



REPUBLIC OF KENYA



**M'Mutungi v Ogoti (Civil Appeal E224 of 2023)  
[2024] KEHC 10292 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 10292 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E224 OF 2023  
F WANGARI, J  
FEBRUARY 23, 2024**

**BETWEEN**

**DAVID KINOTI M'MUTUNGI ..... APPELLANT**

**AND**

**MOGIRE OSCAR OGOTI ..... RESPONDENT**

**RULING**

1. The Applicant vide an application dated 5/9/2023 sought for the following orders: -
  - a. Spent
  - b. That this court be pleased to order a stay of execution of the Judgement delivered on 16/7/2023 in Mombasa CMCC No. E1492 of 2021 pending hearing and determination of the application and appeal.
  - c. That the court be pleased to admit the appeal out of time.
  - d. Costs
2. The Appellant relied on grounds that the delay in filing the appeal was due to the fact that the trial court delivered its judgment without the knowledge of the Appellant, as the date that had been fixed for judgment, the matter was not listed and no new date was given. It is not until when the Respondent's Advocate wrote to the Appellant's counsel informing them of the delivery of judgment. The Appeal was lodged immediately but it was already 9 days past the date of filing the appeal. The Appellant was ready and willing to deposit a Bank Guarantee of the entire decretal sum.
3. The application was opposed through the Respondent's Replying Affidavit dated 31/10/2023. It was stated that the application was bad in law and defective. The respondent blamed the Appellant for failing to follow up on the judgment which was posted online.



4. It was further deponed that if any security is to be given, the same should guarantee the Respondent access to the funds in the event the appeal was not successful.
5. Directions were taken that the application be disposed of by way of written submissions. Both parties complied by filing the rival submissions.
6. I have considered the application, the Applicant's submissions, authorities cited as well as the law and in my view, the following are the issues for determination;
  - a. Whether the application is meritorious;
  - b. What is the order as to costs?
7. On the application to have the appeal admitted out of time, Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. It provides 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 good and sufficient cause for not filing the appeal in time.”
8. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Thuita Mwangi V Kenya Airways Ltd* [2003] eKLR. They include the following: -
  - i. The period of delay;
  - ii. The reason for the delay;
  - iii. The arguability of the appeal;
  - iv. The degree of prejudice that will be suffered by the Respondent if the extension is granted;
  - v. The importance of compliance with time limits to the particular litigation or issue;
  - vi. The effect if any on the administration of justice or public interest if any involved.
9. I find that the explanation given as to why there was a 9 days delay was reasonable. Further, there is a draft Memorandum of appeal on record.
10. In respect to granting the stay of execution, the principles for grant of stay of execution pending appeal are settled. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the Civil Procedure Rules, 2010 which provides as follows: -
  - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

11. The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically. It must be recalled that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of each of the parties to the dispute. In *RRW v EKW* [2019] eKLR, the Court of Appeal addressed itself on this issue as hereunder: -

“...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. 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...”

12. Considering that the Respondent’s main concern is the security in the access of funds in the event the appeal is dismissed, and for purposes of expeditious dispensation of justice, the application shall be compromised by granting the orders as herein below.
13. On the issue of costs, the same follows the event. This is what section 27 of the *Civil Procedure Act* decrees. However, this court has discretion to either award or not award any costs. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. The costs shall abide by the outcome of the appeal.
14. Flowing from the foregoing, I proceed to make the following orders: -
  - a. The application dated 5/9/2023 is hereby allowed on the following terms;
    - i. That stay of execution is hereby granted as per Prayer ‘b’ of the application.



- ii. That order (i) above is subject to the deposit of the decretal sum less 30% i.e Kshs. 712,726 in an escrow account i.n.o both counsels on record within the next 30 days.
  - iii. The Appellants is granted leave to file appeal out of time, and the Memorandum of Appeal is deemed to be properly on record.
  - iv. In default of (ii) above, the stay of execution orders granted shall lapse and the Respondent is at liberty to execute.
  - v. The Record of Appeal be compiled, filed and served within the next 60 days
  - vi. Appeal to be disposed of by way of written submissions. The Appellant to file the submissions together with the R.O.A.
  - vii. The Respondent to file and serve the submissions within 14 days after service.
  - viii. Mention to confirm compliance on 16/5/2024.
- b. The costs to follow the outcome of the appeal.

Orders accordingly

**DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024.**

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**F. WANGARI**

**JUDGE**

In the presence of:

Ikanda Advocate h/b for Jengo Advocate for the Appellant

M/S Kariuki Advocate h/b for Saif Advocate for the Respondent

Barile, Court Assistant

