



REPUBLIC OF KENYA



**Mbira v Mung'ere & another (Miscellaneous Civil Application
E001 of 2024) [2024] KEHC 14618 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14618 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CIVIL APPLICATION E001 OF 2024
DO CHEPKWONY, J
NOVEMBER 15, 2024**

BETWEEN

CHARLES NGIGI MBIRA APPLICANT

AND

HELLEN NJERI MUNG'ERE 1ST RESPONDENT

FRANCIS NGATIA MUNG'ERE 2ND RESPONDENT

RULING

1. What is before this court for determination is the Notice of Motion application dated 15th January, 2024 seeking the following orders:-
 - a. Spent.
 - b. That leave be granted to the Appellant/Applicant herein to file and serve the Memorandum of Appeal out of time.
 - c. Spent.
 - d. That pending the hearing and determination of the Appeal this Honourable Court be pleased to stay the execution of the Judgment rendered in Kikuyu CMCC No. E104 of 2021 – Hellen Njeri Mung'ere & Anor –vs- Charles Ngigi Mbira delivered on 5th December, 2023 by Honourable Jacinta A. Orwa.
 - e. That the costs of and incidental to this Application be provided for.
2. The Application is based on the grounds as set out on its face and the Affidavit in support sworn by Kenneth Mwiti on 15th January, 2024. The Applicant holds that judgment was entered against by the trial court in the sum of Kshs 3,273,500/= which aggrieved him and he intends to file an appeal he believes has a high chance of success. He urges the court to grant stay of execution orders since he has



filed the application expeditiously and he is willing to abide by the conditions that will be set by the court. He contends that it will be in the interest of justice that the application is allowed as prayed.

3. The Respondent opposed the application through a Replying Affidavit sworn by Hellen Njeri Mung'ere sworn on 15th January, 2024 urging the court to dismiss it with costs. According to the Respondent, the Applicant misapprehended the law and failed to file an appeal within the prescribed timelines when it is a well known principle that ignorance of the law is not a defence. The Respondent also contends that the Applicant has not offered any security, but should the court be inclined to allow the application, then he should be ordered to deposit the whole decretal sum in court as security. The Respondent argues that the intention of the application is only to delay settlement of the decretal award.

Analysis and Determination

4. The court has considered the application, respective affidavits together with the written submissions 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 18th July, 2023.

5. 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 appeals and extension of time within which to file an appeal is provided for under Section 79G of the [Civil Procedure Act](#) which states 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.”

6. In granting leave to appeal out of time, the court in the case of Edith Gichungu Koine –vs- Stephen Njagi Thoithi [2014]eKLR set out the factors that ought to be considered 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.”

7. These factors were also further discussed and set out by the Court of Appeal in the case of Thuita Mwangi –vs- Kenya Airways Ltd [2003] eKLR. as being:-

- a. The period of delay;
- b. The reason for the delay;
- c. The arguability of the appeal;
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- e. The importance of compliance with time limits to the particular litigation or issue; and



- f. The effect, if any, on the administration of justice or public interest if any is involved.”
8. Having read through the respective affidavits and submissions filed by the parties, I have also perused the annexures attached therein and find that the application herein is dated 15th January, 2024 and it is filed against the Judgment which was delivered on 5th December, 2023. The Appeal ought to have been filed by 5th January, 2024, but it was filed ten (10) days after the required time. This being the case, the court has considered the period of delay and finds that it is not so inordinate. For those reasons, the Applicant is found deserving of leave to file an appeal out of time.
9. Further, the court has taken judicial notice that the afore-stated time was during the High Court recess period in which time stops running pursuant to Order 50 Rules 4 of the Civil Procedure Rules which provides as follows:
Order 50, rule 4.
When time does not run
“Except where otherwise directed by a Judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:
Provided that this rule shall not apply to any application in respect of a temporary injunction.”
10. 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 of the Civil 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”
11. From this provision, it is now trite that for the court to grant stay of execution three conditions must be met that:-
a. The application should be made without unreasonable delay.
b. The Applicant should demonstrate that he/she/it will suffer Substantial loss.
c. The Applicant should offer security for due performance of the decree.
12. With regard to the first condition, it is worth noting that the court has already determined and found that the application was made without unreasonable delay.
13. On the second condition of demonstrating substantial loss likely to be suffered, the Applicant has only stated that it is likely to suffer substantial loss but has not substantiated the exact loss it 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 has this to say on ‘substantial loss’ that a party is likely to suffer. 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”

14. 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 that has been demonstrated as to why the Respondent should be kept away from its Judgment. In this case, the Applicant has only stated that since the stay of execution issued by the court lapsed on 5th January, 2024, the Respondents are likely to proceed with execution of the Judgment delivered against him on 5th December, 2023.
15. Lastly, for consideration is the issue of security for the due performance. This court has noted that the Applicant has not offered any form of security. The issue of security was discussed in the case of Gianfranco Manenthi & Another –vs- Africa Merchant Assurance Company Ltd [2019]eKLR, where the Court held that:-

“... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails...”

16. In this case, although the Applicant has not indicated the substantial loss he is likely to suffer if stay of execution is not granted, or offered any security for the due performance, this Court appreciates the Respondents having obtained Judgment in their favour could easily move to execute the Judgment. The court has also taken note of the Applicant’s expression that he is willing to abide by any conditions set by the court for grant of orders sought herein.
17. Therefore, the Applicant having moved the court without unreasonable delay, and having shown the willingness to secure his right of appeal by undertaking to abide by any conditions to be set by the court, the Court finds it prudent and fair to secure the right of the Respondent to the enjoyment of the fruits of his Judgment.
18. In the end, the court proceeds to allow the Notice of Motion application dated 15th August, 2024 with the following orders:
 - a. Leave be and is hereby granted to the Applicant to file an appeal against the Judgment delivered in Kikuyu CMCC No. E104 of 2021 – Hellen Njeri Mung’ere & Anor V Charles Ngigi Mbira delivered on 5th December, 2023 by Honourable Jacinta A. Orwa out of time.
 - b. The Applicant to file and serve his Memorandum of Appeal within fourteen (14) days from the date hereof.
 - c. A stay of execution of the Judgment delivered in Kikuyu CMCC No.E104 of 2021, Hellen Njeri Mung’ere & Another –vs- Charles Ngigi Mbira be and is hereby granted pending the hearing and determination of this appeal on condition that the Applicant deposits the entire



decretal sum in court within thirty (30) days from the date of this ruling. Failure to comply with this order, will render the application dismissed.

- d. Costs of the application to abide the outcome of the appeal.
- e. Mention on 18th December, 2024 for parties to confirm compliance and take further directions.

It is so ordered.

**RULING DATED AND SIGNED AT KIAMBU THIS 15TH DAY OF NOVEMBER, 2024.
(UPLOADED VIA ELECTRONIC MAIL)**

D. O. CHEPKWONY

JUDGE

