Abukar Hassan* (2017) eKLR which quoted with approval *Butt v Rent Tribunal* (1982) KLR 417 the guiding principles which the court should consider while determining an application of this nature. These were;
    - a. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
    - b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not to be rendered nugatory should that appeal court reverse the judge's discretion.
    - c. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
    - d. The court in exercising the discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the cases and unique requirements. The



special circumstances in this case were that there was a large amount of rent in dispute and the Appellant had an undoubted right of appeal.

- e. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.
  - f. The Appellants finally averred that this court is clothed with very wide discretion to grant the orders sought under Section 3A as read together with section 63(c) of the *Civil Procedure Act*.
15. In the case of *Masis Mwita v Damris Wanjiku Njeri* (2016) eKLR the court provided the guiding principles which the court should consider while determining an application of this nature. These were;
- a. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal from being heard.
  - b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not to be rendered nugatory should that appeal court reverse the judge’s discretion.
  - c. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
  - d. The court in exercising the discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the cases and unique requirements.
16. The judgment appealed against was delivered on February 2, 2023. This application under consideration was filed on March 20, 2022 seeking extension of time to file the said appeal and for stay of execution. Thus, it can be said that this application for of execution have been file timeously.
17. On the likelihood of the applicant suffering substantial loss, the case law as stated in *G. N. Muema P/A (516) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & another* (2010) eKLR is that;
- “It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”
18. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* (2006) eKLR the Court of Appeal held thus;
- “Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”
19. Guided by the above authorities and in the absence of the requisite proof from the Respondent that he is a person of means, I find that the Appellant has satisfied this court that they would suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined.



20. On the security, the Appellant have indicated that they are ready and willing to provide security by giving a bank guarantee.
21. The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See *Attorney General v Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd v Kibiru & another* (Supreme); *Mukuma v Abuoga* (1988) KLR 645.
22. The law is that where the Applicant succeeds, she should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.
23. This issue of adequacy of security was dealt with in the Court of Appeal in *Ndubiu Gitahi v Warugongo* (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100 where the Court of Appeal expressed itself as follows;

“The process of giving security is one which arises constantly so long as the opposite party can be adequately protected. It is right and proper that security should be given in a way which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantees and payment into court are but two of them. So long as it is adequate, then the form of it is a matter which is immaterial. In an application for stay pending appeal, the court is faced with a situation where judgment has been given. It is subject to appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even handedly without prejudicing the issues pending in the appeal. For that purpose, it matters not whether the plaintiff are secured in one way rather than the other, it would be easier for the defendants or if for any reasons they would prefer to provide security by a bank guarantee rather than cash. There are absolutely no principles why they should not do so... The aim of the court in this case was to make sure, in an even-handed manner, that there would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant so as to tempt him into settling the appeal nor will any party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it.”

## **Disposition**

24. Taking all relevant factors into consideration and having read the memorandum of appeal, it is clear that the appellants are appealing on both liability and quantum. I do grant the following orders;
  - a. That the applicant is granted leave to appeal out of time against the judgment and decree dated February 2, 2023 delivered by Honourable E Kimaiyo, Principal Magistrate In Mavoko Civil suit No 577 of 2020. The applicant is granted a further 7 days from the date of this ruling to file the said appeal.



- b. That the appellant do deposit the entire decretal sum of Ksh 133,650/= in a joint interest earning account, held at a reputable bank, in the names of counsels of both parties pending hearing and determination of this appeal
- c. This condition is to be met within 45 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.

25. The costs of this Application are awarded to the Respondent.

26. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 23<sup>RD</sup> DAY OF MAY 2023.**

**RAYOLA FRANCIS**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 23<sup>RD</sup> DAY OF MAY, 2023.**

**In the presence of;**

.....for Appellant

.....for Respondent

.....Court Assistant

