



**Kinyua v Karenga (Suing as the legal representative and administrator of the Estate of the Late Denis Frangleen Muchira Ndwiga (Deceased) (Miscellaneous Application E053 of 2023) [2024] KEHC 1880 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1880 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
MISCELLANEOUS APPLICATION E053 OF 2023  
LM NJUGUNA, J  
FEBRUARY 28, 2024**

**BETWEEN**

**PETER KINYUA ..... APPLICANT**

**AND**

**JAMES MBOGO KARENGA (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE LATE DENIS FRANGLEEN MUCHIRA NDWIGA (DECEASED) ..... RESPONDENT**

**RULING**

1. The applicant filed a notice of motion dated 22<sup>nd</sup> September 2023, being supported by the grounds set out on its face and the facts deposed in the supporting affidavit thereof. The orders sought are as follows:
  - a. Spent;
  - b. That the honourable court be pleased to grant leave to appeal out of time against the judgment/decree of Hon. J. Otieno in Embu CMCC no. E125 of 2021 delivered on 05<sup>th</sup> July 2023;
  - c. That the honourable court be pleased to stay execution of the judgment/decree arising from Embu CMCC no. E125 of 2021 delivered on 05<sup>th</sup> July 2023 where the court awarded Kshs.50,000/= as damages for pain and suffering, Kshs.150,000/= for loss of expectation of life, Kshs.1,402,542/= for loss of dependency and Kshs.53,015/= as special damages plus costs and interests and found the applicant 100% liable, pending hearing and determination of the application and intended appeal herein;
  - d. That this honourable court be pleased to stay any further execution of any proclamation/attachment/sale by public auction by the respondent or through their agent, together with all



consequential orders pending hearing and determination of this application and the intended appeal;

- e. Spent; and
  - f. That the costs of this application abide the outcome of the intended appeal.
2. Judgment was entered against the applicant in Embu CMCC no. E125 of 2021 for the sum of Kshs.1,655,558/=. The respondent moved to execute the decree, thus prompting this application. It is the applicant's averment that the appeal, which he seeks to file out of time, has high chances of success and that if the respondent moves to execute the decree, he will suffer prejudice and the appeal will be rendered nugatory. That the applicant's insurer is willing to secure the decree through a bank guarantee. That the respondent is in the process of executing the decree through auctioneers who have already issued proclamation notices. It is his case that the application has been brought without delay and that it is in the interest of justice that the court grants the orders sought.
  3. The application is opposed through the respondent's replying affidavit sworn on 01<sup>st</sup> November 2023, wherein he deposed that the applicant is using the application to delay the respondent in enjoying the fruits of his judgment. That the application was filed 2 months after the impugned judgment was delivered and the delay has not been explained. That when the application was brought before the court, the court ordered that the full decretal amount be deposited in court but the applicant did not comply with this order and there is correspondence from the court showing this non-compliance.
  4. It was his case that no order for stay of execution can stand without a substantive memorandum of appeal being on the court's record. Further, that there is no documentary evidence adduced to justify the delay in filing the intended appeal. That the applicant's right to appeal should be measured against the respondent's right to enjoy the fruits of his judgment. He urged the court not to allow the application as to do so will amount to entertaining the indolence on the part of the applicant. That the court's discretion should not be exercised in favour of the applicant who has not demonstrated what prejudice he is bound to suffer if the orders are not granted.
  5. In this application, the court directed the parties to file their written submissions but only the respondent complied.
  6. The respondent submitted that the applicant flagrantly disobeyed orders of the court issued on 25<sup>th</sup> September 2023 where the court ordered that stay of execution be granted on condition that the decretal sum be deposited in the court within 30 days. That on 20<sup>th</sup> November 2023, the applicant had not complied with the order and so the court granted the applicant a further 10 days to comply but the applicant still did not comply. Reliance was placed on the case of *Shimmers Plaza Limited v National bank of Kenya Limited* [2015] eKLR where the Court of Appeal stated that disobedience of court orders amounts to contempt of court.
  7. He also relied on the Supreme Court decision in the case of *Republic v Ahmad Abolfathi Mohammed & Another* (2018) eKLR where the court referred to the case of *B. v Attorney General* [2004] 1 KLR 431 and held that court orders are not made in vain and must be obeyed otherwise the court will be ridiculed. It was also the respondent's argument that there was an unexplained delay in filing the application for leave to appeal out of time. That under section 79G of the *Civil Procedure Act*, any delay should be satisfactorily explained before the court can consider the application.
  8. He relied on the case of *Dolphin Coaches Ltd. Benson Kamau Migwi & Another* [2008] eKLR where an order for leave to appeal out of time was denied because the delay was not satisfactorily explained. He also relied on the case of *Nicholat Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR where the court set principles for consideration before granting



leave to appeal out of time. The respondent also placed reliance on Order 42 Rule 6(2) of the [Civil Procedure Rules](#) and the cases of [Teresia Kimani v. Githere Investments Ltd](#) [2004] eKLR, [Seyani Brothers & Co. \(K\) Ltd v Albanus Mwangi Muia](#) [2021] eKLR and [Gerald M'limbine v. Joseph Kangangi](#) [2009] eKLR.

9. He argued that his rights to enjoy the fruits of his judgment should be weighed against the rights of the applicants to the orders sought and he cited the cases of [Mohammed Salim T/A Choice Butchery v Nasserpuria Memon Jamat](#) [2013] eKLR and [M/s Portreitz Maternity v James Karanga Kabia](#) Civil Appeal No. 63 of 1997. That the appeal cannot be rendered nugatory since this is a money decree and that any amounts paid can be refunded if an appeal succeeds. He relied on the case of [Total Kenya Limited v. Emmanuel Ndithya](#) [2021] eKLR and the respondent's arguments in the case of [Antione Ndiaye v African Virtual University](#) [2015] eKLR.
10. The issue for determination is whether the applicant deserves to be granted the orders sought.
11. Through an order issued on 25<sup>th</sup> September 2023, this court determined the issue of stay of execution stating that "...an order be and is hereby issued staying execution of the judgment/decreed dated 05<sup>th</sup> July 2023 on condition that the whole decretal sum is deposited in court within 30 days from the date of this order". The court also ordered that prayer 2, which is seeking leave to appeal out of time, be heard on 12<sup>th</sup> October 2023 and on the said date, none of the parties attended court. When the matter came up on 20<sup>th</sup> November 2023, the applicant had not deposited the decretal amount in the court as had been ordered and the court granted 10 more days for the applicant to comply.
12. The respondent, through his advocate, wrote a letter dated 06<sup>th</sup> December 2023 to the court seeking confirmation of whether the amount had been deposited. The court responded vide letter dated 11<sup>th</sup> December 2023 stating that the decretal amount had not been deposited as of the date of the letter. The order of this court still stands and has not been reviewed or set aside. The same also stands disobeyed by the applicant, who still seemingly hopes that the court will address the issue of stay of execution through this ruling. In my view, the issue is already settled and should not be revisited as there is a pending order on the same.
13. Court orders are not made in vain and should never be trivialized. They are solemn declarations which if disobeyed, the courts will be an institution to be ridiculed, as was held by the Supreme Court in the case of [Republic v Ahmad Abolfathi Mohammed & Another](#) (2018) eKLR where the court referred to the case of [B. v Attorney General](#) (2004) 1 KLR 43. As long as the orders issued still stand, the issue of stay of execution stands determined and, in this case, failure to meet the condition set means that the respondent is at liberty to execute. This also means that prayer 4 cannot be granted.
14. As to whether the court can grant the order to appeal out of time the timelines for filing of appeals are set under section 79G of the [Civil Procedure Act](#) as follows:

"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 a good and sufficient cause for not filing the appeal in time."



15. The applicant has not explained sufficiently why the same should be granted and whether the delay in appealing can be justified. In the case of *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR the court held thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but not 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.”

16. The applicant stated that he will suffer prejudice if leave to appeal is denied and that the appeal will be rendered nugatory if stay of execution is not granted. The applicant has denied himself stay of execution by his own actions of disobeying the court orders by failing to meet the conditions that were set by the court. As a result, whether or not the subject matter of appeal will be extinguished is immaterial. Execution of a decree of the court is bound to happen and the same can only be stopped by a stay order. The risk of execution is not sufficient reason to grant leave to appeal out of time as there is no timeline for a decree-holder to recover the decretal amount.

17. Moreover, execution of a decree is a lawful process as was held in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court held thus:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

18. An application for leave to appeal out of time is subject to the discretion of the court. In applying its discretion on the matter, it is important that the court weighs the rights of the applicant to the orders sought as against the respondent’s right to the fruits of his judgment. The judgment of the trial court was delivered on 03<sup>rd</sup> July 2023 from a suit instituted in 2021. The claim was made by the respondent on behalf of the deceased, whose death was compensated through the judgment. The applicant has not demonstrated his seriousness to appeal. It seems to me that this application has been brought as a way to delay the respondent from enjoying the fruits of his judgment. It is my considered view that judgment in favour of the respondent should not be deferred any further. Therefore, the application for leave to appeal out of time is hereby denied.

19. In the end, the application dated 22<sup>nd</sup> September, 2023 is hereby dismissed in its entirety, with costs to the respondent.

20. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF FEBRUARY, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant



.....for the Respondent

