



REPUBLIC OF KENYA



KENYA LAW
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**Nyaga v Mwachilungo (Miscellaneous Civil Application E015 of 2023)
[2023] KEHC 22566 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22566 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
MISCELLANEOUS CIVIL APPLICATION E015 OF 2023
GMA DULU, J
SEPTEMBER 25, 2023**

BETWEEN

EMILIO NYAGA APPELLANT

AND

PATRICK JOHO MWACHILUNGO RESPONDENT

RULING

1. Before me is an application dated February 14, 2023 by way of notice of motion filed by the applicant through counsel Kimondo Gachoka & Company Advocates.
2. The application was filed under section 1A, 1B, 3, 3A, 79G and 95 of the [Civil Procedure Act](#) (cap.21), and order 22 rule 22, order 42 rule 6, order 50 rule 6, and order 51 rules 1 and 3 of the [Civil Procedure Rules](#) 2010 and seeks the following orders:-
 1. (Spent)
 2. The court be pleased to stay execution of the judgment and decree in Voi CMCC No. 152 of 2021 pending hearing and determination of this application and the appeal therefrom.
 3. That the court grant the applicant leave to appeal out of time against the judgment of the Hon. Resident Magistrate in Voi CMCC No. 152 of 2021 and judgment delivered on 28.07.2022.
 4. That as a condition for stay of execution pending hearing and determination of appeal/intended appeal the applicant/appellant be and is hereby ordered to provide/issue security for the entire decretal sum/amount in the form of a Bank Guarantee to be issued by Family Bank Ltd or deposit the entire decretal amount in a joint account in the names of both parties on record.
 5. That the costs of this application abide the outcome of the appeal.



3. The application has grounds on the face of the Notice of Motion that the statutory 30 days allowed to appeal has lapsed, that the applicant is aggrieved by the quantum of damages awarded in the judgment delivered on 28th July 2022, that the delay was due to late obtaining of judgment wherein the decretal amount was Kshs. 292,000/= plus costs, that if stay is not granted, the appeal will be rendered nugatory.
4. The application was filed with a supporting affidavit sworn by Nannungi Mariat counsel for the applicant on 19th February 2023 which amplifies the grounds of the application. The application is also supported by the affidavit of the applicant Emilio Nyaga, sworn on 14th February 2023. A draft Memorandum of Appeal was attached.
5. The application is opposed through a replying affidavit sworn on 20th march 2023 by the respondent Patrick Joho Mwachilungo who deponed that the defendant/applicant was aware of the judgment and even participated in the assessment of costs, and that the Notice of Motion herein is an abuse of the court process.
6. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Kimondo Gachoka & Company Advocates for the applicant, and the submissions filed by Njoroge Mwangi & Company Advocates for the respondents.
7. This is an application for extension of time to appeal, as well as an application for stay of execution of judgment or decree. It is thus governed by section 79G of the Civil Procedure Act (cap.21), as well as order 42 rule 6 of the Civil Procedure Rules.
8. The orders sought are an exercise of discretionary powers of the court, and an applicant has thus the burden of demonstrating to this court “sufficient reason” for the exercise of that discretionary power in his favour by this court. See *Feroz Begum Qureshi & Another =Versus= Magabhai Patel & Others* (1964) EA 633.
9. The judgment herein was delivered on 28th July 2022 and this application filed on 16th February 2023, which was a period of more than six (6) months.
10. In the case of *Dilpack Kenya Ltd =Versus= William Muthama Kitonyi* (2018) eKLR cited by the applicant’s counsel, it was emphasized that the explanation for any delay is an important consideration by the court in determining whether or not to grant enlargement of time to file an appeal outside the 30 days allowed by law.
11. In the present matter, other than Ms. Nannungi Mariat Advocate referring in paragraph 6 and 7 of the supporting affidavit to the delay, there is no attempt made to give the date or month when copy of the judgment was sought by the applicant, or the date or month when the judgment was received by the applicant or the counsel.
12. In my view therefore, the applicant herein has not provided to court, sufficient reasons to justify this court to exercise its discretion to enlarge time to file an appeal as requested.
13. I will thus not enlarge the time to file an appeal herein.
14. With regard to the prayer for stay of execution pending determination of appeal, I do not have to make a substantive determination on that, as I have already declined to enlarge time to appeal. I will thus not grant the stay orders sought.
15. Consequently and for the above reasons, I find no merits in this application, and I dismiss the same with costs to the respondents.



**DATED, SIGNED AND DELIVERED THIS 25TH DAY OF SEPTEMBER 2023 VIRTUALLY IN
OPEN COURT AT VOL.**

GEORGE DULU

JUDGE

In the presence of;-

Nusura/Alfred – court assistants

Ms. Nannungi for applicant

Mr. Kazungu for respondent

