



**Muraguri & another v Njue (Miscellaneous Application  
E017 of 2024) [2024] KEHC 2957 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2957 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
MISCELLANEOUS APPLICATION E017 OF 2024  
LM NJUGUNA, J  
MARCH 20, 2024**

**BETWEEN**

**PAUL KARIUKI MURAGURI ..... 1<sup>ST</sup> APPELLANT**

**MARK ONE EXPRESS LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SAMSON KARIUKI NJUE ..... RESPONDENT**

**RULING**

1. The applicant filed a notice of motion dated 05<sup>th</sup> March 2024, supported by the grounds set out on its face and the facts deposed in the supporting affidavit thereof. The orders sought are as follows:
  1. Spent;
  2. The honourable court be pleased to grant leave to the intended appellants to appeal out of time against the judgment of the trial magistrate in Embu CMCC No E075 of 2018 on 18<sup>th</sup> January 2024;
  3. That the honourable court be pleased to order a stay of execution of the judgment/decree of the trial magistrate in Embu CMCC No E075 of 2018 on 18<sup>th</sup> January 2024 pending hearing and determination of the application;
  4. That this honourable court be pleased to order stay of advertisement, notification of sale by public auction and/or any further dealings with the 1<sup>st</sup> applicant/intended appellant's motor vehicle and any other movable assets pending hearing and determination of the application;
  5. That this honourable court be pleased to order unconditional release of the unlawfully proclaimed and attached motor vehicles registration numbers KCB 4XXXXX and KBK 9XXXXX pending hearing and determination of the application;



6. That this honourable court be pleased to order the OCS Embu East Police Station to offer police security during the release of the unlawfully attached and proclaimed motor vehicles registration numbers KCB 4XXXXX and KBK 9XXXXX;
  7. That this honourable court be pleased to direct the applicants/intended appellants to deposit a bank guarantee for the entire amount of the decretal sum in court;
  8. That M/S Rutere T/A Giant Auctioneers be ordered to tax their costs before the taxing master;
  9. Spent; and
  10. That the costs of this application abide the outcome of the appeal.
2. Judgment was entered against the applicant for the sum of Kshs.1,003,000/= being general and special damages. The applicants have deposed that the time for appealing has lapsed because they were unable to procure the typed proceedings from the trial court on time and so they could not file an appeal. That if execution continues, the applicants will suffer substantial loss and the appeal may be rendered nugatory. That the application has been brought without delay since the impugned judgment was delivered on 18<sup>th</sup> January 2024. That the applicants are willing to provide security for costs in the form of a bank guarantee and that the respondent has not demonstrated his financial ability to the court in the event that the appeal succeeds and he needs to refund any amounts paid to him.
  3. In opposition, the respondent filed a replying affidavit dated 12<sup>th</sup> March 2024 stating that the applicants are misleading the court by stating that the trial court had granted them 30 days stay of execution, which had since lapsed. That the applicants did not apply for stay of execution when the judgment was delivered and that the application herein was only triggered by the respondent's moved to execute. That the applicants have not demonstrated that they have been following up with the court for copies of the typed proceedings and judgment. It is his case that the appeal does not have any chance of success as the trial magistrate's findings on liability and quantum are legally sound. He urged the court to dismiss the application.
  4. In this application, the court directed the parties to file their written submissions but only the applicants complied.
  5. It was the applicants' submission that the time of appealing has long passed and the reason for delay is that the advocate was instructed late. That the application has been brought 20 days after lapse of the prescribed time of appeal and the court should not hold the same as inordinate delay. They placed reliance on the cases of *Kenya Power & Lighting Company Ltd v Rose Anyango & another* (2020) eKLR and *Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & others* (2013) eKLR. They submitted that the appeal raises triable issues and relied on the case of *Kenya Revenue Authority v Sydney Keitany Changole & 3 others* (2015) eKLR. That the respondent's financial capabilities have not been demonstrated through the replying affidavit. Reliance was placed on the case of *Edward Kamau & another v Hannah Mukui Gichuki & another* (2015) eKLR.
  6. The issues for determination are as follows:
    - a. Whether the applicants deserve to be granted leave to appeal out of time; and
    - b. Whether stay of the advertisement, notification of sale by public auction and or any further dealings with the 1<sup>st</sup> applicant/intended appellant's motor vehicle and any other movable assets should be granted and the motor vehicles unconditionally released to the applicants.
  7. Order 42 Rule 6(2) of the *Civil Procedure Rules 2010* provides:



- (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.
8. As to whether the applicants should be granted leave to appeal out of time, Section 79G of the [Civil Procedure Act](#) provides:
- “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.”
9. The applicants’ reason for failing to appeal within time is that at the time the advocate was being instructed to appeal, the time for appeal had already lapsed. That they have been requesting for typed proceedings and the trial court judgment for purposes of appealing but the same were not availed on time. According to the above cited provision, the delay in appealing ought to be for sufficient cause. It is the applicants’ case that if leave to appeal out of time is not granted, they will suffer irreparable loss. I have perused the draft memorandum of appeal wherein the applicants are challenging the findings of the court on both liability and quantum. Leave to appeal out of time may be granted on discretion of the court. Given the circumstances, the same ought to be granted.
10. On the issue of whether the advertisement notification of sale by public auction and or any further dealings with the 1<sup>st</sup> applicant/intended appellant’s motor vehicle and any other movable assets should be stayed, this is a prayer for stay of execution. It is the applicants’ case that the motor vehicles were seized by the respondent’s auctioneers who have since advertised them for sale by public auction to recover the decretal amount. Under Order 42 Rule 6 of the [Civil Procedure Rules](#), stay of execution should be granted where the same has been brought without delay, the applicant has demonstrated that he will suffer loss and there should be security for performance of the decree.
11. The judgment was delivered on 18<sup>th</sup> January 2024 while the application was brought on 07<sup>th</sup> March 2024. In the application and the supporting affidavit thereof, the applicants have stated that the application was brought without delay. After the judgment was delivered, the respondent moved to execute since there were no stay of execution orders in place to stop the execution. As was held in the case of [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR, execution is indeed a lawful process and can only be hindered through stay orders. Furthermore, the execution began after the time for appeal had lapsed.
12. This court has already issued temporary stay orders pending determination of this application. On the basis of the fact that leave has been granted to appeal out of time, it is prudent to allow stay of execution. I am alive to the fact that the respondent still has the right to enjoy the fruits of his judgment, and to grant the orders herein defers those rights. Therefore, the stay of execution shall be granted on condition that the applicants deposit half of the decretal amount in court.
13. In connection to the issues for determination, the applicants have also prayed that the motor vehicles registration numbers KCB 4XXXX and KBK 9XXXX be unconditionally released. Since this court



has considered and granted leave to appeal out of time and stay of execution, this prayer is merited as to confiscate the motor vehicles will defeat the determination herein. More so, the decretal amount will be secured.

14. On the question of the auctioneer's costs, as I have stated in my previous paragraphs, the respondent's attempt to execute was lawful and the auctioneer's fees should be paid. In that case, the applicants and the respondent should agree on the fees and how it should be settled.
15. In the end, I find that the application has merit and it is hereby allowed with the following orders:
  - a. Leave is hereby granted to the applicants to appeal out of time against the decision of the trial magistrate in Embu CMCC No E075 of 2018 on 18<sup>th</sup> January 2024;
  - b. The applicant to file and serve the memorandum of appeal within 21 days of this ruling;
  - c. Stay of execution pending appeal against the decision of the trial magistrate in Embu CMCC No E075 of 2018 on 18<sup>th</sup> January 2024 is hereby granted to the applicants, on condition that the applicants shall within 21 days of this ruling, deposit half of the decretal amount to the court;
  - d. Stay of advertisement, notification of sale by public auction and or any further dealings with the 1<sup>st</sup> applicant/intended appellant's motor vehicle and any other movable assets, is hereby granted pending hearing and determination of the appeal against the trial magistrate in Embu CMCC No E075 of 2018 on 18<sup>th</sup> January 2024;
  - e. The motor vehicles registration numbers KCB 4XXXXX and KBK 9XXXXX to be released back to the owners pending hearing and determination of the appeal;
  - f. The applicants and the respondent to agree on the auctioneer's fees and how the same is to be paid. In default, the auctioneer should file a bill of costs within 30 days of this ruling; and
  - g. The cost of this application shall abide the outcome of the appeal.
16. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 20<sup>TH</sup> DAY OF MARCH, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicants/Intended Appellants

.....for the Respondent

