



Mutisya v Kitulu (Suing through next friend Paul Mwaniki Katulu) (Miscellaneous Application E096 of 2022) [2023] KEHC 24249 (KLR) (9 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24249 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
MISCELLANEOUS APPLICATION E096 OF 2022
GMA DULU, J
OCTOBER 9, 2023**

BETWEEN

REGINA MUTIO MUTISYA APPLICANT

AND

MUTUA PAUL KITULU (SUING THROUGH NEXT FRIEND PAUL MWANIKI KATULU) RESPONDENT

RULING

1. Before me is an application by way of Notice of Motion dated 7TH October, 2022 filed by the applicant under Section 3A, 79G, and 95 of the *Civil Procedure Act* (Cap.21), and Order 22, Order 42 Rule 6, Order 50 Rule 6, Order 51 Rule 1 and 3 of the Civil Procedure Rules.
2. The application has five (5) prayers, some of which have been spent as follows:-
 1. (Spent).
 2. That the applicant be granted leave to appeal out of time against judgment delivered on 31st August 2022 by Hon. M. K. Mutegi (PM) in Tawa CMCC No. 84 of 2021.
 3. That this court be pleased to order a stay of execution of the judgment delivered by the trial court on 31st August 2022 in Tawa CMCC No. 84 of 2021 between the parties herein pending the hearing and determination of the intended appeal herein.
 4. That the court allow the applicant to furnish the court with security in the form of a bank guarantee from a reliable bank.
 5. The costs of this application abide the outcome of the intended appeal.
3. The application has grounds on the face of the Notice of Motion that judgment was delivered on 31st August 2022 and respondent awarded general damages of Kshs. 300,000/= and special damages of



Kshs. 24,000/= plus costs and interest, that the 30 days initial stay of execution granted by court had now lapsed, that the applicant was not able to file an appeal within the time because of inability to extract the judgment in time, that if the decretal amount is paid, the applicant might not be repaid the amount, and that the applicant was prepared to provide a bank guarantee as security.

4. The application was filed with a supporting affidavit sworn on 7th October 2022 by Regina Mutio Mutisya the applicant which amplifies the grounds of the application. The affidavit annexes a draft Memorandum of Appeal, and, decree, and Bank Guarantee.
5. The application is opposed through a relying affidavit sworn on 1st November 2022 by Paul Mwaniki Katulu in which it was deponed that the applicant had not satisfied the legal requirements for the grant of extension of time to file appeal, and for stay of execution of judgment or decree.
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 A. K. Mutua Advocate for the respondent.
7. This being an application for extension of time to file an appeal in a civil matter, it is governed by the provisions of Section 79G of the *Civil Procedure Act* (Cap.21) which provides as follows:-
79 G ‘Every appeal from a subordinate court to the High court shall be filed within a period of thirty days from the date of 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 for a copy of decree or order, provided an appeal may be admitted out of time if the appellant satisfies the court that he or she had good and sufficient cause for not filing the appeal on time.’
8. Thus though an appeal from a subordinate court has to be filed within 30 days, this court has powers to extend that time for filing an appeal where there is good and sufficient cause.
9. Such power to extend time for filing an appeal is an exercise of discretionary power by the court. It is a power exercised by courts for the purpose of doing justice to all the parties, and is not exercised merely on sympathy, and or otherwise to obstruct or delay the cause of justice.
10. I note that in the written submissions of counsel for the applicant, there is no mention of extension of time to file appeal, either in the prayers for the application reproduced by counsel for the applicant, nor in the body of the written submissions. Only in reported case judgments filed with counsel’s submissions is there a mention of extension of time to file appeal.
11. In my view, the applicant’s counsel abandoned the application for extension of time to file appeal, and in the process failed to explain to this court the delay in filing the appeal on time, and as such the applicant denied herself the opportunity to have this court exercise its equitable discretion in extending time to appeal.
12. I will thus decline to extend time to appeal herein.
13. With regard to the request for stay of execution pending appeal, same is governed by the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules; which provides as follows:-
6 (2) No order for stay of execution shall be made under sub-rule (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 court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
14. In my view, in the present case where the applicant has not yet appealed, and has not been granted extension of time to appeal, it cannot be said that substantial loss will be suffered by her if stay of execution is not granted pending appeal, as there is presently no appeal filed, and extension of time to appeal has also been declined. On that account, the application for stay of execution will not succeed.
15. I will thus dismiss the entire application herein with costs to the respondent.
16. Consequently, I find no merits in the application dated 7th October 2022 which is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF OCTOBER 2023 AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Ms. Kemunto for applicant

Mr. A. K. Mutua for respondent

