



**Kinyanjui v Kimatu (Civil Miscellaneous Application E260 of 2024)  
[2024] KEHC 13982 (KLR) (11 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13982 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL MISCELLANEOUS APPLICATION E260 OF 2024  
FROO OLEL, J  
NOVEMBER 11, 2024**

**BETWEEN**

**ERUSTUS MWAURA KINYANJUI ..... APPLICANT**

**AND**

**ELIZABETH NZILANI KIMATU ..... RESPONDENT**

**RULING**

**A. Introduction**

1. The application before this court is the Notice of Motion application dated 28<sup>th</sup> August 2024 brought pursuant to provisions of Section 3, 3A, 63,79G of the *Civil Procedure Act*, Order 22 rule 22, Order 42 Rule 6, Order 50 rule 6, Order 51 Rule 1 of the Civil Procedure Rules, and all other enabling provision of law. The applicant seeks orders that;
  - a. Spent
  - b. Spent
  - c. That the Honourable court be pleased to extend time and grant leave to the Applicant/ Intended Appellant to lodge their Memorandum of Appeal out of time against the Judgement and/or decree entered against them the Honourable D. Kioko (RM) in Civil suit No E 159 of 2023 Kangundo Law courts delivered on 11<sup>th</sup> July 2024.
  - d. Spent
  - e. That the Honourable Court be pleased to grant a stay of execution of the judgement and/or decree by Honourable D Kioko (RM) in civil suit No E159 of Kangundo Law court pending the full hearing and determination of the intended Appeal.



- f. That this Honorable Court allow the Applicant to furnish the court with security in the form of a Bank Guarantee from a reputable bank pending the full hearing and determination of this Appeal
  - g. That the costs of this Application be provided for.
2. The application is supported by the ground on the face of the said application and the supporting affidavits of one Wanjiku Caroline and the Applicant Erastus Mwaura Kinyanjui both dated 28<sup>th</sup> August 2024. The respondent did not file any response to this Application.

## **B. Analysis & Determination**

3. I have carefully considered the Application and its supporting Affidavit. The issue which arises for determination is whether this court should grant the Applicant's leave to Appeal out of time and if so, whether to further grant an order of stay of execution of the Judgement/decreed dated 31<sup>st</sup> May 2024 issued in Kangundo Cmcc No E159 of 2023.
4. Order 50 rule 6 of the civil procedure Rules does provides that;
- “where a limited time has been fixed for doing any act or taking any proceedings under these rules or by summary notice or by order of the court, the court shall have powers to enlarge time upon such terms(if any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”
5. The basis for applying for an extension of time was discussed in the Court of Appeal case of Susan Ogutu Oloo & 2 Others v Doris Odindo Omolo (2019) eKLR where it was held:-
- “In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in Nicholas Kiptoo Arap Korir Salat v IEBC (2014) eKLR Sup Ct Application No 16 of 2014.
- The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted”.
6. The Judgement sought to be Appealed against was delivered 11<sup>th</sup> July 2024 May and this Application seeking an extension of time has been filed on 28<sup>th</sup> August 2024, which is about two weeks late. This delay is not inordinate considering the explanation proffered and thus the prayer sought for extension of time is merited.
7. Stay of Execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 as follows;
- “(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made,



to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

- (2) 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.”

8. The three conditions to be fulfilled can therefore be summarized as follows;

- a. that substantial loss may result to the applicant unless the order is made
- b. application has been made without unreasonable delay
- c. security as the court orders for the due performance

### **C. Disposition**

9. Considering the fact that this Application is not opposed, the decretal amount is substantial and the applicant has offered to provide security by way of a Bank guarantee I do find that this application is merited and allow it on the following terms
  - a. Leave is granted to the Applicant to Appeal out of time against the judgement/ decree issued by Hon D. Kioko (RM) in Kangundo Cmcc No E 159 of 2023 and they are granted 14 days from the date of this ruling to file and serve their memorandum of Appeal.
  - b. An order of stay of execution of the said Judgement/decree is hereby issued on condition that the Applicant will provide a bank guarantee for the entire decretal amount, which guarantee, must be specific to this Appeal and shall be valid for the entire Appeal period.
  - c. The Applicant is granted 45 days to provide the said Bank guarantee and have it filed herein failure of which, stay orders will lapse and the respondent will be at liberty to execute.
10. This file will be marked as closed, and all further proceedings will be held in the Appeal file to be opened.
11. It is so Ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2024**

**In the presence of: -**

No appearance for Appellant



Mr. Mutinda for Respondent  
Susan/Sam Court Assistant

