



REPUBLIC OF KENYA



**Britam General Insurance Co Ltd v Kamau (Civil Miscellaneous
E069 of 2024) [2025] KEHC 2397 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL MISCELLANEOUS E069 OF 2024
JK SERGON, J
MARCH 13, 2025**

BETWEEN

BRITAM GENERAL INSURANCE CO LTD APPLICANT

AND

MARGARET NJOKI KAMAU RESPONDENT

RULING

1. The application coming up for determination is a notice of motion dated 2nd December, 2024 seeking the following orders;
 - (i) Spent.
 - (ii) Spent.
 - (iii) That this Honourable Court be pleased to extend the time within which to lodge an appeal from the judgment/ Decree of the trial Court in Kericho Cmcc No. E094 Of 2022 Between Margaret Njoki Kamau ~vs-britam Insurance Company Ltd.
 - (iv) That the Memorandum of Appeal be filed within 21 days of granting of such leave.
 - (v) That there be stay of execution of the Judgment/decreed in Kericho CMCC NO. E094 OF 2022 pending the hearing and determination of the Applicant's appeal.
 - (vi) That the costs of this application be provided for.
2. The application is based on grounds on the face of it and the supporting affidavit of Millian Aligula, the Legal Officer of the Applicant herein M/s. Britam General Insurance Company Limited and duly authorized to swear this affidavit.
3. He avers that he is fully conversant with the facts and circumstances giving rise to this instant application and suit herein.



4. He avers that the judgment was delivered on 29th October, 2024 and upon delivery of the judgment the court indicated that the copy of the judgment will be uploaded on the CTS.
5. He avers that it took a while for Applicant's advocates on record to procure a copy of the judgment after it was delivered and that by the time the Applicant's advocates on record procured a copy of the typed judgment from the court and transmitted it to them for review and then issue instructions to appeal the time limited for filing an appeal had lapsed.
6. He avers the Applicant M/s. Britam General Insurance Company Limited were waiting for a copy of the judgment to make a decision on whether to appeal and therefore the failure to lodge an Appeal within time arose out of no fault of part of the Applicant.
7. He avers that the Applicant has a strong appeal an attached a copy of the draft Memorandum of Appeal and some of the credible grounds of appeal raised are; a) That the learned trial court was in error of law and fact in ordering the Applicant to pay over and above the statutory and/or policy limit of Kshs.3,000,000/= b) That the trial court misdirected itself in ordering the Applicant to pay costs and interest in addition to the statutory and/or policy limit of Kshs.3,000,000/=
8. He avers the execution of the trial court's judgment in Kericho CMCC NO. E094 OF 2022 may ensue any time now as there is no stay of execution in place and that execution will not only destroy the substratum of the appeal but it will occasion substantial loss to the Applicant.
9. He avers that if execution of the said judgment/Decree is not stayed, the aforesaid Appeal will be rendered nugatory and would occasion substantial and irreparable loss to the Appellant and that if the Orders sought are granted the Respondent shall not suffer any prejudice which cannot be compensated by way of costs.
10. Margaret Njoki Kamau the Respondent filed the following grounds of opposition;
 - (i) That the Notice of Motion Application is mischievous, misconceived, frivolous, vexatious and bad in faith and an apparent abuse of the court process.
 - (ii) That the Application is fashioned to delay execution and deny the respondent the enjoyment of the fruits of her judgment granted way back on 29th October 2024 awarding her costs and interest on the Kshs. 3,000,000/= statutory amount.
11. The Respondent filed a replying affidavit in response to the said application sworn by Robert Mochache, an advocate of the High Court of Kenya practicing as such in the name and style of R.M. Mochache & Co. Advocates.
12. He avers that he has been in conduct of the Respondents case against the Applicant from the inception of Kericho CMCC 120 OF 2017 filed following a road traffic accident where the Respondent was seriously injured and therefore well versed with the issues herein and capable of swearing this affidavit.
13. He avers that in the Kericho CMCC 120 OF 2017, the Respondent was awarded damages in the sum of Kshs. 5, 020,000/=, plus costs and interest, where the applicant settled the decree to the legal limit of Kshs. 3,000,000/= and ignored the fact that the said limit was subject to costs and interest as awarded by the court.
14. He avers that it is trite law that costs are not a tool to penalize the losing party but for compensating the successful party for the trouble taken in prosecuting or defending his or her case.
15. He avers that or the Applicant's failure to pay costs and interest as per the judgment of the court in CMCC 120 OF 2017, the Respondent sought to recover the costs of the Kshs. 3,000,000/= vide



declaratory suit CMCC no. E94 of 2022 and judgment was delivered in favour of the Respondent on 29th October 2024.

16. He avers that the said Judgment was delivered on the 29th day of October 2024 in the presence of Advocates for both the Applicant and Respondent herein, and the Advocate for the Applicant proceeded to apply for 30 days stay of execution, an which stay was accordingly granted by the Honourable court as can be evidenced by the judgement of the court dated 29th October 2024.
17. He avers that the said judgment was uploaded on the CTS immediately after it was delivered contrary to what the Applicant's deponent one Millian Aligula stated in paragraph 5 of his supporting affidavit.
18. He avers that it is therefore not true that the Applicant/Appellant was not aware about judgement in CMCC E94 of 2022, thus the explanation given for its failure to lodge an appeal at the earliest is not plausible but a gimmick aimed at delaying the finalisation of the matter.
19. He avers that after the said judgment, the Applicant/Appellant later sent an email to the Respondent's Advocates requesting them to tabulate the awarded costs for consideration.
20. He avers that the Applicant/ Appellant is not truthful when it alleges that they did not have the judgement on time and therefore were not in a position to consult and give instructions for an appeal on time.
21. He avers that the Applicant/Appellant did not even lodge a Notice of Appeal as a safeguard to buy time as they prepared their intended appeal, therefore this Application for Stay of Execution and Intended Appeal are totally an afterthought, and indeed an abuse of the court process therefore aimed at delaying the conclusion of this matter and or to punish the respondent and deny her, her fruits of her judgement.
22. He avers that the extension of time is an equitable and discretionary remedy but purely reserved for a deserving party and the applicant has not met that threshold nor given any plausible reason for its indolence, hence it is only fair and just to dismiss the Applicant's application and allow the Respondent an opportunity to execute the decree and enjoy the fruits of her judgment.
23. He avers that the Applicant has also not shown the loss it is likely to suffer in the event the order of stay of execution is not granted and has failed to satisfy the conditions set out in order 42 Rule 6 of the civil procedure rules, 2010 and as such, the Applicant's application herein seeking stay of execution and leave to file appeal out of time is bad in law, misconceived, inappropriate, ill motivated and otherwise an abuse of the court process.
24. Having considered the pleadings by the parties this court finds that the issue (s) for determination are whether to enlarge the time to file the intended appeal out of time and grant stay execution pending appeal.
25. On the issue as to whether to enlarge time to lodge the appeal out of time, the operative section of the law is section 79G of the *Civil Procedure 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." In the case of Paul Musili Wambua v Attorney General & 2 others [2015] eKLR, the Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated as follows: "...it is now well 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 whims or caprice. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the 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.”

26. Regarding the length of delay, it is evident from the pleadings on record herein that the judgment that the applicant is seeking to appeal against was delivered on 29th October, 2024. The instant application was filed on the 2nd December, 2024, occasioning a delay slightly under a month and the applicant submitted that the delay in lodging the appeal was occasioned by the delay in procuring a copy of the typed judgment and that by the time they obtained a copy of the said judgment, the time to lodge an appeal had lapsed. In the circumstances, I am inclined to allow the applicant leave to lodge an appeal against the judgment/ decree of the trial Court in KERICHO CMCC No. E094 of 2022.
27. On the issue as to whether to grant a stay of execution, the Judgment was delivered on 29th October, 2024 while the present application was filed on 2nd December, 2024, slightly under a month after the lapse of the 30 days stay of execution granted by the trial court. An application for stay invokes the discretionary powers of this court under Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010 that empowers the court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Order 42, Rule 6 (2) 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.”
28. This court notes that the instant application was not filed timeously, this notwithstanding, on one part, the applicant contended that the execution of the trial court’s judgment in Kericho CMCC NO. E094 OF 2022 may ensue any time now as there is no stay of execution in place and that execution will not only destroy the substratum of the appeal but it will occasion substantial loss to the Applicant, the applicant did not offer any security, the applicant having settled the decree to the legal statutory limit of Kshs. 3,000,000/=
29. On the other part, the respondent conceded that the applicant settled the decree to the legal statutory limit of Kshs. 3,000,000/= and ignored the fact that the said limit was subject to costs and interest as awarded by the court. The respondent contended that the applicant had not demonstrated the loss it is likely to suffer in the event the order of stay of execution is not granted and had failed to satisfy the conditions set out in order 42 Rule 6 of the civil procedure rules, 2010. Having considered the submissions by the parties on the issue of stay and the circumstances of this case, it is the finding of this court that the applicant is entitled to a stay of execution as he ventilates his intended appeal.
30. I find that the applicant is entitled to pursue the appeal. I hereby partially allow the notice of motion dated 2nd December, 2024 in the following terms:-
 - (i) Leave is granted to the applicant to file an appeal out of time against the judgment delivered in Kericho CMCC number E094 OF 2022 within 14 days from the date hereof.
 - (ii) An order for stay of execution of the judgment/decree in Kericho CMCC number E094 OF 2022 pending the hearing and determination of the intended appeal is granted.



- (iii) There is no need to impose security for stay of execution, the applicant having paid out a substantial part of the decretal award in Kericho CMCC number 120 OF 2017.
- (iv) Costs of the Application to abide the outcome of the intended appeal.

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 13TH DAY OF
MARCH, 2025.**

J.K. SERGON

JUDGE

In the Presence of:

C/Assistant – Rutoh

Mochache for the Respondent

Miss Karanja holding brief for Matiri for Applicant

