



**Itotia v Ndundu & another (Suing as the legal representatives of the Estate of Mwalimu Ndungu) (Commercial Miscellaneous Application E004 of 2024) [2024] KEHC 13974 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13974 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
COMMERCIAL MISCELLANEOUS APPLICATION E004 OF 2024  
DO CHEPKWONY, J  
NOVEMBER 6, 2024**

**BETWEEN**

**MOSES MWANGI ITOTIA ..... APPLICANT**

**AND**

**JOSEPHAT KANGETHE NDUNDU ..... 1<sup>ST</sup> RESPONDENT**

**JULIET WANJIKU NDUNGU ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MWALIMU NDUNGU**

**RULING**

1. What is before the court for determination is the Notice of Motion dated 11<sup>th</sup> March, 2024 seeking the following orders:-
  - a. Spent
  - b. That the firm G. Mutua & Molo and Company Advocates is hereby granted leave to come on record after Judgment as Advocates for the Applicant in place of the Firm of Njoki Njogu and Company Advocates in terms of the consent to come on record after Judgment and a Notice of Change of Advocates annexed to the Supporting Affidavit hereto.
  - c. Spent.
  - d. That there be a stay of execution of the Judgment and or decree in Ruiru SPM Court Civil Case Number 466 of 2019, Juliet Wanjiku Ndungu and Josphat Kangethe Ndungu suing as the legal representatives of the estate of Boniface Mwangi Wamagata vs Moses Mwangi Itotia pending the hearing and determination of the intended appeal.



- e. That leave be and is hereby granted to the Applicants to lodge an appeal out of time against the Judgment and decree in Ruiru SPM Court Civil Case Number 466 of 2019, Juliet Wanjiku Ndungu and Josphat Kangethe Ndungu suing as the legal representatives of the estate of Boniface Mwangi Wamagata –vs- Moses Mwangi Itotia.
  - f. The subject to prayer No.(4) above that the next draft memorandum of the Appeal be deemed to be duly filed and properly on record.
  - g. That this Honourable Court be deemed to grant any further directions that may be necessary for the expeditious determination of intended appearance.
  - h. That the cost of this application be provided for.
2. The application is based on the grounds as set out on its face and Affidavit in support sworn by Jane N. Wairimu on 11<sup>th</sup> March, 2024 as the legal officer of Kenya Alliance Insurance Company. The Applicant’s case is that Judgment was entered against him by the trial court on 5<sup>th</sup> October, 2023. That at the time, the matter was being handled by his previous advocate and a dispute arose over legal fees, hence he did not disclose the real status of the proceedings in court or agree to sign a consent for the new advocates to come on record. Instead, the said law firm exercised lien over the applicant’s file and refused to grant consent for the new advocates to come on record effect a Notice of Change of Advocates after Judgment.
  3. According to the Applicant, despite settling the legal fees on 16<sup>th</sup> February, 2024 and requesting for a grant of the consent the previous advocates turned hostile and declined to hand over his file. As a result, the new advocate for the insurance on record had no option than to peruse the court records to establish the status of the file. That, it was at this point that the Applicant realised that Judgment had already been entered and since he was aggrieved by the said Judgment, he seeks leave to file an appeal out of time.
  4. It is the Applicant’s contention that the failure to find the Memorandum of Appeal within time was not intentional but it was caused by disputes which made it impossible for him to proceed that at the point of delivery of Judgment. The trial court issued a thirty (30) days stay of execution which has now lapsed and the Applicant is now exposed to risk of execution proceedings against him.
  5. The Applicant holds that he was dissatisfied with the Judgment and lodged an appeal on assessment of quantum of damages on loss of dependency. He holds that he will suffer substantial loss and its insurance company is ready and willing to provide security in form of a bank guarantee for due performance of the appeal. The Applicant holds that the application is made in good faith, that Respondents will not suffer any prejudice or damages which cannot be compensated by way of costs and the application has been filed without unreasonable delay and this will be in the nature of Justice that the same is allowed.
  6. The Respondent opposed the application through a replying affidavit of Caroline Jepkorir Kibiwott , the respondents advocate sworn on 17<sup>th</sup> May, 2024. The Respondent’s have averred that the Application does not satisfy the grounds for grant of orders for leave out to appeal out of time as there is no satisfactory explanation given for the delay.
  7. The Respondents have averred that the Applicant has not established sufficient cause for the orders to be granted as he has not demonstrated how he will suffer loss. The Respondents argue that the Intended appeal is only on quantum of damages which they hold had no error apparent on the face of the record in terms of damages for the court to disturb the award. According to the Respondents, the Memorandum of Appeal does not disclose any arguable grounds with any chances of success and



therefore the application is a delay tactic meant to deny them the fruits of their Judgment. Further, the Respondents argue that the Applicant has not demonstrated how he will suffer injustice and is only seeking to obstruct justice. It is the Respondents' contention that in the event the court allows the application, the Applicant should be ordered to pay the Respondents half of the decretal sum and deposit the remaining in a joint interest account in the names of advocates to the parties on record as security.

8. The court directed the application to be canvassed by way of written submissions. The Applicant has filed his submissions dated 2<sup>nd</sup> April, 2024 whereas the Respondents filed theirs dated 17<sup>th</sup> May, 2024. I have read and considered the same for the determination of this application.

### **Analysis and Determination**

9. The court has considered the application, respective affidavit and written submission filed by the parties herein and find the issues for determination being:-

- a. Whether the Applicant should be granted leave to file an appeal out of time.
- b. Whether the court should grant a stay of execution of the Judgment and decree issued against the Applicant on 18<sup>th</sup> July, 2023.

10. With regard to the first issue on leave to file an appeal out of time, it will be appreciated that the law on time to file an appeal out of time or extension of time to file an appeal is provided under Section 79G of the *Civil Procedure Act* which provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the 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 of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

11. The factors which a court is required to consider in granting leave to appeal out of time, were addressed in the case of Edith Gichungu Koine –vs- Stephen Njagi Thoithi [2014]eKLR as follows:-

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

12. These factors were also discussed by the Court of Appeal in the case of Thuita Mwangi –vs- Kenya Airways Ltd [2003] eKLR. as follows:

- i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;
- iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;



- v) The importance of compliance with time limits to the particular litigation or issue; and
- vi) The effect if any on the administration of justice or public interest if any is involved.”

13. Having read through the respective affidavits and submissions filed by the parties, the court has also perused the annexures attached therein and find that the application dated 11<sup>th</sup> March, 2024 is against the Judgment which was delivered on 5<sup>th</sup> October, 2023. The Appeal ought to have been filed by 5<sup>th</sup> November, 2023 and the fact that the application was filed March, 2024, the court finds that period of delay is inordinate as the same was filed more than four (4) months later.
14. The court has analysed the explanation given by the Applicant that a dispute arose between him and his previous advocate who kept him in the dark and did not explain to him the status of his case to be substantial given that he has provided annexures of correspondences which confirmed the dispute of the legal fees.
15. Further, a look at the grounds of appeal to be cited reveal issues which are arguable particularly the adoption of the multiplicand of Kshs. 20,166.80 as per Regulations of Wages (General) Amendment Order, 2017 which the Applicant holds that it ought to have been Kshs. 6,896.15 and it ought to be considered on merit. For those reasons, the Applicant is found deserving of leave to file an appeal out of time.
16. The next issue for determination is whether the court should grant stay of execution orders. The law on stay of execution is enshrined under Order 42 Rule 6(a) of the Civil 11 Procedure Rules which provides as follows:-

Order 42 rule 6(2) of the Civil Procedure Rules which provides:

“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 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”

17. On the purpose of an application for stay of execution pending appeal the court in RWW –vs- EKW [2019] eKLR, held:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

18. It is trite law that for the court to grant stay of execution three conditions must be met:
  - a. The application has been made without unreasonable delay.



- b. The Applicant will suffer Substantial loss
  - c. The Applicant has offered security for due performance of the decree.
19. On the first condition, the court has already found that the Applicant has been allowed to file appeal out of time and hence this condition has been addressed.
20. On the second condition of substantial loss that the Applicant is likely to suffer, the Applicant has only stated that he is likely to suffer substantial loss, but has not substantiated the exact loss he is likely to suffer. It is trite that it is not enough for a party to simply state that it is likely to suffer substantial loss. In the case of *Kenya Shell Limited –vs- Benjamin Karuga Kibiru & Another* [1986] eKLR, the court held that:-

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”

21. Guided by the finding in the case of *Kenya Shell* (supra), this court agrees that without the evidence of the substantial loss to be suffered, it is difficult to grant the stay orders sought as there is no reason why the Respondent should be kept away from its Judgment.
22. Lastly, for determination is the issue of security for the due performance, the Applicant has offered to provide a bank guarantee of its insurer to fulfill this condition. However, this court finds that the bank guarantee is not a sufficient security in the case. In the case of *Nyang'au –vs- Choi & 2 Others (Civil Appeal E088 of 2021)* [2022] KEHC 3015 (KLR) (2 June 2022) (Ruling), the court declined the issuance of a bank guarantee as security holding that it would be difficult for the bank which is not a party to the suit, to honour it. The court went on to hold that:-

“Whereas he had also met the third condition of being granted an order for stay of execution, this court took the view that security in the form of a bank guarantee was not suitable. There was a possibility of a bank that had given a bank guarantee not honoring the same. Not being a party to a suit would make it difficult for a successful party to enforce any orders he or she might get concerning such a bank guarantee. This court therefore determined that the security to be furnished herein would be in form of money.”

23. In this case, the Applicant has fulfilled the three conditions for the stay of execution orders to issue. Given that the Applicant has offered a bank guarantee which is not acceptable, the court shall direct the Applicant to pay the Respondents or deposit to court half of the decretal sum as security.
24. Although at this juncture the court is not required to consider the merits of the appeal, to determine whether or not it will succeed, it finds that the grounds raised therein, particularly the award on quantum of damages for loss of dependency and the applicable multiplicand is arguable ground of appeal which warrants the protection of the court before it is determined. The court of Appeal in the case of *Joseph Gitahi Gachau & Another –vs- Pioneer Holdings (A) Limited & 2 Others* [2009] eKLR had this to say on arguable appeals:-

“...On our part, after considering the rival submissions by the parties, the ruling of the learned Judge below together with pleadings we are satisfied that the appeal is indeed arguable. This, in essence, does not mean an appeal which must necessarily succeed, but of course, one which ought to be argued fully before the Court.”



25. In view of this, the court makes the following orders:-

- a. That the Firm G. Mutua & Molo and Company Advocates be and is hereby granted leave to come on record after Judgment as advocates for the Applicant in place of the Firm of Njoki Njogu and Company Advocates in terms of the consent to come on record after judgement and a notice of change of advocates annexed to the supporting affidavit hereto.
- b. Leave is granted to the Applicant to file an appeal out of time against the Judgment delivered in Ruiru SPM Court Civil Case Number 466 of 2019, Juliet Wanjiku Ndungu and Josphat Kangethe Ndungu suing as the legal representatives of the Estate of Boniface Mwangi Wamagata vs Moses Mwangi Itotia.
- c. The Applicant to file and serve his Memorandum of Appeal within fourteen (14) days hereof.
- d. Execution of the Judgment/Decree in Ruiru SPM Court Civil Case Number 466 of 2019, Juliet Wanjiku Ndungu and Josphat Kangethe Ndungu suing as the legal representatives of the estate of Boniface Mwangi Wamagata vs Moses Mwangi Itotia is hereby stayed pending the hearing and determination of the appeal.
- e. The Applicant deposit half of the decretal sum in court within sixty (60) days from the date of this ruling.
- f. In default of complying with Order No.(d) above, the orders staying execution shall lapse and the Respondents shall be at liberty to execute.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 6<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Masila counsel for Applicant

Court Assistant - Martin

