



**Morema v Guto & another (Miscellaneous Civil Application  
231 of 2023) [2025] KEHC 797 (KLR) (3 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 797 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS CIVIL APPLICATION 231 OF 2023**

**PN GICHOHI, J  
FEBRUARY 3, 2025**

**BETWEEN**

**ALEX SIANGWE MOREMA ..... APPLICANT**

**AND**

**GLADYS KERUBO GUTO ..... 1<sup>ST</sup> RESPONDENT**

**DAVID WAINAINA NGUMI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant has moved this Court by a Notice of Motion dated 8<sup>th</sup> July, 2023 brought pursuant to Articles 159 (2) (d) of the Constitution, Section 1A, 1B, 3A, 79 G and 95 of the Civil Procedure Act, Order 42 Rule 6 (1), (2), (7), Order 50 Rule 6 and Order 51 Rule 1 of Civil Procedure Rules seeking orders that:-
  1. Spent.
  2. The Applicant be grant leave to Appeal out of time in respect to the Judgement/decree delivered in Nakuru CMCC E846 of 2021 by Hon. Ruth Kefa Chebesio (PM).
  3. Spent.
  4. The Applicant be granted an Order of stay of execution of the Judgement and or decree delivered on 31/05/2023 and all consequential Orders arising therefrom pending the hearing and determination of the intended Appeal herein.
  5. This Court does issue an order for provision of a Bank Guarantee of the entire decretal sum awarded by the trial court of Kshs. 217,775/= as security pending hearing and determination of the intended Appeal herein.



6. This Court be pleased to issue any other Order as it may deem just, appropriate and expedient in the interest of justice.
7. Costs of this Application be provided for.
2. The grounds are on the face of the application supported by the Affidavit sworn on 8<sup>th</sup> July, 2023 by Millicent Lukasile Advocate for the Applicant. It is deponed that judgement in CMCC E846 of 2021 was delivered on 31<sup>st</sup> May, 2023 in favour of the Respondent as against the Applicant herein at 100% liability; General damages of Kshs. 200,000/= and Special damages of Kshs. 17,775/=.
3. She depones that the delay in filing the Appeal was due to delay by their instructing client, Directline Assurance company Limited in giving them instruction to Appeal this matter.
4. It is further deponed that the Applicant is apprehensive that the Respondents will commence execution proceedings against him thereby rendering Appeal nugatory considering that the financial capabilities of the Respondents to refund the decretal sum, if Appeal succeeds, is unknown.
5. It is stated that the intended Appeal raises numerous triable issues and points of law as reflected in the Memorandum of Appeal and thus, it has high chances of success. Further, it is stated that the Applicant is willing to furnish the Court with a Bank Guarantee for the entire decretal sum and that the Respondents will not suffer any prejudice if the application is allowed.
6. In opposition, the Respondents filed a Replying Affidavit sworn by the 1<sup>st</sup> Respondent on 12<sup>th</sup> October, 2023. She depones that the application herein is bad in law, made in bad faith, inept, lacks merit and an afterthought.
7. She states that when judgement was entered in their favour, the trial court granted the Applicant 30 days stay of execution to allow him make any Appeal if need be, but none was made within the timelines given.
8. It is her position that the Applicant has not given sufficient reason for granting of order of stay of execution and further, the security of bank guarantee offered by the Applicant is not viable for road traffic matters.
9. She maintains that the Applicant has not satisfied the court on the conditions for granting such an application.

### **Submissions**

10. Directions were taken for the application to be disposed of by written submission.
11. Though the Applicant indicated that he filed submissions through the e-filing platform, no submissions had been uploaded in the platform and neither was a physical copy presented before this Court as at 22<sup>nd</sup> January, 2025.
12. It is therefore deemed that the Applicant did not file any. On the other hand, the Respondents' submissions are on record having been filed on 23<sup>rd</sup> July, 2024.
13. On whether the Applicant has met the conditions of stay, the Respondents placed their reliance on the case of Elena Doudol Adova Korir Vs Kenyatta University [2014] eKLR which restated the three conditions an Applicant must satisfy before stay of execution is granted being; sufficient cause, substantial loss would ensue from a refusal to grant stay and the Applicant must furnish security and that the application must be made without unreasonable delay.



14. In regard to substantial loss, they relied on the two decisions including the case of Luxus Wood(K) Limited Vs Patrick Amugune Kamadi [2016] eKLR and submitted that the Applicant has not demonstrated the substantial loss or exact loss it would suffer should the application be dismissed. They submitted that without demonstration of any loss, the application is not merited.
15. They further argued that since this is a money decree, the Appeal would not normally be rendered nugatory as was held in the case of Kenya Shell Limited Vs Benjamin Karuga Kibiru & Another [1986] eKLR.
16. On furnishing security, they submitted that though the Applicant has proposed a Bank Guarantee, the one attached to the application has been overtaken by events since it was for the period between 18/2/2022 and 18/2/2023.
17. It was submitted that in the event the court is inclined to allow the Application then three -quarters ( $\frac{3}{4}$ ) of the decretal sum plus costs be paid to the Respondents and the balance be deposited in a joint interest earning account.
18. On the prayer for leave to file Appeal out of time, the Respondents submitted that this prayer should also fail as no substantive Appeal has been filed by the Applicant.
19. In support of this view, the Respondent relied on the case of Evans Kiptoo v Reinhard Omwoyo Omwoyo [2021] eKLR, where while citing the holding by the Emukule J in Gerald M'limbine vs. Joseph Kangangi [2008] eKLR, High Court agreed with the submissions by Counsel for the Respondent that the proviso to section 79G envisages that a substantive appeal be filed first; and that an application such as the one before the Court ought to be made in that appeal, seeking orders for the admission of the appeal out of time.
20. In conclusion, the Respondent prayed for the Application to be dismissed in its entirety with costs to them.

### **Determination**

21. After considering this application and the response to the same together with the submissions by the Respondents, the broad issues for determination in this Application are as follows; -
  1. Whether the Application for stay of execution is merited.
  2. Whether the Application for extension of time to Appeal out of time is merited.
22. With regard to the first issue; Order 42 rule 6(1) and (2) of the Civil Procedure Rules provides as follows:
  - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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.”

23. The Court of Appeal in the case of Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365 held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 42 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
24. On whether the application was filed timeously, the application herein was filed on 11<sup>th</sup> July, 2023, seeking stay of the Judgement of the trial Court delivered on 31<sup>st</sup> May, 2023 pending the intended Appeal. The time within which an Appeal can be filed as of right is 30 days from the decision to be Appealed.
25. The Applicant’s time lapsed on 30<sup>th</sup> June, 2023, therefore and in filling this Application on 11<sup>th</sup> July, 2023, the Applicant had delayed for 11 days. The Applicant explained the delay and stated that she did not receive instruction from their instructing Client on time to enable them lodge the Appeal. The delay of 11 days in the circumstance is not inordinate.
26. On substantial loss, it is settled law that 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 under Order 42 Rule 6 of the Civil Procedure Rules.
27. In this case, the Applicant stated that if stay is not granted and execution proceedings ensue, it will be to their detriment and the Appeal would be rendered nugatory. Further that the financial worth of the Respondents is unknown and if the decree is paid to them, they might not be in a position to refund the same.
28. Though, the Respondent opposed the Application, they did not mention in the Replying affidavit, their capabilities of refunding the decretal sum if the Appeal succeeds and therefore, the position by the Applicant is not challenged meaningfully.
29. Her financial capability is a matter within her knowledge and therefore, it was incumbent upon her to show that she is in a position to refund the money if the Appeal is finally successful but she failed to do so.
30. It is not enough for Respondents to say that the damages are for injuries sustained in 2021 and therefore the 1<sup>st</sup> Respondent will be denied enjoyment of the fruits of her judgment if the application is granted.
31. With regard to security, this Court has considered the Applicant’s offer of a Bank Guarantee. A perused of the same shows that it is dated 18<sup>th</sup> February, 2022 with an indication that it will run for one year.
32. The presumption is that the same takes effect from the date it was drawn and therefore, it expired in February 2023 several months before this application was filed and therefore not a suitable security.



33. Having opposed the said security as one which has been overtaken by events, the Respondents proceeded to make a proposal for  $\frac{3}{4}$  of the decretal sum to be paid to them and the balance be deposited in a joint interest earning account. In the circumstances herein, this Court is satisfied that depositing the entire decretal sum in Court within specific timelines would be more efficient and justifiable.
34. In regard to payer for extension of time to file an Appeal, Section 79G of the Act provides that: -
- “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.”
35. It is therefore clear that this Court has discretion to grant application for extension of time if the Applicant satisfies the court that he had good and sufficient cause for not filing the appeal on time.
36. The issues for consideration by the Court while exercising that discretion has been settled by superior Courts. Indeed, the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR had this to say: -
- “Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus: “It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.”
37. Further, Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2014] eKLR held: -
- “...It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant. This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion.
- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.
  - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
  - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.



- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.
  - v. Whether there will be any prejudice suffered by the respondents if the extension is granted.
  - vi. Whether the application has been brought without undue delay; and
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
38. The Respondents’ opposition of granting extension sought is that there is no Appeal that has been filed to be admitted by the Court out of time as instructed by Section 79 G of the *Civil Procedure Act*.
39. This Court confirms that there is a Draft Memorandum of Appeal annexed to the application herein signalling the basis upon which the Applicant wishes to appeal the decision by the trial court and that is what is required at the stage for leave.
40. The proviso to Section 79 G of the *Civil Procedure Act* allows the Court the discretion to grant leave to a party who has not filed an Appeal at all to file one out of time and also to deem an Appeal which has been filed out of time without leave of the Court as duly filed.
41. Faced with a similar application, the Court of Appeal in *Abubaker Mobamed Al-Amin v Firdaus Siwa Somo (Civil Appeal 59 of 2018)* [2018] KECA 202 (KLR), had this to say:-
- “In our view, the essence of the proviso to Section 79G and more specifically, the phrase ‘an appeal may be admitted out of time’ does not exclude an appeal that is yet to be filed. In Charles Karanja Kiiru vs. Charles Githinji Muigwa (supra) this Court was dealing with the issue of an appeal that had been filed out of time without leave of the Court. The learned Judge of the High Court was being cudgelled for granting leave and deeming as having been duly filed, an appeal that had in the first instance been filed without leave of the court.
29. This Court held that an appeal can be filed out of time and validated later by way of seeking and obtaining leave of court to admit it out of time. This decision seemed to validate the decision in Martha Wambui vs. Irene Wanjiru Mwangi & another (supra) and the other decisions in the second school of thought referred to above. Did the decision invalidate the position taken by the first school of thought? We answer this in the negative and add that this decision sanctioned both positions. We echo with approval the words of Aburili, J. in Martha Wambui (supra) where she stated :-
- “In my view the use of the term ‘admitted’ connotes both the act of allowing an appeal to be filed out of time and also the act of allowing or permitting an appeal already filed to be admitted out of time...”
30. We hold the view that the above expression by Aburili, J. portrays the correct interpretation of the proviso to Section 79G of the *Civil Procedure Act*. Having arrived at that finding, it goes without saying that the learned Judge fell into error when she dismissed the prayer to file the appeal out of time on grounds that leave could not be granted before the appeal itself had been lodged.”



42. In the circumstances , this Court is not persuaded by the High Court decision in Gerald M'Limbine vs Joseph Kangangi (supra) relied on by the Respondent.
43. As earlier stated, the reason for the delay of about 11 days stated herein is that the instructing client, Directline Assurance Company Limited, did not give instructions within the timelines allowed for filling an Appeal. That explanation is reasonable in the circumstances.
44. In the upshot, the application is allowed in the following terms:-
1. A stay of execution of the decree herein be and is hereby issued pending the hearing and determination of the intended Appeal on condition that the Applicant deposits the entire decretal in Court within 30 days from the date of this Ruling.
  2. Leave be and is hereby granted to the Applicant to file Appeal out of time on condition that he files a Memorandum of Appeal and the Record of Appeal within 30 days from today.
  3. Costs of this application to abide the outcome of the Appeal.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2025.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of:**

N/A for Applicant

Ms Cherutich for Respondent

Ruto, Court Assistant

