



**Ali & another v Nyamai (Miscellaneous Application E366 of 2024)
[2025] KEHC 3401 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3401 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E366 OF 2024
J NGAAH, J
MARCH 21, 2025**

BETWEEN

ABDI WALI ALI 1ST APPLICANT

CHINA ROAD & BRIDGE CORPORATION KENYA 2ND APPLICANT

AND

FELISTA NDETE NYAMAI RESPONDENT

RULING

1. By a motion dated 9 December 2024, the applicants have sought the following orders:
 - “ 1. That this application be certified as urgent and be heard ex parte in the first instance.
 2. That this Honourable court be pleased to stay execution of the judgment and decree in Mombasa Civil Case No. 2304 of 2018 - Felista Ndete Nyamai Vs. _abdi Wali Ali and another judgment was entered 30th August, 2024 for Ksh. 310,553/= pending the hearing and determination of the application inter parties.
 3. That this Honourable court be pleased to grant leave to the applicant to appeal out of time against the judgement of the Honourable G. Sogomo Principal Magistrate in Mombasa Civil Case No. 2304 of 2018 delivered on 30th August, 2024.
 4. That this Honourable court be pleased to stay execution of the judgment and decree in Honourable G. Sogomo Principal Magistrate in Mombasa Civil Case No. 2304 of 2018 delivered on 30th August, 2024 pending the hearing and determination of this application.



5. That this Honourable court be pleased to stay execution of the judgment and decree in Mombasa Civil Case No. 2304 of 2018 delivered on 30th August, 2024 pending the hearing and determination of the intended appeal.
 6. That upon prayer 4 and 5 being granted the honourable court be pleased to order that the decretal sum of Ksh. 310,553/= be secured by way of bank guarantee pending hearing and determination of the intended appeal.
 7. That the costs of this Application abide the outcome of the intended Appeal.”
5. The application is expressed to be brought under sections 3A, 79G and 95 of the *Civil Procedure Act* (Cap 21); Order 22 rule 22, Order 42 Rule 6, Order 50 rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010. It is supported by the affidavits of Abdi Wali Ali and Billy Ndolo. Ali has, nonetheless, turned out to be the sole applicant in this application.
 6. He has sworn that he is the insured owner of the motor vehicle registration number KBW 281 Z. He has been informed by his counsel on record, which information he verily believes to be true, that on 30 August, 2024 judgement was entered against the applicant for the sum of Kshs. 310,553/- as general and special damages together with costs and interest at court rates. The judgment arose out of a road traffic accident in which the applicant was held to be solely responsible.
 7. Being aggrieved by the judgment, the applicant instructed his advocates to appeal against it. However, the time within which the appeal ought to have been filed had expired when he gave instructions to appeal against the judgment
 8. According to the applicant, when the judgment was delivered, he faced what he has described as “technical difficulties in communicating” and, therefore, he could not access the necessary information in time to appeal. He has also sworn that his advocates were unable to obtain a copy of the judgment in time because it was not made available to the parties soon after it was delivered. If his application is allowed, he is willing to provide a bank guarantee of Kshs. 310,553/- as security for the performance of the decree.
 9. On his part, Mr. Billy Ndolo, the learned counsel for the applicants has “sworn” that indeed the judgment sought to be impugned was delivered on 30 August 2024. Even then, he has gone further to swear that:
 - “ 3. That that that (sic) judgment was delivered on the said date 26th April, 2024 that at the material time, the company’s systems were experiencing technical difficulties, which hindered effective communication and access to pertinent information, further contributing to the oversight.”
 10. According to the learned counsel, the delay in filing of the appeal should not be blamed on the applicants because they had nothing to do with the delay. The intended appeal, according to him, is merited and arguable and has overwhelming chances of success.
 11. The respondent opposed the application by way grounds of objection dated 6 January 2025. According to the respondent, the application is frivolous since the applicant has not satisfied the court that he has a good and sufficient cause for not filing the appeal in time as required under section 79G of the *Civil Procedure Act*. The applicant, it is contended, has not offered reasonable explanation for his delay in making the current application which, in any event, was made more than two months after the lapse of statutory time within which to lodge the intended appeal. Thus, the applicant is guilty of laches and does not deserve exercise of discretion in his favour.



12. The respondent has also averred that extension of time is not a right to which the applicant is entitled. Rather, it is an equitable remedy that is only available to a deserving party at the discretion of the court, which discretion can only be exercised judiciously.
13. The respondent, it is alleged, has waited for many years, precisely from 2018, when her suit was filed in the magistrates' court till 30 August 2024 when judgment was rendered. The case in which judgment was obtained arose out of a personal injury in a road traffic accident and, considering the time it has taken to determine her suit in the lower court, she will continue to suffer untold prejudice and loss if the court was to allow the applicant's application.
14. It is also urged that the applicant has not met the basic conditions for such an application for stay as set out in section 79G of the *Civil Procedure Act*, having not exhibited a copy of any letter written to the court requesting for a certified copy of the decree appealed from. Further, the applicant has not demonstrated that he has a reasonable or arguable appeal with a probability of success, assuming the application is granted.
15. The applicant's advocate, it is alleged, has presented an unsigned and unsworn affidavit, in support of the application. Such a defective affidavit cannot aid the applicant's cause.
16. The respondent also contends that the allegation that some company's systems were experiencing technical difficulties which hindered effective communication and access to pertinent information further contributing to the purported oversight on the part of the applicant's counsel, is described as "pedestrian" as the identity of the subject company is not disclosed. The judgment is also stated to have been delivered on 26 April 2024 when it is obvious that the judgment was delivered on 30 August 2024. In any case, copies of the judgment were given to the same parties the same day it was delivered.
17. The respondent has also pleaded that since there were two defendants that were held liable, jointly and severally, in the primary suit, the 1st applicant will suffer no prejudice if his application for stay is declined. He has the option of seeking indemnity from his co-defendant.
18. The applicant has not only failed to exhibit the judgment he seeks leave to appeal from but he has also failed to demonstrate that a decree and a certificate of stated costs have been issued and execution is imminent. There is, thus, no justification to order stay of execution at all.
19. The respondent has also contended that although the applicant has sought for an order to allow him to offer security by way of a bank guarantee for any award that may ultimately be binding upon him, that offer is not tenable because the applicant has himself deposed that the company's accounts, upon which he would rely to satisfy the guarantee, are frozen. Without proper security, stay of execution cannot be ordered.
20. Further, the draft memorandum of appeal is said not to raise pertinent issues of law and an intended appeal based on such grounds will not be arguable. The applicant has also not demonstrated any likelihood that he would suffer irreparable loss or any loss at all if the application is declined.
21. My reading of the application reveals two limbs of prayers the first of which is for extension of time to file the appeal out of time while the second limb is for stay of execution. This second limb can quickly be disposed of. No doubt, the prayer for stay of execution is hinged on order 42 Rule 6 (1) of the Civil Procedure Rules. This rule reads as follows:
 6. Stay in case of appeal
 - (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 order set aside.(Emphasis added).

22. This rule presupposes that an application for stay of execution in the court to which an appeal has been preferred can only be made if the appeal has been filed. Indeed, this Honourable Court, for instance, aside from its supervisory jurisdiction over the magistrate's court, can only entertain matters arising from that court in exercise of its appellate jurisdiction. Thus, in an application of the nature that is now before court, the law is clear that... "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..."
23. Without belabouring the point, this court can only entertain an application for stay of execution pending appeal from the magistrates' court when the appeal has, in fact, been filed. It is only in the context of the application that has been made within an appeal that this honourable court is seized of jurisdiction to consider the application for stay and make such order or orders as appropriate.
24. It follows that without the appeal, an application for stay of execution of a judgment from the magistrate's court, is premature. The applicant's application for stay of execution would fall for this reason. The appeal is yet to be preferred and, without it, this Honourable Court has no jurisdiction to entertain the application for stay on the basis of a pending appeal when it obvious that none exists.
25. The only other prayer in the applicant's application is the prayer for leave to file the appeal out of time. Section 79 G of the Civil Procedure Act prescribes the time within which an appeal from the magistrates' court ought to be filed to this Honourable court from the date of the decree or order appealed against. It states as follows:

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.
26. The judgment against which the applicant intends to appeal was rendered on 30 August 2024 and, therefore, under this provision of the law, the appeal ought to have been filed by 30 September 2024. The applicant did not file the appeal within the prescribed timeline, hence the application to file the appeal out of time. The window to admit the appeal out of time is open under the proviso to section 79(G).
27. Extension of time in such circumstances is a discretion of this Honourable Court and the principles to consider in exercising such a discretion have been spelt out by the Supreme Court in *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR. The court held the principles to be as follows:
 - "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.”

28. And while considering the same question of the quest to file appeal out of time, the Court of Appeal in Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR, held as follows: -

“...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.”

29. Turning to the applicant’s application, it was not until 13 December 2024, three months after the date of the judgment, that the applicant filed the instant application. Since the appeal ought to have been filed by 30 September 2024, the application was filed more than two months after the deadline for filing of the appeal. The questions that then follow are, what as the cause of the delay and, whatever the cause, is it a “good and sufficient cause” as contemplated under the proviso to section 79G?

30. In the affidavit sworn by the applicant in support of his application, the reasons for the delay have been given as follows:

- “ 3. That I am informed by my advocates on record which information I verily believe to be true, that judgment was delivered on the said date 30th August, 2024.
- 4. That I am informed by our advocates on record which information I verily believe to be true that at the material time, the company’s systems were experiencing technical difficulties, which hindered effective communication and access to pertinent information, further contributing to the oversight.
- 9. That I am informed by our advocates on record which information I verily believe to be true, that failure to file the appeal within thirty (30) days was caused by the fact that the applicant through their advocates was unable to obtain copy of judgement in time the same had not been released by the trial court”.



31. On his part, the learned counsel for the applicant has given reasons for the delay as follows:
- “ 3. That that that (sic) judgment was delivered on the said date 26th April, 2024 that at the material time, the company’s systems were experiencing technical difficulties, which hindered effective communication and access to pertinent information, further contributing to the oversight.
 6. That the inadvertent delay on our part was not deliberate and is highly regretted and since the Applicant had nothing to do with it, I honestly believe that the Applicant is a victim of circumstances and as such the application ought to be allowed.”
32. There are glaring self-contradictory remarks in the depositions made by the applicant. On the one hand, he says that “the company’s systems were experiencing technical difficulties, which hindered effective communication and access to pertinent information...” but, on the other hand, he states that “...that failure to file the appeal within thirty (30) days was caused by the fact that the applicant through their advocates was unable to obtain copy of judgement in time the same had not been released by the trial court...”
33. With these depositions, it is difficult to tell whether the delay in filing the appeal was due to the “technical difficulties” of some company, the nature of which has not been provided, or whether the delay arose from the delay in obtaining the judgment from the court.
34. A copy of the judgment was not exhibited to any of the affidavits sworn in support of the application but I managed to access it when I called for the original court file from the lower court. The record shows that the judgment was delivered in the presence of counsel of both parties on 30 August 2024. There is no communication of any sort from the applicant seeking a copy of the judgment. There is also no evidence of when the applicant eventually obtained the judgment and, in the absence of any evidence to the contrary, it is assumed that the typed judgment was available to the parties as soon as it was delivered on 30 August 2024.
35. Like the applicant, his counsel has attributed the delay to “technical difficulties” of a company. As noted, it is not clear from the applicant and his counsel what these “technical difficulties” and how they prevented the applicant or his advocate from accessing the judgment. The court has also not been told how “the company” that was experiencing the so-called technical issues was related to the applicant’s case. The identity of the company and its role in the applicant’s case are details that ought to have been given but which were not given.
36. In any case, the purported affidavit by the counsel for the applicant has neither been signed nor commissioned and, therefore, irrespective of what the learned counsel has stated in his affidavit, it has no evidential value.
37. With this background in mind, I am not satisfied that a “good and sufficient” cause has been proffered for the delay in filing the appeal or the application before court. The application is dismissed with costs to the respondent.

SIGNED, DATED AND DELIVERED ON 21 MARCH 2025

Ngaah Jairus

JUDGE

