



Kimolo & another v Karanja & another ((Suing as the administratrix of the Estate of Peter Karanja Ndungu (Deceased)) (Miscellaneous Civil Case E004 of 2024) [2024] KEHC 5438 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEHC 5438 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL CASE E004 OF 2024
FN MUCHEMI, J
APRIL 25, 2024**

BETWEEN

JUDE KINGOO KIMOLO 1ST APPELLANT

JOSIAH DENNIS IKUNGU KANGANGI 2ND APPELLANT

AND

JESCAH WANJIKU KARANJA 1ST RESPONDENT

SUSAN MUGECHI CHEGE & ANOTHER (SUING AS THE ADMINISTRATRIXES OF THE ESTATE OF PETER KARANJA NDUNGU (DECEASED)) 2ND RESPONDENT

(SUING AS THE ADMINISTRATRIXES OF THE ESTATE OF PETER KARANJA NDUNGU (DECEASED))

RULING

1. The application dated 15th January 2024 seeks for orders of leave to file an appeal out of time against the judgment in Thika CMCC No. E399 of 2021 delivered on 7th December 2023. The applicants further seek for orders of stay of execution in respect of the said judgment delivered on 7th December 2023 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondents filed Grounds of Opposition dated 24th January 2024.

Applicants' Case

3. The application was supported by an affidavit sworn by Mr. Kenneth Mwiti Mureithi, a Principal Legal Associate at Britam General Insurance Company Limited, the insurers of the applicants. Mr.



Mureithi deponed that judgment in the trial court was delivered on 7th December 2023 for a sum of Kshs. 830,750/- in the respondents' favour. Being dissatisfied with the judgment, the applicants intend to appeal the decision of the trial court. The deponent avers that the intended appeal has high chances of success.

4. The deponent states that the applicants are apprehensive that the respondents will proceed with execution of the decree as stay of execution lapsed on 5th January 2024. The deponent further states that such extreme and high prejudicial consequences before the hearing and determination of the appeal shall subvert the ends of justice.
5. The applicants undertake to lodge their Record of Appeal expeditiously within such time as the court may order upon receipt of the typed proceedings of the trial court. The deponent state that the applicants are willing to abide any conditions set by the court for the grant of the orders sought. The deponent further states that the application has been brought promptly and without unreasonable delay.

The Respondents' Case

6. The respondents oppose the application on the premise that it is misconceived, vexatious, frivolous, an abuse of the court process and an afterthought coined up to deny them the fruits of the judgment.
7. The respondents further state that the intended appeal has the sole purpose of delaying execution proceedings in the trial court.
8. The applicants filed a Further Affidavit dated 13th March 2024 and aver that the delay in filing the appeal within the stipulated time was occasioned by an unprecedented technical mishap that lead to the email issuing instructions to appeal being flagged as spam. The applicants further state that it is only when the advocates on record were following up on settling the judgment when they discovered that the instructions to appeal had been issued on 20th December 2023 prompting them to file the instant application.
9. The applicants argue that the mistakes of an advocate should not be visited upon a client. Further, the applicants state that the court as an agency of the process of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course in order to administer justice without undue regard to procedural technicalities.
10. The applicants contend that they are amenable to depositing half the decretal sum in court as security for the issuance of stay orders.

The Applicants' Submissions

11. The applicants submit that an arguable appeal is one that is not frivolous and raises a bona fide issue deserving of the court's full consideration. The applicants further submit they intend to appeal on the grounds that the respondents did not prove their case on a balance of probabilities and as there was no concrete evidence placed before the court to determine how the accident occurred and who is to blame for the accident, both parties ought to be held liable. The applicants further argue that the learned magistrate erred in finding that a police abstract is conclusive proof of liability yet it is merely evidence that a report of an accident was made and not that an accident occurred. Further the police officer was not present at the scene of the accident at the time the alleged accident occurred which goes against the evidentiary rule of direct evidence rendering his testimony as hearsay.



12. The applicants submit that the deceased substantially contributed to the accident which led to his demise and thus they are urging the court to consider the fact of the accident and liability to be apportioned to the deceased.
13. The applicants submit that the respondents have failed to provide any information to sufficiently prove their ability to repay the decretal sum of Kshs. 830,750/-. The applicants further submit that the respondents have failed to prove whether there are any assets that would guarantee the repayment of the decretal sum should the appeal succeed. As such, the applicants contend that in the event the appeal succeeds, they will be unable to recover the decretal sum from the respondents which shall result to substantial loss. To support their contentions, the applicants rely on the cases of Dickson Muricho Muriuki vs Timothy Kagundu Muriuki & 6 Others [2013] eKLR and Henry Sakwa Maloba vs Boniface Papando Tsabuko [2020] eKLR.
14. The applicants submit that they are willing to deposit a portion of the decretal sum in a joint interest earning account and half the decretal sum, Kshs. 415,375/- in court or in a joint interest earning account as the court may deem fit.
15. The applicants contend that they have filed the instant application timeously as the decision in the trial court was rendered on 7th December 2023 and the instant application was filed on 15th January 2024, which is a period of one month before excluding the vacation period when time does not run. The applicants submit that in the event the court finds that the period of appeal has lapsed, the delay is a period of ten days after the requisite statutory period to file one's appeal. The applicants argue that the time lapse for filing the appeal fell within the Christmas holiday season which also encompasses the courts vacation period and therefore the 10 days delay in lodging their appeal is inordinate. To support their contentions, the applicants rely on the cases of Almas Hauliers Ltd vs Abdulnasir Abukar Hassan [2017] eKLR and [*Sokoro Savings and Credit Co-operative Society Ltd vs Mwamburi \(Civil Application E032 of 2022\)*](#) [2023] KECA 381 (KLR) (31 March 2023).
16. The applicants further rely on the cases of Raila Odinga vs IEBC & 4 Others [2013] eKLR and Shabbir Ali Jusab vs Anaar Osman Gamrai & Another [2013] eKLR and submit that the court ought to administer justice without undue regard to procedural technicalities.

The Respondents' Submissions

17. The respondents submit that the application is an afterthought and an abuse of the judicial process. The respondents rely on Section 79G of the [*Civil Procedure Act*](#) and submit that the applicants filed the current application ten days late as judgment was rendered on 7/12/2023 and the application was filed on 15/1/2024. Furthermore, the respondents argue that the applicants have not given any reasons for the delay.
18. The respondents rely on the cases of Thuita Mwangi vs Kenya Airways Ltd [2003] eKLR and Mombasa County Government vs Kenya Ferry Services & Another (2019) eKLR and submit that the decision to grant leave to appeal out of time is a discretionary one and urges the court to not exercise its discretion in favour of the applicants as they have not satisfied the court that they have good and sufficient cause for not filing the appeal in time. Furthermore, the respondents contend that although the applicants attribute their delay in filing the appeal to a technical mishap, the applicants never made any follow ups to the registry to rectify the technical mishap.
19. The respondents further rely on the case of Esther Wambui Mahia vs Geoffrey Njogu Kimani Nairobi HCCC Misc. App. 412 of 2003 and submit that the respondents have not properly moved the court for an application for stay of execution as the legal provisions under which the application is brought



do not support the granting of the relief sought by the applicants. As such, the respondents submit that the application is defective and an abuse of the process of the court. To support their contentions, the respondents rely on the case of *Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others* [2009] eKLR.

20. The respondents submit that the applicants have not shown the damage or loss they are likely to suffer if the orders of stay are not granted. It is trite law that it is not merely sufficient for the applicants to state that they are likely to suffer substantial loss if the application for stay of execution is not allowed. The respondents rely on the cases of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR and *Kenya Shell Ltd vs Benjamin Kenya Kibor & Ruth Wairimu Karuga* (1982-1988) 1023 and submit that the applicants have not proved that they do not have any assets that would be unable to repay the decretal sum in the event the appeal succeeds. The respondents argue that the decree sought to be stayed is a money decree and successful litigants as themselves should not be denied the fruits of their judgment.
21. Relying on the case of *Malindi Law Society of Kenya vs Law Society of Kenya, Nairobi Branch & 5 Others* (2017) eKLR, the respondents argue that the grant of stay of existing orders is not a matter of course but it rests upon genuine conditions, grounds, merit and dispatch.
22. On the issue of security, the respondents urge the court to order the applicants to deposit the entire decretal amount in a joint interest earning account in the name of the advocates for the parties.

Issues for determination

23. The two main issues for determination herein are:-
 - a. Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;
 - b. Whether the applicants have met the prerequisite for grant of stay of execution pending appeal;

The Law

Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;

24. Section 79G of the *Civil Procedure Act* states:-

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 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.

25. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicants must satisfy the court that that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.



26. The Supreme Court in the case of Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.

27. Similarly in the case of Paul Musili Wambua vs Attorney General & 2 Others [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

28. The applicants have faulted a technical mishap by their insurers to their advocates for the delay caused in filing their appeal. Mr. Kenneth Mwiti, a principal legal associate in conduct of the matter, deposed that he sent instructions to their advocates on record to lodge an appeal on 20th December 2023 but the email was flagged as spam on the receiving end. The applicants further contend that the time within which to lodge an appeal had not run out as the time fell within the courts Christmas vacation which by law is not included in the computation of time.

29. I have perused the court record and noted that judgment was delivered on 7th December 2023 in the presence of both the applicants’ and respondents’ advocates. Following delivery of the ruling, the trial court granted 30 days stay of execution. The applicants filed the instant application on 18th January 2024. Order 50 Rule 4 of the Civil Procedure Rules provides:

Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act.



Provided that this rule shall not apply to any application in respect of a temporary injunction.

30. As such, the period from 21st December 2023 to 13th January 2024 ought to be excluded from the computation of time. Therefore the time within which to file the appeal had not run out by the time the applicants filed their application on 15th January 2024. In this regard, the Memorandum of Appeal annexed to the applicants' affidavit is not out of time and ought to be deemed as properly filed.

Whether the applicants have satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

31. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-

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 orders set aside.
2. No order for stay of execution shall be made under sub rule 1 unless:-
 - a. The Court is satisfied that substantial loss may result to the 1st 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.

32. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

33. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

"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.



34. The applicants in their affidavit, contend that they stand to suffer irreparably if the respondents levy execution against them. It is in their submissions that the applicants state that they stand to suffer irreparable damage as the respondents will not be financially able to repay back the decretal sum in the event the appeal succeeds.
35. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicants are required to show how execution shall irreparably affect them or will alter the status quo to their detriment therefore rendering the appeal nugatory. The applicants claim that the respondents are unable financially to refund the decretal sum. The respondents have not rebutted the claim or adduced any evidence to the contrary. The decretal amount involved is close to KSh.1,000,000 and is in my view quite substantial. Should the appeal succeed, the applicants may not recover the money. It is therefore my considered view that the applicants have demonstrated that they will suffer substantial loss in the event that the respondents are not in a position to refund.

Has the application has been made without unreasonable delay.

36. Judgment was delivered on 7th December 2023 and the applicant filed the instant application on 18th January 2024. It has taken the applicants one month and ten days between the date of judgment delivered in the trial court and the time when they filed the instant application. As discussed above, time did not run during the Christmas vacation. It is therefore my considered view that the application was filed timeously.

Security of costs.

37. The purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

38. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicants have stated that they are willing to deposit a portion of the decretal sum in a joint interest earning account of both parties' advocates and half the decretal sum in court.

39. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits



of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

40. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondents their right of enjoying their judgment. I have perused the grounds of appeal and without going into the merits of the appeal noted that there are arguable points of law raised hereon. The applicants having not been satisfied with the judgment are desirous of appealing against it. Accordingly, the application dated 15th January 2024 is allowed on the following terms:-
- a. That the applicants have 14 days to file the intended appeal.
 - b. That the applicants are granted orders for stay pending filing, hearing and determination of the intended appeal.
 - c. That the applicants do deposit in court within 30 days the whole decretal amount and in default, the stay orders to be vacated forthwith.
 - d. That the costs of this application shall abide in the appeal.
41. It is hereby so ordered.

RULING DELIVERED, DATED AND SIGNED THIS 25TH DAY OF APRIL 2024 AT THIKA.

F. MUCHEMI

JUDGE

