



**Gatua v Gatua & another (Miscellaneous Application E007 of 2023)
[2024] KEHC 1710 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION E007 OF 2023
LM NJUGUNA, J
FEBRUARY 23, 2024**

BETWEEN

JOHN BOSCO NJIRU GATUA APPLICANT

AND

JOHNSON LENSON MBOGO GATUA 1ST RESPONDENT

PASQUALINA MUTHONI GATUA 2ND RESPONDENT

RULING

1. The applicant filed the notice of motion dated 21st February 2023 seeking orders that:
 - a. The Honourable court be pleased to grant the applicant leave to file an appeal out of time against the judgment delivered on 22nd September 2022 in Senior Principal Magistrate’s Court at Runyenjes Succession Cause No. 185 of 2013;
 - b. Execution of the judgment of Hon. J. W. GIchimu SPM delivered on 22nd September 2022 be stayed pending the hearing and determination of the intended appeal by the applicant; and
 - c. The costs of this application be in the cause.
2. The application is premised on the grounds set out on the face of the application and in the supporting affidavit.
3. It was the applicant’s case through his advocate that several requests and reminders were made to the court for typed proceedings for purposes of appeal. That the court delayed in issuing the typed proceedings, causing the applicant to miss the window for appeal. That the appeal has high chances of success and that the respondents may execute the impugned judgment to the applicant’s disadvantage if the orders sought herein are not granted.



4. The respondents opposed the application stating that the same is bad in law, an abuse of the court process and malicious on its face. That the applicant did not file a memorandum of appeal when the judgment was supplied to him and the window for appeal has already closed. That in any event, the intended appeal has no chance of success.
5. The applicant filed a supplementary affidavit refuting the averments of the applicant that there was inordinate delay in filing the application. That he wrote a letter to the registry but the same was not stamped as received on 26th September 2022 but was stamped on the date of filing the application.
6. The application was canvassed by way of written submissions.
7. The applicant, in his submissions, relied on section 79G of the *Civil Procedure Act* to reiterate the power of the court to grant leave to the applicant to file the appeal out of time. That he had 30 days from the date of delivery of the judgment which was 22nd September 2022, within which to file an appeal. That there was a delay on the part of the trial court's registry in supplying him with certified copies of the judgment and the proceedings. That the same were requested for within good time but the registry delayed in issuing them until the window for appeal closed.
8. Further reliance was placed on the case of *Mombasa County Government v. Kenya Ferry Services & Another (2019)* eKLR, where the court stated that the reasons for delay in meeting the court's timelines must be explained. On the issue of stay of execution, the applicant submitted that the trial court ordered that the suit land be subdivided 3 ways and if this order is executed, the applicant will suffer irreparable harm and the appeal will be rendered nugatory. He relied on the case of *Nicholas Stephen Okaka & Another v. Alfred Waga Wesonga (2022)* eKLR. He urged the court to grant the orders as prayed.
9. The respondents submitted that the application was filed 5 months after the impugned judgment was delivered and that this is inordinately late. That though this court may choose to exercise discretion on the issues, the discretion must be applied judiciously considering that the application lacks merit. That the applicant is using this application to deny his siblings the fruits of their judgment. They urged the court to dismiss the application.
10. The issues for determination are:
 - a. Whether or not the court should grant stay of execution of the judgment of the trial court;
 - b. Whether or not the applicant should be granted leave to appeal out of time; and
 - c. Who should bear the costs of the application.
11. The orders sought by the applicant may be granted by this court on discretion and subject to the applicable laws and facts. However, there are factors to be considered before stay of execution can be granted or denied. Stay of execution is governed by Order 42 Rule 6 of the *Civil Procedure Rules* which 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.

12. In considering whether or not to grant stay of execution, the court must satisfy itself that justice will be served to both the appellant and the respondent. That is to say, the right of the respondents to enjoy the fruits of the judgment should not be compromised because the applicant has been granted the orders. At the same time, the constitutional right of the applicant to be heard on his appeal should not be denied because the respondent's have a right to the fruits of their judgement. In the case of *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR, the court held that:

“The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”



13. In the present application, the applicant herein claims delay in receiving the certified copies of the judgment and proceedings to enable him to appeal against the impugned decision. Through his supporting affidavit, the applicant has demonstrated that he made numerous attempts to follow up with the registry on the typed proceedings and certified copy of the judgment but court delayed in issuing the same. I have taken note of the exhibits marked as JK1-5 which are correspondences and payment receipts for the follow-up. Exhibit marked as JK6 is a certificate of delay issued by the registry on 20th February 2023. The judgment was delivered on 22nd September 2022 and since 26th September 2022 until the certificate of delay was issued, the applicant had been following up on the certified copies of the proceedings and judgment.
14. Indeed, there is inordinate delay in filing this application. However, according to Order 42 Rule 6 (2) (a) of the Civil Procedure Rules, the delay has been sufficiently explained.
15. The applicant has also explained that if the Decree is executed, the suit land will be subdivided into 3 portions, and that, he will suffer irreparable loss, thereby rendering the appeal nugatory. The respondents have simply stated that this application is a ploy to deny them the fruits of the judgment. In my view, it is imperative that stay of execution be granted in order to preserve the subject matter pending the hearing and determination of the appeal.
16. 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.”
17. When a party delays in lodging an appeal, guidance may be sought from the proviso in the above-cited provision of the *Civil Procedure Act*. The proviso creates lee-way but only to an extent where the court may apply discretion on the matter and grant such orders when it is satisfied with the reasons for the delay and other factors. 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.”
18. It has already been determined that there is indeed a delay in filing this application but the same has been explained satisfactorily. The Applicant cannot be said to have slept on his rights and he has demonstrated his diligence to prosecute his intended appeal. Therefore, the order seeking leave to appeal out of time will be granted. However, as I have stated in my previous paragraphs, all the parties in this suit have the right to justice alike and no one party’s right supersedes the other’s.
19. Therefore, I find that the application has merit. In the interest of justice and in accordance with Article 159(2)(d) of *the Constitution* of Kenya 2010 and Sections 1A, 1B and 3A of the *Civil Procedure Act*, the application is hereby allowed and the following orders to issue:
- a. The applicant is hereby granted leave to file the appeal out of time and the same to be filed within 14 days from the date of this ruling;



- b. Execution of the judgment and subsequent orders in Runyenjes Succession Cause No. 185 of 2013 delivered on 22nd September 2022 is hereby stayed pending hearing and determination of the appeal;
- c. The appeal to be prosecuted within 90 days of filing the record of appeal; and
- d. There shall be no order as to costs.

20. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF FEBRUARY, 2024.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the 1st Respondent

.....for the 2nd Respondent

