



**Waweri & another v Auma (Miscellaneous Civil Application E1065 of 2024)
[2025] KEHC 14225 (KLR) (Civ) (17 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 14225 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E1065 OF 2024
LP KASSAN, J
SEPTEMBER 17, 2025**

BETWEEN

JAMES MUCHIRI WAWERI 1ST APPLICANT

AGNES WANJIKU MATHENGE 2ND APPLICANT

AND

DOROTHY AUMA RESPONDENT

RULING

1. By the motion dated 25.11.2024 brought pursuant to Section 3A, 79G & 95 of the *Civil Procedure Act* (CPA), Order 22 Rule 22, Order 42 Rule 6 and Order 50 Rule 6 of the Civil Procedure Rules (CPR), James Muchiri Waweri and Agnes Wanjiku Mathenge (hereafter the 1st & 2nd Applicant/Applicants) seek the following orders-;
 - i. Spent.
 - ii. That this Honourable Court be pleased to grant leave to the Applicants to appeal out of time against the judgment/decree in Nairobi Milimani CMCC No. E5529 of 2022 delivered on 22.08.2024.
 - iii. That the Honourable Court be pleased to stay execution of the judgment and further execution in form of a declaratory suit or attachment vide warrants of attachment of moveable property in execution of a money decree in Nairobi Milimani CMCC No. E5529 of 2022 (hereafter the lower Court Suit) delivered on 22.08.2024 pending hearing and determination of the intended appeal.
 - iv. That as a condition for stay of execution pending hearing and determination of the intended appeal, the Applicants be and hereby ordered to provide/issue security for the entire decretal



sum/amount in the form of a bank guarantee to be issued by Family Bank Ltd, therefore, this court allow the intended appellants to furnish the Court with reasonable security in the form of a Bank Guarantee.

- v. That the costs of the motion abide the outcome of the intended appeal.
2. The application is premised on the grounds on its face thereof amplified by the supporting affidavit deposed by 2nd Applicant of even date. The gist of her disposition is that decision of the lower Court suit having been delivered on 22.08.2024, the time within which to appeal has since lapsed whereas the Applicants intended appeal is merited, arguable and raises pertinent points of law. That Dorothy Auma (hereafter the Respondent) may levy execution at any time thus rendering the intended appeal nugatory and causing them irreparable loss. She states that should the decretal sum be paid over to the Respondent, the latter would be in no position to refund the same if the instant motion and intended appeal succeeds.
3. That her insurer is ready and willing to furnish the Court with a bank guarantee from Family Bank as security therefore it is in the interest of justice that the motion is allowed whereas no prejudice will be visited on the Respondent. She maintains that the instant motion has been filed without undue delay meanwhile the delay is not so inordinate or inexcusable and was occasioned by difficulty in tracing the Applicants to issue instructions to appeal the matter. Further, the impugned judgment was delivered and forwarded without the knowledge of the Applicants. In summation it was stated that any prejudice visited on the Respondent can be compensated by an award of costs therefore the motion ought to be allowed.
4. Dorothy Auma opposes the motion by way of a replying affidavit dated 05.12.2024 and further affidavit dated 21.01.2025. At the outset, she assails the motion as being an afterthought, lacking in substance with the same having been filed with the sole purpose of denying her the fruits of successful litigation. She goes on to depose that the Applicants have not offered security and or demonstrated substantial loss they risk to suffer should the Court decline to grant the orders sought. That the Applicants are equally guilty of inordinate delay as the impugned decision of the lower Court was rendered on 01.12.2023 with the instant motion being filed more than a year later, with no substantive explanation and only being prompted by execution. She further deposes that the affidavit in support of the motion is false and misleading with the intent to hoodwink the Court in granting the orders sought. In conclusion, she urged the Court to dismiss the motion with costs.
5. Directions were taken on disposal of the Applicant's motion by way of written submissions. Only the Respondent complied.
6. That said, the Court has considered the rival affidavit material alongside the Respondent's submissions, to wit, the Court's postulation that the issues for determination concerns:
 - a. Whether the Court ought to grant an order of stay execution of the judgment and further execution in form of a declaratory suit or attachment vide warrants of attachment of moveable property in execution of a money decree in Nairobi Milimani CMCC No. E5529 of 2022 pending hearing and determination of the intended appeal?
 - b. Whether the Court ought to grant the leave to the Applicants to appeal out of time?
 - c. Who ought to bear the costs of the motion?



Whether the Court ought to grant an order of stay execution of the judgment in Nairobi Milimani CMCC No. E5529 of 2022 pending hearing and determination of the intended appeal?

7. In presenting the instant motion, the Applicants have relied on among other provision Section 3A of the CPA which specifically reserves “the inherent power of the court “to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court”, to wit, this Court’s inherent powers was judiciously addressed by the Court of Appeal in *Rose Njoki King’au & Another v Shaba Trustees Limited & Another* [2018] eKLR and requires no restatement. Alongside the above, the Applicants have equally cited the provision of Order 42 Rule 6 of the CPR. Pursuant to the latter provision, it is settled that in order to succeed on an application for stay of execution pending appeal, an applicant must demonstrate that substantial loss may result unless the order of stay is issued; that the motion seeking stay pending appeal has been brought without undue delay; and must give security for the due performance of any decree or order that may ultimately be found to be binding on the applicant. Meanwhile, the cornerstone consideration in a motion to stay execution is whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay is denied.
8. However, it is evident on a plain reading of Order 42 Rule 6(1) of the CPR, that an order to stay execution pending hearing and determination of an appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this Court’s appellate jurisdiction under Order 42 Rule 6 (1) of the CPR. Notably, what is before this Court is a miscellaneous application by the Applicants. As is, no appeal has filed or evinced to have been filed before this Court as at writing of this ruling.
9. That said, this Court has observed time without number that the invocation of this Court’s jurisdiction pursuant to Order 42 Rule 6 (1) or 6 (6) of the CPR must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the CPR). Thus, where a party specifically seeks stay of execution pending hearing and determination of an appeal, not yet filed, the Court may be acting in vacuo by considering the Applicant’s prayer for stay of execution pending a non-existent appeal.
10. The Court of Appeal in *Abubaker Mohamed Al-Amin v Firdaus Siwa Somo* [2018] KECA 202 (KLR) while addressing itself in part on the issue laconically concurred with above position as pronounced in *Rosalindi Wanjiku Macharia v James Kiingati Kimani* (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased) [2017] KEHC 5160 (KLR) that “...in the absence of the appeal there was nothing upon which the stay orders sought under Order 42 of the Civil Procedure Rules could be anchored”
11. Earlier, the Court of Appeal in the case of *Equity Bank Limited v West Link Mbo Limited* [2013] KECA 320 (KLR) while commenting on Rule 5 (2) (b) of the Court of Appeal Rules, whose wording is substantially similar to Order 42 Rule 6 (1) of the CPR, and or Order 42 Rule 6 (6) of the CPR, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also *Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga* [2012] eKLR).
12. Order 42 Rule 1 of the CPR provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, and at the risk of repetition, an appeal is yet to be filed and therefore, there is no basis upon which this Court can exercise its appellate jurisdiction under the said provision in a miscellaneous matter. If the Applicants desired to seek an order to stay execution alongside the prayer for leave to appeal out of time, they ought to have first filed the memorandum of



appeal in a proper appeal and the relevant application. The words that “an appeal may be admitted out of time” in Section 79G, appears to admit both retrospective and prospective applications.

13. So that leave under the Section may be sought before or after a memorandum of appeal is filed. However, it may be more prudent for a party who also seeks stay of execution pending appeal in the same motion for leave to appeal out of time to have filed the memorandum of appeal in advance. In the circumstances, the prayer seeking stay of execution of the decree in Nairobi Milimani CMCC No. E5529 of 2022 pending hearing and determination of the Applicants intended appeal has no legal anchor and cannot be entertained vide the instant matter.

Whether the Court ought to grant the leave to the Applicants to appeal out of time?

14. The power of the Court to enlarge the time for filing an appeal out of time is expressly donated by Section 79G, as well as Section 95 of the CPA. That said, it is trite that for leave to be granted, an applicant is obligated to sufficiently explain to the satisfaction of the Court the cause of the delay. In *Thuita Mwangi v Kenya Airways* [2003] eKLR the Court reiterated the rendition in *Mutiso v Mwangi* [1997] KLR 630 as follows:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

See also: - *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR)

15. The circumstances that led to delay in filing of the intended appeal within time as explained in the Applicants affidavit material is two (2) pronged;- firstly, difficulty in tracing the Applicants to issue instructions towards appealing the impugned decision of the lower Court; and secondly, that the impugned decision was delivered and forwarded without the knowledge of the Applicants. The Respondent’s riposte is fairly straight forward;- that the Applicants are guilty of inordinate delay as the impugned decision of the lower Court was rendered on 01.12.2023 with the instant motion being filed more than a year later and no substantive explanation being advanced for the delay.
16. A perusal of the Applicants affidavit material, the reason advanced is quite peculiar. While they assert difficulty in tracing the Applicants to instruct counsel to appeal, it must be remembered the said deposition on the same was stated by the 2nd Applicant and not counsel. Counsel eschewed filing an affidavit explaining efforts or difficulty faced in tracing his clients. And in any event, cases belong to the litigants who lodge them in Court and or are dragged to Court. Therefore, it would be quite odd that the Applicants proved difficult to find, yet they were the party dragged to Court, to wit, any adverse decision would have consequential effects. The Applicants ought to have been alive to the matter and readily available to counsel for purposes of issuing instructions, as and when necessary. This position was fortified by the Court of Appeal in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR when it held thus: -

“Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

See also *Daqare Transporters Limited v Chevron Kenya Limited* [2020] Eklr



17. Secondly, concerning the impugned decision being delivered and forwarded without their knowledge. Equally, on this front, the Applicants and or counsel have not evinced steps taken toward assuaging the situation either by way of a letter to the Court, or inquiring as to the obtaining position of the lower Court matter. Without any remonstrations by the Applicant and or steps it took towards the issue, it is difficult to ascertain the same. To wit, the Respondent's assertion that the threat of execution is what awoke the Applicants may appear to have merit.
18. Perplexingly, by the Respondent's affidavit material, it would seem that the impugned decision of the lower Court was delivered on 01.12.2023 yet the instant motion was filed on 28.11.2024. As earlier noted, the explanation being offered for delay does not address the aforesaid anomaly meanwhile does demonstrate the efforts taken. It is settled that the period of delay as well as explanation thereof are key considerations in an application of this nature. A party seeking extension of time must not be seen to presume on the Court's discretion. The delay herein is close to a year and in view would be considered inordinate. Meanwhile, the explanation being offered seems rather callous or bland. Makhandia JA in *Patrick Wanyonyi Khaemba v Teachers Service Commission, Board of Management, Kapletingi Mixed Day Secondary School & Francis Tanui* [2019] KECA 112 (KLR) addressed himself on the question of delay as follows; -
- “The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable.....”
19. A motion of this nature principally stands or falls on the demonstration of “good and sufficient cause” by an applicant; it is what unlocks this Court's discretion. The Court agrees with the Respondent that the Applicants have not demonstrated “good and sufficient cause” and granting the prayer sought might only work prejudice against the Respondent. While the Court is alive to the emphasis in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* [2020] eKLR concerning the importance of the right of appeal, the right is not absolute and must be balanced against the Respondent's corresponding right to have the dispute determined expeditiously. The prayer for leave to appeal out of time has not been justified. In the circumstances, the Court finds no merit whatsoever in the Applicants motion dated 25.11.2024. The motion is dismissed with attendant costs to the Respondent.
20. Order Accordingly!

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF SEPTEMBER 2025

L. P. KASSAN

JUDGE

In the presence of:

No appearance for Appellant

Ndiege holding brief Waiganjo for Respondents

Court Assistant – Carol.

