



REPUBLIC OF KENYA



KENYA LAW
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**Carolyne v Isoe & 2 others (Miscellaneous Civil Case E003 of 2023)
[2023] KEHC 18606 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18606 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
MISCELLANEOUS CIVIL CASE E003 OF 2023**

**WA OKWANY, J
JUNE 15, 2023**

BETWEEN

ODENYO CAROLYNE APPLICANT

AND

ZIPPORAH ISOE 1ST RESPONDENT

SAMWEL NYAKUNDI KIMORI 2ND RESPONDENT

FAMILY BANK LIMITED 3RD RESPONDENT

RULING

1. This ruling is in respect to the application dated February 25, 2023 wherein the Applicant seeks orders for stay of execution of the decree issued on November 22, 2022 pending appeal, and leave to appeal out of time. The application is supported by the Applicant's affidavit and is premised on the grounds that: -
 1. Judgment was delivered on the November 22, 2022 in the absence of the applicant's advocate who was only made aware of the same by the advocate for the respondents on the 30th day of January 2023.
 2. The prescribed time for lodging a memorandum of appeal had long elapsed by the time of informing the defence about the judgment.
 3. The applicant's intended appeal stands an overwhelming chance of success and the applicant should be given leave to appeal.
 4. No prejudice shall be occasioned to the respondents if the appeal is filed.



2. The Respondents opposed the application through the 2nd Respondent's replying affidavit dated March 24, 2023. The 2nd Respondent avers that the application is a ploy to defeat justice as the Applicant has all along been reluctant to attend court or file pleadings in time despite notice.
3. Parties canvassed the application by way of written submission which I have considered.
4. The main issue for determination is whether the Applicant has made out a case for the granting of orders for stay of execution.
5. The gist of the Applicant's case is that judgment was delivered in his absence and that he became aware of the said judgment after the expiry of the appeal period. The Applicant maintains that the intended appeal is meritorious.
6. Section 79G of the Civil Procedure Act (CPA) stipulates that: -

“Every appeal from a subordinate court to the High Court shall be filed with 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 of 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.”
7. Courts have taken the position that under Section 79G of the CPA, an Applicant seeking orders for leave to appeal out of time must have filed the intended appeal at the same time that they seek the court's leave for the appeal to be admitted out of time. (See Gerald M'limbine v Joseph Kangangi [2008] eKLR.
8. The Applicant argued that his application satisfied the requirements of Section 79G of the CPA as he had annexed the draft intended to the application.
9. The Respondents on their part, argued that the Applicant had adequate notice of the judgment and that he should have filed the appeal within the stipulated period.
10. It was submitted that the Applicant had not furnished the court with sufficient reasons for the delay in filing the appeal.
11. On stay of execution, the Respondents submitted that the same should be conditional on payment of half of the decretal sum and a deposit of the remaining half in an interest earning account.
12. I have perused the impugned judgment of the lower court and I note that it was delivered virtually on November 22, 2022 in the presence of Ms Asasa for the Plaintiff and “the Firm of GS Okoth for the Defendant.”
13. I note that the said record does not indicate that anyone appeared for the said of GS Okoth Advocates on the judgment date thus lending credence to the Applicant's position that he was not made aware of the said judgment in good time. I find that it will be in the interest of justice to grant the Applicant leave to appeal out of time.
14. Turning to the prayer for stay of execution pending appeal, I take the position that while the Appellant/Applicant has a right to pursue his appeal, the Respondents are, on their part, also entitled to enjoy the fruits of their judgment.



15. In balancing the interest of both parties, I will allow the application for stay of execution pending appeal but on the following conditions: -
- a. That the Applicant pays half of the decretal sum to the Respondents and deposits the other half in a joint interest earning account to be held in the names of Counsel for both parties within thirty (30) days from the date of this ruling.
 - b. In the event that the Applicant defaults in paying the decretal sum and making the deposit, the stay orders issued herein shall be vacated and the Respondents will be at liberty to execute.
16. The costs of this application shall abide the outcome of the appeal.
17. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 15TH DAY OF JUNE 2023.

W. A. OKWANY

JUDGE

