



**Muthuri v Kirimi (suing ss the legal representative of the Estate  
of Nicholas Mwenda Kirimi) (Miscellaneous Civil Application  
E038 of 2023) [2023] KEHC 22561 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22561 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
MISCELLANEOUS CIVIL APPLICATION E038 OF 2023  
EM MURIITHI, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**JULIUS KIRIMI MUTHURI ..... APPLICANT**

**AND**

**STEPHEN KIRIMI (SUING SS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF NICHOLAS MWENDA KIRIMI) ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Chief Magistrate  
at Meru (Honourable D.W Nyambu (Ms.) delivered on the 5th April,  
2023 at the Meru Law Courts in CMCC No. 14 of 2020, Meru)*

**RULING**

1. The Court has considered the principles for extension of time to lodge an appeal out of time as set out in the Supreme Court decision of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, considering earlier cases on the principles for extension of time including *Mutiso v Mwangi* (1997) KLR 630 cited by the Counsel for the Applicant herein. The delay of 60 days between the judgment on 5/4/2023 and the filing on 6/6/2023 of this application for extension of time is not inordinate and the explanation for delay on account late receipt of instructions to appeal is not implausible and inexcusable.
2. The application for stay of execution is not grounded on air as urged by the Respondent, because the applicant also seeks leave to file the appeal out of time. If such leave is granted, it will form the basis to the prayer to hold the status quo by an order for stay of execution pending the hearing and determination of the intended appeal.
3. In addition, the non-service of the ex parte order herein within 3 days as provided for under Order 40 Rule 3 of the *Civil Procedure Rules*, as raised by Counsel for the Respondent, while relevant in



considering the time on the principle of expeditious disposal of cases, the order should have been served does not bar the court consideration of this matter which is brought under Order 42 Rule 6 of the Civil Procedure Rules.

4. The court has also considered the principles for the grant of stay of execution as laid down in Order 42 Rule 6 of the Civil Procedure Rules and the relevant case of *Jason Ngumba Kagu & 2 Ors. v. Intra Africa Assurance Co. Limited* (2014) eKLR on the central place of the substantial loss in the jurisdiction for stay of execution.
5. On the facts of this case, the court has considered the supporting affidavit of the applicant sworn on 2/6/2023 and the Respondent's Replying Affidavit of 19/6/2023.
6. Although this is a money decree as urged by the Respondent, there is obvious substantial loss in the payment in full, should stay not be granted, of the not-insignificant sum of the decretal amount of Ksh.1,675,525. It has not been demonstrated that the Respondent is a man of means readily able to refund the sum of decretal amount in the eventuality of a successful appeal.
7. However, as observed by Odunga, J. in *Josphat Kimani Mwangi v Samuel Wanyoike Mwangi & another* [2020] eKLR (as he then was) while ordering payment of half of the decretal sum to the respondent and deposits the balance in a joint interest earning account in the names of the advocates for the respective parties in that case "the mere fact that the decree holder is not a man of means does not necessarily justify [keeping] him from benefiting from the fruits of his judgement."
8. The partial payment of the decretal sum does not overly exposed the applicant, and it is in the interest of justice that the respondent enjoys, even if partially, the fruits of his judgment, as urged by Counsel the Respondent in opposing the application as a delaying tactic. The court considers the payment to the respondent of a third of the decretal sum approximated to 500,000/- to serve the interest of justice in the case pending the full hearing and determination of the appeal.
9. The appeal as shown in the draft Memo of Appeal cannot be said to frivolous and the arguable case raised with respect to liability, applicability of the doctrine of volens and the quantum, not necessarily such that must succeed, are fit for further investigating by way of the appeal.
10. There is no demonstrable prejudice on the respondent judgment decree holder which cannot be compensated by costs and an order for interest on the decretal sum until payment in full.

## Orders

11. The application for extension of time to file an appeal by Notice of Motion dated 2023 is granted.
12. The application for an order for stay of execution is granted on the following conditions:
  1. The applicant shall file the Memorandum of Appeal within 7 days and the Record of Appeal in 60 days from the date hereof.
  2. The applicant shall pay to the Respondent the sum of Ksh.500,000/-, approximating 1/3 of the decretal sum, and secure the payment of the balance of the decretal sum by a suitable bank guarantee for the specific suit the subject of this appeal, with 30 days from today.
  3. In default of any of the above terms the Order for day of execution shall lapse and be of no effect.
13. Costs in the Appeal.  
Order accordingly.



**DATED AND DELIVERED ON THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S Meritad Law Africa LLP Advocates for the Applicant.

M/S Murango Mwenda & CO. Advocates for the Respondent.

