**Migotiyo Plantations Limited v Kaswii (Suing on Behalf of the Estate of the Late James Kilonzi Kimwele) & another (Civil Appeal E1129 of 2024) [2025] KEHC 11788 (KLR) (Civ) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11788 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E1129 OF 2024**

**LP KASSAN, J**

**JULY 31, 2025**

**BETWEEN**

**MIGOTIYO PLANTATIONS LIMITED ..... APPLICANT**

**AND**

**PHILOMENA NGINA KASWII (SUING ON BEHALF OF THE ESTATE OF THE LATE JAMES KILONZI KIMWELE) ..... 1ST RESPONDENT**

**NICK SALAT ..... 2ND RESPONDENT**

**RULING**

1. For determination is Migotiyo Plantations Limited (hereafter the Applicant) motion dated 01.10.2024 seeking inter alia: -

    a. Spent.

    b. Spent.

    c. That there be a stay of proceedings in Nairobi Milimani CMCC No. 448 of 2013 (hereafter lower Court suit) pending hearing and determination of the appeal herein

    d. That leave be granted to the Applicant to file an appeal out of time against the ruling delivered on 09.08.2024 in Nairobi Milimani CMCC No. 448 of 2013.

    e. That the appeal filed on 01.10.2024 be deemed properly filed

    f. That costs of the motion be provided for.

2. The applicant's motion is brought pursuant to Section 1A & 3A of the *Civil Procedure Act* (CPA) and Order 42 Rule 6 of the Civil Procedure Rules (CPR) and is supported by an affidavit deposed by George Metali on even date. The gist of his deposition is that the lower Court on 09.08.2024 rendered a ruling and the Applicant being aggrieved by the same has preferred an appeal. That on the backdrop of the aforestated ruling, warrants of arrest may be issued against the directors of the Applicant at any time whereas they were condemned unheard before the lower Court. That delay in lodging an appeal within time was not intentional meanwhile was occasioned by the fact that the ruling was only made available and or uploaded in the Case Tracking System (CTS) on 02.09.2024. He goes on to state that the Applicant needed time to digest the purport of the ruling and subsequently instructed counsel therefore delay since delivery of the ruling was not inordinate. Should the Court decline to grant the motion the pending appeal will be rendered nugatory and a mere academic exercise as such it is in the interest of justice to allow the application. He concludes by deposing that the motion has been filed without unreasonable delay.

3. Philomena Ngina Kaswii (hereafter the 1st Respondent) opposes the motion by way of a replying affidavit dated 14.11.2024. She begins by asserting that the Applicant has not laid a reasonable basis for extension of time within which to lodge an appeal. That the impugned ruling of the lower Court was delivered virtually on 09.08.2024 however the Applicant lodge a request for a certified copy of the ruling forty-seven (47) days later. She assails the Applicant's explanation that the impugned ruling was availed on 02.09.2024 but rather the action as captured on CTS on the latter date was with respect to fixing the lower Court matter for mention on 10.09.2024. That in any event the Applicant has not explained the delay from the latter date up until filing of the instant motion which delay is inordinate, indolent and inexcusable. She maintains that the Applicant has not demonstrated sufficient cause to warrant the orders sought whereas the motion only serves to prejudice her by delaying the fruits of successful litigation. In summation she states that enforcement of the lower Court decree has been pending for the past eight (8) years therefore it is in the interest of justice that the motion be dismissed with costs.

4. In rejoinder by way of a further affidavit dated 10.12.2024, George Metali expresses the apprehension that if the decretal sum is paid out to the 1st Respondent she may not be in a position to refund the amount thus occasioning the Applicant irreparable harm should the appeal herein succeed. He goes on to further express the Applicant's willingness to provide security towards the order of stay pending appeal being sought. He surmises by iterating that the ruling was only made available to the Applicant on 02.09.2024 whereas the instant motion was filed within 30 days of receipt of the impugned ruling.

5. Nick Salat (hereafter the 2nd Respondent) did not participate in the instant proceedings.

6. Directions were taken on disposal of the motion by way of written submissions, to wit, the parties duly complied. That said, the Court has duly considered the respective parties' affidavit material alongside the filed submissions and authorities.

7. The Court proposes to first address the question of leave to file the instant appeal ought of time, as its outcome affects the entire motion. 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 generally, by 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)

8. The circumstances that led to delay in filing of the intended appeal within time have been explained in the applicant's affidavit to appertain the fact that the impugned ruling was delivered in part and a copy of the ruling was only obtained on 02.09.2024 whereafter it took time to digest the same before counsel was instructed to lodge an appeal by which time the statutory period had lapsed. The Respondent has assailed the explanation by arguing that no reasonable explanation had been offered for delay as at delivery of the impugned ruling and or upon the Applicant obtaining a copy of the impugned ruling as purported.

9. Vide the Applicant's affidavit material, it is not in dispute that the impugned ruling was delivered on 09.08.2024 (Annexure GM-O) in presence of both counsel for the Applicant and 1st Respondent. It further appears, as purported by the Applicant, that the said ruling was uploaded on the CTS platform on 02.09.2024 going by (Annexure GM-3). The Applicant's letter dated 25.09.2024 (Annexure PNK-5) assailed by the 1st Respondent, seems to be a request for extraction of the resultant order from the impugned ruling and not a request for a certified copy of the ruling as contended by the 1st Respondent. That said, while this Court does not have the benefit of the proceedings to ascertain the assertion that the learned Magistrate had intimated that she would upload the ruling on shortly thereafter it is not disputed that counsel for the Applicant was present as at delivery of the ruling. On whether the lower Court only rendered its final orders without reading the body of ruling, this Court is equally at a disadvantage of the said fact.

10. While this Court appreciates the fact that judicial officer on account of scarcity of judicial time as a matter of practice at times only read out final orders with respect to rulings and judgments in order to save on time, it may be true that the Applicant as at delivery did not have the benefit of the learned Magistrates ratio decidendi leading up to her final order. The Court equally notes that the Applicant's affidavit material is deficient material illustrative of its attempt to ensure that the impugned ruling was actually availed, either by way of correspondence requesting from a copy of the ruling meanwhile only waited until 02.09.2024 when the same was uploaded on the CTS. Some industry on the part of the Applicant and or counsel would have gone a long way to avert delay.

11. However, it is notable that the impugned ruling was availed before the lapse of the statutory period within which an appeal ought to have been lodged. The Applicant upon receipt of the ruling had a total of seven (7) days, to wit, would have been utilized towards digesting the purport of the impugned ruling however only waited until 01.10.2024 to lodge the instant motion. Perceptibly, between 09.08.2024 and 02.09.2024 the Applicant's inaction towards any endeavor to obtain a copy of the impugned ruling would be symbolic of indolence. Further, the duration between 02.09.2024 and 01.10.2024 when motion here was filed equally appears to be too long a period within which the Applicant purportedly utilized digest the ruling.

12. Here, the delay appears to be slightly over a month, and it would seem that the Applicant has offered a rather feeble explanation. That said, Makhandia JA in Patrick Wanyonyi Khaemba v Teachers Service

Commission, Board of Management, Kapletingi Mixed Day Secondary School & Francis Tanui [2019] KECA 112 (KLR), observed that; -

> " 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.

13. Given the aforestated, the Court is somewhat persuaded by the explanation advanced by the Applicant whereas the delay in itself does not appear to be so inordinate. Indubitably, it would be a travesty of justice for the Court to drive the Applicant from the seat of justice. Besides, it does not seem that the Respondent will suffer any prejudice that cannot be compensated through costs if the motion is allowed.

14. Concerning the arguability of the appeal, the Court, having perused the grounds in the memorandum of appeal, is satisfied that they raise issues worthy of consideration on appeal. That said, based on the language employed in Mutiso (supra) the requirement touching on the viability of the intended appeal, is neither mandatory nor sternly applied in an application of this nature. The Court of Appeal in Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited [2020] eKLR stated that "an arguable appeal need not (be one that will) succeed so long as it raises a bona fide issue for determination by the Court." In the circumstances of this case, the Court is persuaded that to facilitate the Applicant's undisputed right of appeal as equally advanced in Vishva (supra), the appeal is admitted out of time and deemed properly filed in the circumstance.

15. On whether this Court ought to grant stay of proceedings in lower Court suit pending hearing and determination of the appeal herein? This Court's authority to issue an order in the effect of stay of proceedings pending appeal is donated by Order 42 Rule 6(1) of the CPR, which provides that: -

> (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.

16. Ringera, J (as he then was) in the of-cited decision of Re Global Tours &Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 spelt out the applicable considerations in determining an application for stay of proceedings, as follows: -

> " As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weighs the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

17. Further, it may be observed that the need to avoid unnecessary proliferation of proceedings and needlessly dissipating limited judicial resources, are equally key considerations in an application of this nature. The Court of Appeal in Raymond Ruto & 5 others v Stephen Kibowen [2021] KECA 745 (KLR) exhorted that: -

> "We acknowledge at the outset, that a court will sparingly and only in exceptional circumstances will it grant an order to stay of proceedings which essentially is an interruption of the other parties right to conduct their hearing....
>
> > "The learned authors of; Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, have also given some principles to bring to bear while considering whether or not a court should stay proceedings as follows: -
> >
> > "The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."
>
> This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases..."

18. Aside from the above, due cognizance must be taken of the fact that there is an imposed duty on this Court by dint of Section 1A & 1B of the CPA to progress the overriding objectives towards the just, expeditious, proportionate and affordable resolution of matters before a Court. Here, having considered the rival arguments, it can be noted that vide his further affidavit the Applicant has demonstrated the 1st Respondent intends to execute the lower Court decree and has taken out a Notice to Show Cause meanwhile the Applicant has equally expressed the apprehension that should execution issue by way of settlement of the decretal sum there is a possibility that the 1st Respondent may not be in a position to refund the paid out amount.

19. Indubitably, this Court agrees that stay of proceedings pending appeal ought to be granted sparingly and only in exceptional circumstances given the scarcity of judicial and necessity towards utilization of judicial time. In spite of the other necessary prerequisites to be considered in respect of the Applicant's motion, this Court must ask itself whether the application has demonstrated such exceptional circumstances notwithstanding the appeal that has since been presented before a higher Court and whether failure to stay proceedings would prejudice the Applicant?

20. To answer the above, this Court must tread lightly so as not to prejudice and or embarrass the appellate proceedings. It must be remembered that the gist of the Applicant's motion that resulted in the impugned ruling sought among other orders to set aside the lower Court judgment delivered on 16.08.2016. The lower Court dismissed the Applicant's motion thereby prompting the appeal before this Court. The Applicant's declined motion gyrates on whether counsel had instruction to act, service of summons and whether the Applicant has a draft defence that raises triable issues going by the identified issues in the impugned ruling (Annexure GM-O). The appeal before this Court seems to challenge the lower Court ruling on the premise of some of the issues it had coined for determination. Ex facie, the grounds of appeal appear to raise issues serious enough to warrant consideration by the court on appeal, or that are prima facie arguable.

21. In Stanley Kang'ethe Kinyanjui V Tony Keter & 5 Others [2013] eKLR the Court of Appeal stated:

> " The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable".
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> See also Denis Mogambi Mong'are V. Attorney General & 3 Others Civil Appeal No. Nairobi 265 of 2011 (UR 175/2011) where the Court of Appeal stated that:
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> > "An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration."

22. Thus, if the Notice to Show Cause (NTSC) in the lower court were to proceed before this appeal is determined, and the appeal subsequently succeeds, the Applicant's apprehension that the appeal may be rendered academic does not seem farfetched. It may well be that if stay is denied, the judgment-debtor would have irreversibly paid the penalty through payment of the decretal sum or committal to civil jail, by the time the appeal is concluded. In George Gathura Karanja v George Gathuru Thuo & 2 Others [2019] e KLR, the Court of Appeal stated that:

> " [A]n appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible. See the case of Stanley Kangethe Kinyanjui versus Tony Ketter & 5 Others, Civil Appeal No. 31 of 2012 where this Court stated inter alia thus:
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> > "Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is irreversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party."

23. Conversely, and without demeaning the importance of the NTSC in the administration of justice, and the Respondent's right to expedited resolution of her grievance before the lower court, is not to say that the 1st Respondent's pursuit is peripheral. The ultimate purpose of the NTSC is the vindication of the rule of law. Moreover, the Court must guard against the dissipation of its time arising from the prospect of two different courts entertaining somewhat parallel and related proceedings. Not to mention the possibility of potentially conflicting outcomes. For good order and efficient utilization of the Court's resources it appears more prudent that the appeal ought to be determined as a priority.

24. Again, any prejudice to the 1st Respondent arising from delay can be curbed through appropriate conditions, especially because the matter touches on the rule of law. Equally, an award of costs would adequately compensate the 1st Respondent for any delay and inconvenience caused. Balancing the rights of the respective parties, the Court is persuaded that the justice of the matter lies in allowing the prayer on stay of proceedings on condition.

25. Therefore, the motion dated 01.10.2024 is granted upon the following conditions:

    a. The appeal memorandum of appeal dated 01.10.2024 is admitted out of time and deemed properly filed.

    b. The Applicant shall within 45 days of the ruling file and serve a complete record of appeal.

    c. The Applicant shall fully prosecute the appeal within six (6) months of filing the record of appeal.

d. The Applicant shall within 21 (twenty-one) days of this ruling deposit into court the sum of Kshs. 500,000/- (five hundred thousand) as security.

e. In default of any of the above conditions, the stay of proceeding order shall automatically lapse.

f. The costs of the motion are awarded to the 1st Respondent in any event

Orders Accordingly!

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY 2025**

**LINUS P. KASSAN**

**JUDGE**

In the presence of:-

Abiere for Applicant

Kimata for 1st Respondent

Carol – Court Assistant