



**Mutwiri v M’aburi (Miscellaneous Civil Case E039 of 2023)
[2023] KEHC 19962 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19962 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL CASE E039 OF 2023
EM MURIITHI, J
JULY 13, 2023**

BETWEEN

JUSTUS MUTWIRI APPLICANT

AND

ERICK J. KAARIA M’ABURI RESPONDENT

RULING

1. The court has considered the application for leave to file appeal out of time and stay of execution of the judgment of the trial court herein on the basis of the pleadings, affidavits and submissions of counsel before the court.
2. The court finds that the applicant has an arguable case – not necessarily one that must eventually succeed – on the question of want of fair hearing in the refusal of an adjournment by the trial court when the suit to proceeded to hearing and subsequent judgment, now sought to be stayed. However, a question of want of presentation of draft decree for approval taken up by the appellant in submissions before the court, does not appear to invalidate the decree which is clearly for the payment of money, especially in circumstances where the suit although defended proceed to hearing ex parte, and the court has power to approve a draft decree at the time of the pronouncing judgment. See order 21 rule 8 of the *Civil Procedure Rules*.
3. The Court further finds that although the delay of 9 months since the ruling sought to be appealed from and seven months from the judgment sought to be stayed is not sufficiently explained, the same is not inordinate and the court shall in the interest of justice grant leave to appeal upon terms as to filing of the Memorandum of Appeal and the Record of Appeal.
4. As regards stay of execution, the court considers that the sum of Ksh. 914.805 is substantial if it is paid and not recovered in the event of successful appeal. In balancing the interests of the appellant who pursues an opportunity to be heard on the merits of his case and that of the respondent decree



holder who seeks to benefit from the fruits of his judgment and take care to protect the appellant from irreparable loss in the event of a successful appeal, the court shall make an order for the part payment of the decretal sum assessed at one third thereof to the respondent and the deposit as security under order 42 rule 6 of the *Civil Procedure Rules* of a bank guarantee for the balance of the decretal sum both within fourteen days. In default execution shall issue.

Orders

5. Accordingly, for the reasons set out above, the Court allows the application dated 8/6/2023 for leave to appeal out of time and stay of execution pending appeal as follows:
 1. Leave to appeal out of time is granted.
 2. Memorandum of Appeal to be filed with 14 days.
 3. Stay of execution of the judgment of the trial of 1/12/2022 is granted subject to the payment of approximately one third (1/3) of the decretal sum, that is Ksh.300,000/-, to the Respondent and the deposit of a bank guarantee for the balance of the decretal sum, both within 14 days from the date of this Order.
 4. In default, order for stay of execution to lapse and execution to issue.

16 Orders accordingly.

DATED AND DELIVERED THIS 13TH DAY OF JULY, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES

Mr. Hymo Advocate for the Applicant.

Ms. Aketch Advocate for Respondent.

