



**Aringo & another v Cherotich (Miscellaneous Civil Application  
E039 of 2023) [2023] KEHC 25819 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25819 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
MISCELLANEOUS CIVIL APPLICATION E039 OF 2023  
JK SERGON, J  
NOVEMBER 23, 2023**

**BETWEEN**

**JOHN ARINGO ..... 1<sup>ST</sup> APPLICANT**

**SIMON ODUOR ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DIANA JOYCE CHEROTICH ..... RESPONDENT**

**RULING**

1. The application coming up for this court's determination is a notice of motion dated 25th August, 2023 seeking for the following orders;
  - (i) Spent
  - (ii) Spent
  - (iii) That this Honourable Court be pleased to enlarge the time within which the Applicants may lodge their intended appeal against the judgment delivered on 12th July, 2023 in Kericho CMCC No. E132 of 2019 Diana Joyce Cherotich v John Aringo and Simon Odour
  - (iv) That this Honourable Court be pleased to order a stay of execution of the decree issued in Kericho CMCC No. E132 of 2019 Diana Joyce Cherotich v John Aringo and Simon Odour pending the hearing and determination of the intended appeal.
  - (v) That costs of this application be provided for.
2. The Application is based on the grounds set out on the face of it and the facts deponed in the affidavits of Beatrice Musyimi and Joseph N. Ngigi.



3. The application is supported by the affidavit of Beatrice Musyimi the Claims Legal Assistant at CIC General Insurance Company, in which she avers that she has authority of the said insurance company (the insurer) to swear the affidavit.
4. She avers that she is aware that a judgment was delivered on 12th July 2023 in Kericho CMCC No. E132 of 2019 Diana Joyce Cherotich v John Aringo and Simon Odour for a total sum of Kshs. 1, 009, 850/= and states that she was duly advised of the judgment by the advocates on record.
5. She also avers that she was unable to get instructions from the Legal Manager regarding the appeal within the statutory period owing to an inadvertent misrepresentation by the respondent's counsel on the terms of judgment delivered on 12th July, 2023 to the firm of advocates on record seized with the conduct of the matter on behalf of the applicants herein.
6. She further avers that she subsequently obtained instructions from the Legal Manager to issue instructions to the advocates on record for the applicants to file an appeal from the judgment arising from Kericho CMCC No. E132 of 2019 Diana Joyce Cherotich v John Aringo and Simon Odour, however, by that time the time for filing the appeal had lapsed.
7. She avers that she consequently instructed the advocates on record via email to lodge an appeal against the judgment on 21st August, 2023 by which time the statutory period within which an appeal could be lodged had lapsed.
8. She avers that the delay was not inordinate and therefore urged the court to exercise its discretion and allow the appeal to be filed out of time
9. She urged the court not to visit the inadvertent mistake of the applicant's insurer on the applicant. She reiterated that as an insurer her employer has direct interest in the matter and further that as an insurer they are mandated to settle any judgment on behalf of their insured.
10. The application is supported by the affidavit of Joseph N. Ngigi an advocate practicing in the firm Joe Ngigi & Co. Advocates LLP having personal conduct of the matter hence conversant with facts and issues giving rise to the instant application hence duly competent to swear the affidavit.
11. He avers that the application arises pursuant to proceedings and judgment in Kericho CMCC No. E132 of 2019 Diana Joyce Cherotich v John Aringo and Simon Odour in which the respondent sued the applicant for general and special damages as well as costs and interests for an accident which occurred on 29th April, 2016.
12. He avers that judgment in the suit was delivered on 12th July 2023 in favour of the Respondent herein as against the Applicants for a total sum of Kshs. 1,009, 850/= without notice and in the absence of the Applicant's counsel whilst the court was proceeding on transfer.
13. He avers that the counsel for the respondent who was in attendance when the judgment was delivered on 12th July, 2023 served the applicants advocates on record with a notice of entry of judgment with an erroneous figure, the insurer was informed of the terms of judgment as indicated in the erroneous notice of entry of judgment.
14. He avers that the respondent's counsel subsequently served another letter dated 10th August, 2023 intimating to the applicants advocates that the notice of entry of judgment was misleading on account of an inadvertent error thereby advising that the trial court awarded the respondent damages in the sum of Kshs. 1,000, 850/= instead of Kshs. 1, 985,000/= as earlier advised.



15. He avers that on 15th August, 2023 their firm of advocates informed the insurer the correct terms of the judgment and further that upon review of the correct terms of the judgment, the applicant's insurer sent instructions via email on 21st August, 2023 to lodge an appeal against the judgment by which time the statutory period within which an appeal could have been lodged had lapsed.
16. He avers that the delay in lodging the appeal was inadvertent in the circumstances and further that the delay was inadvertent and not inordinate.
17. He avers that the applicant is dissatisfied with the judgment of the subordinate court and intended to appeal and further that the applicant has a good and arguable appeal with high chances of success and therefore sought to be allowed to lodge the intended appeal out of time.
18. He avers that the applicants were apprehensive that the respondent may commence execution of the decree of the subordinate court thereby rendering the instant application and intended appeal superfluous. He further avers that the applicants are ready and willing to abide by the terms the court would impose including but not limited to an insurance bond or bank guarantee on the decretal sum pending the appeal.
19. He avers that the instant application was merited and brought without unreasonable delay.
20. The respondent filed a replying affidavit in opposition to the applicants application dated 25th August, 2023, the affidavit was sworn by Diana Joyce Cherotich Langat the Respondent herein.
21. The respondent set out the chronology of events in the subordinate court in paragraph 3 - 14 of her replying affidavit.
22. The respondent avers that the advocates for the applicants were duly informed of the date when judgment was set to be delivered, however, the advocates for the applicants did not attend court and the trial court proceeded to pronounce itself in their absence and directed that a notice of entry of judgment be issued upon the applicants advocates and therefore the assertion by the applicants advocates that judgment was issued without notice was spurious and misleading.
23. The respondent contended that the reason for the delay in lodging the appeal was untenable as the advocates for the applicants had an opportunity to attend court on 12th July, 2023 and note the contents of the judgment.
24. The respondent faulted the applicants for failing to provide a plausible explanation for the delay in filing the appeal and for invoking section 79G of the *Civil Procedure Act* on enlargement of time to file their intended appeal, which appeal ought to have already been filed before or filed alongside the application seeking leave to extend time to file an appeal.
25. The respondent avers that she continues to suffer prejudice due to the loss and damages occasioned by the road traffic accident that occurred on 29th April, 2016.
26. The respondent contended that whereas the applicants were ready and willing to abide by the terms imposed by the court including and not limited to an insurance bond or bank guarantee on the decretal sum pending hearing of the intended appeal, the court was not bound by what was offered by the applicants. The respondent proposed that in the unlikely event that this court be inclined to allow the instant application in exercise of its discretion, the applicants should be ordered to deposit the entire decretal amount in an interest earning account held in the joint names of the advocates for the parties.
27. The respondent avers that the instant application is an abuse of court process, devoid of any merit and therefore urged this court to dismiss it with costs.



28. I have considered the application and the replying affidavit filed by the parties and the issues for this court's determination are whether the application meets the threshold for enlargement of time to file an appeal and whether the application meets the threshold for grant of stay of execution pending appeal.

29. On the first issue for determination, the question of enlargement of time to file an appeal from a subordinate Court to the High Court is governed by section 79G of the [Civil Procedure Act](#) which provision states:

“79G. Time for filing appeals from subordinate courts

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.”

30. I have considered the explanation by the advocates representing the applicants and find the same to be sufficient. In the circumstances, I find it befitting to exercise discretion in favour of the applicants and allow the application for enlargement of time.

31. On the second issue for determination, on stay pending appeal, the conditions to be met before stay is granted are provided under Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) which states as follows-

“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 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. On the issue of stay, I find it a mark of good faith that the applicants are willing and ready to furnish security for the decretal amount including but not limited to an insurance bond or bank guarantee. However, the determination of what amounts to a suitable security is a matter of the court's discretion. In [Focin Motorcycle Co. Limited v Ann Wambui Wangui & another](#) [2018] eKLR, the court noted that: “Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security...”

33. Accordingly, I find that the notice of motion dated 25th August, 2023 has merit with the following incidental orders;

(i) I hereby enlarge the time within which the applicants may lodge their appeal;

(ii) The applicants are given 14 days to file and serve the Memorandum of Appeal from the date of this ruling;



- (iii) The applicants will deposit the entire decretal amount a sum of Kshs. 858, 372 /= in a joint interest earning bank account in the names of the Advocates for the parties herein in a reputable financial institution within 45 days from the date of this ruling;
- (iv) In default of satisfying the condition in paragraph (iii) above, the applicants' right of appeal is liable to being non-suited/dismissed. The respondents on the other hand will be at liberty to execute the Judgment of the Trial Court; and
- (v) The costs of the application herein shall abide by the outcome of the intended appeal.

**DATED, SIGNED AND DELIVERED AT KERICHO THIS 23RD DAY OF NOVEMBER, 2023**

**J.K. SERGON**

**JUDGE**

**In the presence of:**

Rutoh - Court Assistant

Kimani for the Plaintiff

Miss Achola for the Applicant

