



**Mwirigi v Mpinda (Miscellaneous Application E089 of 2021)  
[2023] KEHC 19964 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19964 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
MISCELLANEOUS APPLICATION E089 OF 2021  
EM MURIITHI, J  
JULY 13, 2023**

**BETWEEN**

**ELIUD MWIRIGI ..... APPELLANT**

**AND**

**REGINA MPINDA ..... RESPONDENT**

**RULING**

1. By a Notice of Motion under certificate of urgency dated 28/10/2021, brought under Order 21 Rule 1B, Order 22 Rule 22, Order 40 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules*, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Article 159(2) (a) & (d) of *the Constitution* and all other enabling provisions of the law, the Applicant seeks that:
  1. Spent
  2. This Honorable Court be pleased to grant stay of execution of the Judgment and/or Decree issued by Honorable J.Irura (PM) on 29<sup>th</sup> July 2021 in Nkubu CMCC 34 of 2019 pending the hearing and determination of this Application.
  3. This Honorable Court be pleased to grant stay of execution of the Judgment and/or Decree issued by Honorable J. Irura (PM) on 29<sup>th</sup> July 2021 in Nkubu CMCC 34 of 2019 pending the hearing and determination of the intended appeal.
  4. This Honorable Court be pleased to grant leave to the Applicant to lodge an appeal out of time against the Judgment and/or Decree issued by Honorable J.Irura (PM) on 29<sup>th</sup> July 2021 in Nkubu CMCC 34 OF 2019
  5. This Honorable Court allow the Applicant to furnish the Court with security in the form of a Bank Guarantee from the DTB Bank.



6. The Application be heard inter partes on such date and time as this Honorable Court may direct.
7. The costs of this Application abide the outcome of the Appeal.
2. The application is supported by the grounds that by the time instructions to appeal against the impugned judgment were issued, the 30 days period within which to lodge an appeal had lapsed. The appeal is meritorious with high chances of success, and the Applicant is apprehensive that if the decretal sum, which is quite substantial, is paid to the Respondent whose financial standing is unknown, he may deal with it in a manner prejudicial to the Applicant. The Applicant is also apprehensive that the Respondent may execute the said judgment if stay is not granted, which will render the appeal nugatory and the Applicant will suffer irreparable loss and damage. The Applicant's insurer, Directline Assurance Company Limited is ready, willing and able to furnish the court with a Bank Guarantee as security to the court. The application is made in good faith without unreasonable delay and the Respondent will not suffer any prejudice which cannot in any event be compensated by payment of costs.
3. The Respondent responded to the application vide her submissions filed on 18/4/2023 urging the court to dismiss the application with costs for being misconceived, incompetent and unmerited. She accuses the Applicant of unreasonably delaying in filing the application, and cites *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR and *RWW v EKW* (2019) eKLR. She further accuses the Applicant of failing to state any clear reasons why he did not file his appeal within the laid down timelines.

### **Analysis and Determination**

4. The issues for determination are whether leave to appeal out of time and stay should be issued.

### **Leave to appeal out of time**

5. The principles for consideration on an application for extension of time to appeal out of time are that, the power is discretionary but the Applicants must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay are plausible, that the appeal is arguable and not frivolous and that the Respondent will not be unduly prejudiced by the order being made. See *Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others* (2014) eKLR.
6. The judgment sought to be appealed against was made on 29/7/2021 while the instant application was filed on 1/12/2021. That delay of approximately 4 months cannot be said to be inordinate.
7. On the arguability or otherwise of the intended appeal, the grounds raised in the annexed memorandum of appeal faulting the trial court for awarding manifestly excessive general damages of Ksh.800,000 for a single fracture of the pelvic ring cannot be said to be frivolous.
8. From the Respondent's response to the application, no prejudice has been disclosed.
9. For the reasons set out above, this court deems it fit to enlarge time to lodge the appeal out of time.

### **Stay of Execution**

10. Order 42 Rule 6 of the *Civil Procedure Rules* empowers a court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided under Rule 6 (2) as follows: "No order for stay of execution shall be made under subrule (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 the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

11. On 1/12/2021 the court (Wamae Cherere J) granted the Applicant conditional stay of execution upon deposit of the decretal sum in court within 14 days. That condition was however not complied with and the Applicant has not offered any explanation for non-compliance with the said order.
12. Even though the court feels that the Applicant does not deserve the stay sought on the basis of past non-compliance with court orders, it will render substantive justice to the parties herein by allowing the application dated 28/10/2021 upon terms.

### **Orders**

13. Accordingly, for the reasons set out above, the court allows the application for extension of time and stay of execution upon the following terms:-
  1. The Applicant is granted leave to appeal out of time against the judgment and decree made in Nkubu CMCC No. 34/2019.
  2. Stay of execution of the judgment/decree in Nkubu CMCC No. 34/2019 is granted on condition that the Applicant deposits the entire decretal sum of Ksh. 800,000 in court within 30 days from the date herein.
  3. The Record of Appeal to be filed within 60 days from the date hereof.
  4. In the event of default of any of the aforementioned conditions, the stay hereby granted shall stand as discharged, and the Respondent shall be at liberty to execute.
  5. The costs of this application shall abide the outcome of the appeal.

Order accordingly.

**DATED AND DELIVERED THIS 13<sup>TH</sup> DAY OF JULY, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

### **APPEARANCES**

Ms Hymo Advocate for the Appellant/Applicant.

Mr. Mutembei Advocate for Respondent.

