



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nduruhu & another v Waweru (Miscellaneous Civil Application  
E045 of 2023) [2024] KEHC 15741 (KLR) (13 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15741 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
MISCELLANEOUS CIVIL APPLICATION E045 OF 2023  
AN ONGERI, J  
DECEMBER 13, 2024**

**BETWEEN**

**FREDRICK MWENDA NDURUHU ..... 1<sup>ST</sup> APPLICANT**

**SAMUEL MWANGI NJOROGE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PERMINUS MACHARIA WAWERU ..... RESPONDENT**

**RULING**

1. The application coming for consideration in this Ruling is dated 31<sup>st</sup> July 2023 brought under Section 1A, 1B, 3 and 3A, 79G and 95 of the Civil Procedure Act (Cap. 21), 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 all other enabling provisions of the Law seeking stay of execution of the judgment delivered in Voi PMCC No. E050 of 2020 pending appeal on 5<sup>th</sup> May 2023.
2. The Applicant is also seeking leave to appeal out of time from the said judgment.
3. The application is based on the following grounds:-
  - i. Judgment herein was delivered on the 5<sup>th</sup> May 2023 and the 30 days within which an appeal is to be filed have lapsed.
  - ii. The Applicant/Intended Appellant are aggrieved by the judgment on Quantum by the Honourable Magistrate T. N. Sinkiyian – Principal Magistrate in Voi Chief Magistrate Court Civil Suit No. E050 of 2020 and judgment delivered on 5<sup>th</sup> May 2023 and seek leave to appeal out of time.
  - iii. The delay was occasioned on us



- a. Obtaining the copy of judgment late and as such we could not advise our client in good time.
  - b. Getting instructions from our client to appeal on time.
  - iv. The Respondent will commence with the process of execution Voi Chief Magistrate Court Civil Suit No. E050 of 2020 and judgment delivered on 5<sup>th</sup> May 2023 for the decretal sum awarded of Kshs. 203,550/= plus costs since stay has elapsed.
  - v. This application is timely made and without any inordinate delay.
  - vi. The Applicant/Intended Appellant stand to suffer substantial and irreparable loss and damage as there is a likelihood that the Applicants will be unable to recover the decretal sum awarded herein from the Respondent.
  - vii. Unless this application is allowed, Applicant/Intended Appellant intended appeal will be rendered nugatory.
  - viii. The Applicant/Intended Appellant have a good arguable appeal which has high chances of success.
  - ix. The Respondent will not suffer any prejudice or any damage that cannot be compensated by way of costs of this application is allowed.
4. The application is supported the affidavit of Nannungi Mariat, the legal Counsel of Direct Assurance Company Limited, the insurers of the Appellant herein.
  5. The Respondent filed a Replying Affidavit in opposition to the application dated 9<sup>th</sup> April 2024. In it the respondent stated that the deponent of the supporting affidavit being an advocate has sworn an affidavit relating to a contentious matter, which offends the rules of practice and thus the application herein should be struck out. The deponent has deponed on matters that are not within his personal knowledge.
  6. He deponed that the stay granted lapsed after 30 days and they were never served with any appeal within the prescribed timeline in law. He indicated that he has a right to judgement and successful fruits of litigation and therefore the execution was initiated as the applicants absconded, neglected to settle the decretal sum herein
  7. Both parties filed written submissions which I have duly considered.
  8. The Applicant submitted that the reason they had failed to file the appeal was that they were not supplied with the proceedings.
  9. The Appellant also submitted that the Respondent will not be prejudiced if the application is granted.
  10. The Respondent opposed the application and submitted that the Applicant has not invoked Order 40 of the [Civil Procedure Rules](#) which lays the legal basis for grant of the orders sought.
  11. Further, that the deponent in the supporting affidavit does not have capacity to swear the affidavit as he is not a party to the suit and that he swore the said affidavit presumably under the doctrine of subrogation.
  12. The Respondent also stated that the said supporting affidavit has deponed to matters that are not within his personal knowledge which offends Order (c) Rule 3 of the [Civil Procedure Rules](#) and that the same should be struck out.



13. The Respondent also submitted that the Applicant has failed to meet the conditions for grant of stay of execution pending appeal. I find that Article 159 of the Constitution empowers the court to dispense justice.
14. The issues for determination in this application are as follows:-
- i. Whether the Applicant should be granted leave to appeal out of time.
  - ii. Whether the Applicant should be granted stay of execution pending appeal.
15. The legal provision for leave to appeal out of time is Section 79G of the Civil Procedure Act. Section 79G of the Civil Procedure Act 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.
16. I find that the court has the discretion to grant leave to appeal out of time.
17. I allow the Applicant leave to appeal out of time on condition that the appeal is filed within 30 days of this case.
18. On the issue as to whether the Applicant should be granted stay of execution pending appeal, the governing provision is Order 42 Rule 6 of the Civil Procedure Rules. It provides;
- 1) No appeal or second appeal shall operate as a stay of execution or proceedings 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.
  - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
  - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
  - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.



- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
19. The conditions for grant of the same are now well settled.
20. I grant stay of execution pending appeal on condition that half the decretal sum is deposited in court within 45 days of this date.
21. The appeal to be filed within 30 days of this date.
22. The applicant to pay costs of the application assessed at Kshs. 5,000 within 30 of this date.

**DATED, SIGNED AND DELIVERED THIS 13<sup>TH</sup> DAY OF DECEMBER 2024 IN OPEN COURT AT VOI.**

**ASENATH ONGERI**

**JUDGE**

In the presence of:-

Court Assistant: Trizah

