



**Mungai & another v Mucheru (Civil Appeal E676 of 2022)
[2023] KEHC 18790 (KLR) (Civ) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18790 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E676 OF 2022
CW MEOLI, J
JUNE 12, 2023**

BETWEEN

JEREMIAH KAIRU MUNGAI 1ST APPELLANT

PATRICK KAMAU NGIGI 2ND APPELLANT

AND

JANE NYAMBURA MUCHERU RESPONDENT

RULING

1. Before the Court for determination are two (2) applications: the first is the Notice of Motion dated September 5, 2022 (hereafter the first application) brought by Jeremiah Kairu Mungai and Patrick Kamau Ngigi (hereafter the Appellants) and supported by the grounds laid out on its face and the facts stated in the affidavit of Martha Mugo, the Appellants' advocate.
2. Therein, the Appellants seek an order to stay execution of the judgment of the lower court delivered on June 6, 2022 in Milimani CMCC No 3957 of 2019 pending the hearing and determination of the appeal and a further order that the appeal which was filed out of time "be deemed as duly filed". The deponent stated in her supporting affidavit that Jane Nyambura Mucheru the decree holder in the lower court suit (hereafter the Respondent) had commenced execution and that unless the orders sought are granted, the Appellants stand to suffer irreparable loss and damage. Further, that the Appellants are willing to provide security by way of a bank guarantee.
3. The Respondent opposed the first application through the replying affidavit sworn by her advocate, Purity Makori, on October 25, 2022, asserting that the memorandum of appeal was filed out of time and without leave of the court and hence the first application lacks merit and the orders sought therein are incapable of being granted. The advocate further asserted that the first application is intended to deny the Respondent the fruits of her judgment. She points out that while the Appellants had



previously been granted an interim order of stay of execution on the condition that they deposit the sum of Kshs 500,000/- by close of business on September 26, 2022 they did not comply with the condition until September 29, 2022. To the advocate therefore, the first application is an abuse of the court process and should not be granted.

4. The Notice of Motion dated September 14, 2022 (hereafter the second application) was brought by the Respondent and is supported by the grounds laid out on its face and the facts stated in the affidavit of advocate Purity Makori. The application seeks an order to strike out and/or dismiss the appeal. The key contention in the advocate's supporting affidavit is that the memorandum of appeal herein was filed outside the stipulated timelines for lodging an appeal against the decision of a subordinate court and without leave, rendering the appeal incompetent.
5. Martha Mugo, the Appellant's advocate who swore a replying affidavit on behalf of the Appellants, stated that while the memorandum of appeal was filed out of time, the Appellants had by way of the first application sought an order to have the appeal deemed as duly filed. It was further averred that the intended appeal raises arguable issues which deserve to be heard and that in any event, the law makes provision for the extension of time where such time for appealing had lapsed. The advocate expressed willingness by the Appellants to comply with the court's directions on the filing of the record of appeal, further stating that the Appellants had since complied with the conditions given by the court on September 8, 2022 for the deposit of security in court.
6. The two (2) applications were canvassed by way of written submissions. On their part, the Appellants anchored their submissions on the provisions of Sections 95 and 79G of the *Civil Procedure Act* as well as the case of *Esther Wamaitba Njibia & 2 others v Safaricom Limited* [2014] eKLR concerning enlargement of time for filing of appeals out of time. The Appellants through their counsel urged the court to exercise its discretion in their favour on the basis that the memorandum of appeal raises arguable legal and factual issues, and that the delay in filing the appeal was not intentional or inordinate.
7. The Appellants' counsel further urged the court to consider the principles set out under Order 42, Rule 6(2) of the *Civil Procedure Rules* as echoed in *Tabro Transporters Ltd v Absalom Dova Lumbasi* [2012] eKLR. Counsel contended that if the order for a stay of execution was denied and the decretal sum paid to the Respondent, there is a likelihood that the Respondent may not be able to refund the same if the appeal succeeds, occasioning substantial loss to the Appellants. She cited the fact that the Respondent's means are unknown and reiterated the Appellants' readiness and willingness to provide a bank guarantee as security, in addition to the security earlier provided. On those grounds, the Appellants urged the court to allow the first application while dismissing the second application.
8. On behalf of the Respondent, it was contended that Section 79G of the *Civil Procedure Act* clearly sets out the timelines for lodging appeals in the High Court and that no explanation has been given by the Appellants for the delay in filing the appeal in good time and hence its second application ought to succeed. Concerning the prayer for a stay of execution, it was contended that the same is not tenable, there being no competent appeal or substantial loss demonstrated. The Respondent was therefore of the view that the Appellants are not entitled to the orders sought in the first application and urged the court to allow the second application while dismissing the first.
9. The court has considered the material canvassed in respect of the two applications. The court proposes to simultaneously address the two applications. Section 79G of the *Civil Procedure Act* provides that:

“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.”

10. The above provision is couched in mandatory terms. And whereas the section also makes provision for the extension/enlargement of time to for the lodging of appeals out of time, such extension must be sought and obtained by an intended appellant. The decision intended to be appealed by the Appellants was delivered by the subordinate court on June 6, 2022 and the memorandum of appeal filed on August 25, 2022 admittedly out of time.
11. Whereas under the proviso to section 79G of the *Civil Procedure Act* leave may be sought prior to or after the late filing of the memorandum of appeal, the Appellants’ motion merely seeks that the appeal “filed out of time herein be deemed as duly filed.” That is not the same as seeking leave or enlargement of time and in the absence of an express prayer in that regard, the Appellants’ motion flounders, rendering the appeal incompetent.
12. Equally, the jurisdiction of this court to grant stay of execution under Order 42 Rule 6 can only be exercised when a competent appeal by way of a memorandum of appeal has been filed and or admitted out of time. The Court of Appeal in *Abubaker Mohamed Al-Amin v Firdaus Siwa Somo* [2018] eKLR while citing with approval the decision of the High Court in *Rosalindi Wanjiku Macharia vs James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased))* [2017] eKLR concurred with the foregoing reasoning.
13. As things stand therefore, there is no competent application for enlargement of time to file an appeal out of time for consideration, and by extension any competent prayer for stay of execution. Ditto for the memorandum of appeal herein. Both the motion dated September 5, 2022 and memorandum of appeal are hereby struck out with costs to the Respondent. In the result the application September 14, 2022 has succeeded and is allowed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON

THIS 12TH DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellants: Ms. Mugo

For the Respondent: N/A

C/A: Carol

