



**Kaleli & 2 others v Munguti & another (Suing as the Legal and Personal Representatives of the Estate of the Late Brian Munguti - Deceased) (Miscellaneous Application 97 of 2022) [2023] KEHC 18179 (KLR) (6 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18179 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
MISCELLANEOUS APPLICATION 97 OF 2022**

**GMA DULU, J**

**JUNE 6, 2023**

**BETWEEN**

**MATHEKA KALELI ..... 1<sup>ST</sup> APPLICANT  
NICODEMUS KYALO KITHUKA ..... 2<sup>ND</sup> APPLICANT  
CAR HOUSE LIMITED ..... 3<sup>RD</sup> APPLICANT**

**AND**

**KANYALU MUNGUTI, MAUNDU MUNGUTI ..... 1<sup>ST</sup> RESPONDENT  
JOSIAH MUTATI MUNGUTI ..... 2<sup>ND</sup> RESPONDENT  
SUING AS THE LEGAL AND PERSONAL REPRESENTATIVES OF THE  
ESTATE OF THE LATE BRIAN MUNGUTI - DECEASED**

**RULING**

1. Before me is an application by way of notice of motion dated October 11, 2022 filed by the applicants under order 22, 42 and 51 of the Civil Procedure Rules, and section 1A, 1B, 3A and 95 of the Civil Procedure Act (cap.21), as well as order 50 rule 6 and section 79 (B) and (G) of the Civil Procedure Act and 5(2) (B) of the Court of Appeal Rules.
2. The application which was filed through counsel M/s Gichuki Kivindy & Associates Advocates, has five (5) prayers some of which have been spent as follows:-
  1. (Spent).
  2. (Spent).



3. That there be a stay of execution of judgment delivered on June 29, 2022 and or any other consequential orders herein pending the hearing and determination of the applicant's appeal herein.
  4. That the applicant/appellant be granted leave to file appeal out of time.
  5. That costs be in the cause.
3. The application has grounds on the face of the Notice of Motion, which are brief and I will reproduce them hereunder:-
1. That the applicant herein being dissatisfied with judgment delivered on 29<sup>th</sup> day of June 2022 has lodged an appeal herein being appeal number .....of 2022.
  2. That though the appeal has overwhelming chances of success it does not operate as a stay of execution.
  3. That if execution is cleared to proceed and the respondents (whose means are unknown) is paid, they may be unable to refund the decretal sum if the appeal is eventually heard and allowed.
  4. That unless this application is granted, the said appeal will be rendered nugatory.
4. The application was filed with a supporting affidavit sworn by Paul Kivindyo Advocate for the applicants on October 11, 2022, in which it was deponed under paragraph 4 that an appeal has already been filed, and that the decretal sum is Kshs. 1,969,939/= and further that the appeal has overwhelming chances of success.
5. The applicants also filed a further affidavit sworn on October 28, 2022 by Paul Gichuhi Advocate for the applicants explaining the insurance aspect of the matter, and the attachment notices issued by the respondent. This affidavit was a response to the issues raised in the replying affidavit to the application.
6. The application is opposed through a replying affidavit sworn by Faith Mutio Mutuku Advocate for the respondents on October 21, 2022 in which it was deponed that the decretal amount was Kshs. 4,546,180/=, that there were no arguable grounds in the draft Memorandum of Appeal, and that the present application is frivolous, vexatious, and defective with no merits.
7. This application was canvassed through written submissions. In this regard, I have perused and considered the submissions and further submissions filed by Gichuhi Kivindyo & Company Advocates for the applicants, as well as the submissions filed by Mutuku Wambua & Associates Advocates for the respondents.
8. This is an application for stay of execution as well as an application for the extension of time to file appeal.
9. With regard to stay of execution pending appeal, this court has to be guided by the provisions of order 42 rule 6(2) of the Civil Procedure Rules. Rule 6(2) provides as follows:-

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- (2) 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; and

- b. Such security as court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

10. With regard to the request for enlargement of time to file appeal, section 79(G) of the Civil Procedure Act (cap.21) applies. The said section provides as follows:-

79(G) 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 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 for 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. It must be stated here that whether or not leave is granted to extend time to file appeal or to grant stay of execution is an exercise of discretionary power by the court – see *Patel v EA Cargo Handling Services Ltd* [1974] EA 75.
12. In the exercise of such discretion the applicant has the burden of demonstrating to the court that the above parameters set in the Civil Procedure Act and Rules for the exercise of the court's discretion have been satisfied. Each applicant should do so on the balance of probabilities, as these are civil proceedings.
13. The application herein for stay of execution will not succeed because in my view the applicants have failed to demonstrate attempts to comply with the statutory requirements. The applicants have also deliberately tried to mislead this court.
14. The first reason for dismissal of the application is that the applicants have wrongly relied on rule 5(2) (B) of the Court of Appeal Practice Directions 2015, which have no relevance in the present matter or application which is an effort to appeal to the High Court from the Magistrate's Court. This in my view is an attempt to mislead and confuse this court that this matter relates to an appeal to the Court of Appeal, which is not the case.
15. The second reason is that the applicants have failed to explain the reasons for the delay from the time judgment was delivered by the Magistrate's Court on June 29, 2022 to the time execution was set in process on October 4, 2022, as well as the difference between the actual decretal amount of Kshs. 4,546,180/= and the now claimed amount of Kshs. 1,969,939/=, which the applicants wrongly claims to be the decretal amount. This in my view, is another attempt by the applicants to mislead the court in the exercise of its discretionary power.
16. The applicant having failed to disclose material facts as above, and attempting to mislead the court herein in my view disentitles them of the benefit of this court's powers to exercise discretion in their favour for the stay of execution. In my view, issuing the stay of execution orders prayed herein, will be prejudicial to the respondents and will not serve the best interest of justice.
17. With regard to the request for extension of time to appeal, against the applicants have failed to explain the nature, extent and reasons for the delay in filing the appeal and filing the present application. In addition, the applicants have also attempted to mislead this court by stating that an appeal has already been filed without giving information on the court where it was filed and the date, while the actual situation is that no appeal has yet been filed.



18. In my view, this is yet another attempt to mislead and misuse this court, which disentitles the applicants from the exercise of this court's judicial discretion in their favour, which is an equitable relief meant to avoid doing injustice not just to the applicant, but to all parties involved.

19. Consequently, I find that the application of the applicants herein is an attempt to abuse the process of this court, and unmerited and I dismiss the same with costs to the respondents.

**DATED, SIGNED AND DELIVERED THIS 6<sup>TH</sup> DAY OF JUNE 2023 VIRTUALLY FROM VOI.**

**GEORGE DULU**

**JUDGE**

**In the presence of:-**

**Ms. Kiragu holding brief for Ms. Mutuku for respondent**

**Ms. Mary court assistant**

