



**Njoroge v Dido (Miscellaneous Application E005 of 2023)  
[2024] KEHC 6175 (KLR) (29 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6175 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
MISCELLANEOUS APPLICATION E005 OF 2023  
SM GITHINJI, J  
MAY 29, 2024**

**BETWEEN**

**SAMUEL KOIGI NJOROGE ..... APPLICANT**

**AND**

**ABDI ARTE DIDO ..... RESPONDENT**

**RULING**

Coram:

Mr. Nyongesa Advocate for the Respondent

Mr. Kavita Advocate for the Applicant

1. On the 23/8/2023, the Applicant filed a Notice of Motion of an even date under Order 22 rules 22 and 24, Order 51 rule 1 of the [Civil Procedure Rules](#), Sections 1, 1A, 1B, 3 and 3A of the [Civil Procedure Act](#), and all other enabling provisions of the law. In it he sought the following orders;
  1. Spent.
  2. Spent.
  3. Spent.
  4. Spent.
  5. That this honourable court be pleased to allow the Applicant to file his appeal out of time.
  6. That this honourable court does order a stay of execution of the order issued on 17/3/2016(sic) in Garsen CMCC No. 13 of 2016 Samuel Koigi Njoroge v Abdi Arte Dido pending the hearing and determination of the appeal.
  7. That the costs of this application be in the cause.



2. The Applicant has based his application on the grounds attached thereto and on his supporting affidavit dated 23/8/2023 wherein he deposed that upon canvassing the suit at the subordinate court, the trial court scheduled to deliver the judgment on 8/12/2022. On that date, the judgment was not ready and it was deferred to 22/2/2023. Again, on that date, the same was not delivered. Parties were instructed that judgment would be issued on notice and electronically. The Applicant deposed that no such notice was issued, and that he only became aware of the judgment when he visited his former advocates on 21/8/2023 and was informed that the advocates had been served with a letter for costs and decree. That prompted him to file the present application. He stated that he had written a letter requesting for certified copies of the proceedings and judgment in order to facilitate the intended appeal. He exhibited a copy of the said letter and a draft memorandum of appeal. He indicated his willingness to abide with any conditions that shall be set.
3. The Respondent filed a replying affidavit which he swore on 5/10/2023 opposing the application. He deposed therein that the impugned judgment was delivered electronically on 23/5/2023 to the counsel's last known email addresses. On 8/8/2023, his advocate sent to the Applicant's former counsel, a tabulation of costs, which he did not respond to. He deposed that the application is a tactic by the Applicant to delay the Respondent from enjoying the fruits of judgment. Further, the Respondent stated that should the application be allowed, the Applicant be ordered to deposit into a joint interest earning account of both advocates the decretal sum plus costs amounting to Kshs. 581, 620/-, failure to which execution do issue.
4. The court directed that the application be canvassed by way of written submissions. However, as at the time of writing this ruling, I did not have the benefit of seeing the Applicant's submissions. I have therefore considered the Respondent's submissions and find that the two issues for determination are:
  - i. Whether leave should be granted to appeal out of time.
  - ii. Whether execution of the trial court's judgment should be stayed pending the hearing and determination of the intended appeal.

### **Analysis and Determination**

5. The statutory provision in respect to appeals from the judgment or decree of a subordinate court to the High Court is Section 75G of the [Civil Procedure Act](#), which provides that:

“

“79G. 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.”
6. The undisputed facts herein are that the trial court delivered its judgment electronically on 23/5/2023 and a decree issued on 17/7/2023. The Applicant moved this court on 23/8/2023 seeking leave to appeal the said judgment and decree out of time. The Applicant's explanation is that notice of judgment was never served and that his former advocates failed to notify him of the decree and letter of costs as early as 8/8/2023 when they were served with the same by the Respondent's advocates. The



Applicant did not contest that the email address to which the judgment was allegedly delivered to was either wrong or that their former advocate failed to receive the same.

7. However, seeing that the Applicant attempted to follow up on his matter through his then advocate on 21/8/2023, I am inclined to excuse his delay occasioned by his former advocates. Further, a delay of three months is in the circumstances excusable bearing in mind that the parties were informed that the judgment would be delivered electronically on notice. In the circumstances, the Applicant is hereby granted leave to file appeal out of time.
8. The decision on whether or not to grant stay of execution is discretionary and this Court has powers to stay execution pending an Appeal. This jurisdiction is derived from Order 42 rule 6 of the Civil Procedure Rules which reads-

“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.”
9. The import of the above provision is that there must be an appeal properly on record for this court to exercise its discretion as to grant an order for stay of execution pending appeal. Having granted leave to the Applicant to file his appeal out of time, and there being a memorandum of appeal now properly on record, I will hereinafter consider whether an order for stay in this case is proper.
10. In Butt v Rent Restriction Tribunal (1982) KLR 417 the Court of Appeal held that the general principle in granting or refusing stay is if there is no overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the trial court’s discretion.
11. It follows therefore that this court, in such application as the present one, must consider whether the Appellant has met the conditions namely - establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. The application must also have been made without unreasonable delay.
12. The Applicant has not even at the slightest attempted to demonstrate that he meets the aforementioned conditions. Particularly, he has failed to show how he stands to suffer substantial loss if stay is not granted, which is the corner stone of both jurisdictions for granting a stay (See Kenya Shell Limited v Kibiru [1986] KLR 410).
13. In the foregoing, the application is only successful in terms of prayer no. 5. For the avoidance of doubt I grant the following orders: -



- a. Leave is granted to the Applicant to file appeal out of time.
- b. The draft memorandum of appeal be deemed as duly filed upon payment of the requisite fees.
- c. The Applicant to file and serve a record of appeal within thirty (30) days of this ruling.
- d. The appeal shall be mentioned on 10<sup>th</sup> July, 2024 for directions on the mode of disposal of the appeal.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 29<sup>TH</sup> DAY OF MAY, 2024.**

.....

**S.M. GITHINJI**

**JUDGE**

In the absence of: -

1. Mr Nyongesa for the Respondent
2. Mr Kavita for the Applicant

Parties to be notified.

Mention on 3/7/2024.

.....

**S.M. GITHINJI**

**JUDGE**

**29/5/2024**

