



**Kenya Wildlife Service v Wanja (Civil Miscellaneous E142 of 2024)  
[2025] KEHC 3636 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3636 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL MISCELLANEOUS E142 OF 2024  
HM NYAGA, J  
MARCH 20, 2025**

**BETWEEN**

**KENYA WILDLIFE SERVICE ..... PLAINTIFF**

**AND**

**ROSE WANJA ..... DEFENDANT**

**RULING**

1. The matter for consideration is the Application dated 4<sup>th</sup> December 2024 which seeks the following orders
  - a. Spent
  - b. Spent
  - c. That this Honorable court be pleased to grant a stay of execution of the Judgement and Decree of Honorable H. Nyamweya. (Adjudicator (Resident Magistrate) delivered on 17<sup>th</sup> October 2024 pending hearing and determination of the intended appeal.
  - d. That the Honorable court be pleased to grant the Applicant leave to appeal out of time against time whole judgment of Hon H. Nyamweya (Adjudicator/Resident Magistrate) delivered on 17<sup>th</sup> October 2024 in Meru Succession No. E759 of 2024, Rose Wanja vs Kenya Wildlife Service.
  - e. The costs be in the cause.
2. The application is propped by the grounds set out on its face and the supporting affidavit of Gideon Mutai sworn on even date.
3. In a nutshell, the Applicant states that on 17<sup>th</sup> October 2024, the lower court dismissed the Preliminary Objection challenging the original Jurisdiction of the trial court to hear and determine the claim



and consequently allowing the claim. That being dissatisfied with the decision of the trial court, the applicant attempted to file an appeal against it but due to a technical hitch on the e-filing system, the appeal was registered on 19<sup>th</sup> November 2024, beyond statutory time for filing appeal. That upon realization of the above, the applicant withdrew the appeal No. E300 of 2024, but they are still desirous of appealing, hence this application.

4. It is further averred that the Respondent has initiated execution proceedings by instituting garnishee proceedings and has been issued with a garnishee order absolute. That unless stay is granted, the garnishee order absolute will be executed hence render this intended appeal nugatory. That the Applicant shall suffer substantial and irreparable loss.
5. It is further averred that the intended appeal, as seen from the draft memorandum of appeal annexed to the application, raises serious questions of law with a high probability of success. That the application has been made without unreasonable delay.
6. In response the respondent filed a replying affidavit sworn in 11<sup>th</sup> December 2024.
7. The Respondent avers that this application is taken out to frustrate her in not realizing the decree of the local courts. That the Applicant had filed HCC Appeal No. E300 of 2024 with a similar application and she filed a preliminary objection to the appeal and the applicant withdrew it. That the applicant has morphed into a vexatious litigant.
8. It is further averred that if the applicant was desirous of filing the appeal. It could have done so earlier instead of waiting for 29 days to do so. That the reasons adduced for filing the appeal out of the time is an afterthought as there is no evidence of downtime in the E-filing system on 17<sup>th</sup> November 2024.
9. It is further averred that while an appeal from the small claim court to this court is limited to matters of law only, the appeal raises issues of facts and therefore, the appeal does not have a high chance of success.
10. It is further averred that the applicant has not met the threshold set out under 42 Rule 6 of the Civil Procedure Rules (CPR) as no security has been offered as a condition precedent for the grant of stay of execution.
11. The Respondent further avers that while this court has discretion, to grant the orders the applicant has not provided any grounds to support the application. It urged the court to dismiss the application with costs.

### **Applicant's Submission**

12. It is submitted that the delay of filing appeal was caused by e-filing hitch an action beyond the control of the Applicant and in any event the application was brought without any undue or inordinate delay.
13. On the issue of delay the applicant cite the case of County Government of Mombasa v Gulambas & another [2024] KEELC 13655 (KLR) in which while allowing appeal to be filed out of time held thus:

“...even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. From the delivery of the ruling to the filing of the instant Application is about 2 months and 15 days. This in my view does not amount to inordinate delay...”
14. On the issue of whether the intended appeal is arguable and raises serious issues of law, the applicant submits that this court has already noted that the Applicant has filed several appeals emanating from



Small Claims Court that address the issue of jurisdiction, which should be addressed conclusively by this Honourable Court.

15. The applicant urged the court to find that the intended appeal is arguable and raises serious issues of law for determination by this court.
16. The Applicant further submits that it is reasonably apprehensive that the Respondent will proceed to execute the decree having already initiated garnishee proceedings if stay of execution is not granted pending filing, hearing and determination of the intended appeal. That the prayer for stay of execution is pegged on the fact that the Respondent will not refund the decretal sum if stay of execution is completed.
17. It is argued that in the replying affidavit, the Respondent has not demonstrated that she is a person of means and will be in a position to refund the decretal sum if the intended appeal and the appeal is allowed. That on this account the applicant has shown that it will suffer substantial loss. Cited in support of this argument was the decision in *Johnson Mwiruti Mburu vs Samuel Macharia Ngure* [2004] KEHC 2232 (KLR) where the court held;

“In the circumstances of this case I find that substantial loss could result to the applicant in view of the possible inability of the respondent to pay’.

18. It is further submitted that Respondent’s response does not address the issue her financial ability to refund decretal sum if called upon to do so. Cited was the case of *Phoebe Asiyu, Akinyi Nzioki, Jacqueline Oduol & Jane Ogot vs Martin Njalalleh* [2008] KEHC 1219 (KLR) where the court in allowing a stay application stated that:

“...it is unreasonable to expect the applicant to know in detail the resources owned by the respondent. The applicants have expressed a reasonable fear that the respondent will be unable to pay back the decretal sum. The respondent ought to have gone beyond merely asserting that he is capable of refunding the decretal sum, by demonstrating that he is able and capable of refunding the decretal sum. I am satisfied that the applicants’ apprehension is not unfounded.”

19. Also cited was High Court in Mombasa Civil Suit No. 85 of 2010 *Florence Hare Mkaha Vs Pwani Tawakali Mini Coach & Another*, where the court quoted Nairobi Civil Application No. 238 Of 2005 *National Industrial Credit Bank Ltd –Vs- Aquinas Francis Wasike & Another (UR)* where the Court of Appeal stated-

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.”

### **Respondents Submissions.**

20. It was submitted that the Applicant has not offered sufficient reasons to explain the delay in filing the appeal which ought to have been filed within 30 days. To Buttress this point counsel for the respondent



cited *Muanyangi vs Mugi* (Civil Appeal No. 1 of 2023) 2024 KEHC 6321 (KLR), where it was held as follows;

The application dated 5th September 2023 seeks for orders of leave to file an appeal out of time against the judgment in *Thika Small Claims Court Civil Case No. 540 of 2022* delivered on 13th July 2023. The applicant also seeks for orders for stay of execution in respect of the said judgment delivered on 13th July 2023 pending the hearing and determination of the appeal. 15. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018] eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.’

21. It is further submitted that whereas the applicant seeks stay of execution pending appeal, it has not tendered any evidence of substantial loss should execution proceed. That no security has been offered pursuant to order 42 Rule 6 of the Civil Procedure Rules. Cited in support of the submissions *Githau vs Kagiri & Anor* (Civil Appeal 314 of 2023 (2024) KEHC 6320 (KLR)], where it was held;

It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. 33. The applicant is silent in his affidavit on how he stands to suffer substantial loss. It is only in his submissions that he contends that he stands to suffer irreparably if the respondents levy execution against him. 34. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show the manner in which execution will irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory. The appellant has failed to demonstrate substantial loss in my considered view. 40. Evidently, the issue of security is discretionary and it is upon the court to determine it and set its terms. The applicant has not offered any security for the performance of the decree.’

22. It was further submitted that the draft memorandum of Appeal does not raise any issues of law for which appeals from the small claims court are linked to a cited was *Mwanyangi vs Mugi* (supra), where the court stated;

I have perused the intended Memorandum of Appeal and the judgment of the trial court and noted that the appeal does not raise pertinent issues of law. Furthermore, an appeal from the Small Claims Court to the High Court is only allowed on matters of law pursuant to Section 38 of the *Small Claims Court Act*. The grounds of appeal as set out in the memorandum of appeal pertain to points of fact. Thus, it is evident that the chances of the intended appeal succeeding in the event this application is granted, are quite limited. In the circumstances, I reach a conclusion that the applicant has not established to the satisfaction of the court the reasons for enlargement of time.’

23. The Respondent urged the court to dismiss the application with costs

### **Analysis and Determination**

24. The issue for determination is whether the applicant has offered sufficient grounds to grant the application.



25. There is no dispute that the court has Jurisdiction to extent time within which a party can file an appeal section 79 G of the Civil Procedure Act provides as follows:-

“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. An applicant approaching the Court under the said section must demonstrate “good and sufficient cause” for not filing the appeal in time.

27. In *Thuita Mwangi v Kenya Airways* [2003] eKLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the Civil Procedure Act, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

“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 general the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

28. While the discretion of the court is unfettered, the applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor.

29. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 others* [2014] e KLR set out the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

“The underlying principles a court should consider in exercise of such discretion include;

- 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 a case- to-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.



30. These principles were also considered in the case of *Leo Sila Mutiso vs Rose Hellen Wangeri Mwangi Civil Appeal 255/ 1997*, where the court held as follows: -

“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.”

31. Lastly, in *First American Bank of Kenya Ltd -vs- Gulab P. Shah & Others HCC 2255/2000 [2002] IEA 65* the court summed up the factors to be considered to be : -The explanation if any, for the delay;The merits of the contemplated action, whether the appeal is arguable;Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.

32. I will therefore proceed to determine whether the Applicant has advanced plausible grounds for delay in filing the appeal.

33. The lower court delivered the Judgment on 17<sup>th</sup> October 2024. Thus, the applicant had until 16<sup>th</sup> November to file its memorandum of appeal. The applicant explains that it was unable to file the memorandum of appeal on time due to downtime on the e-filing system. That when it succeeded, the same was registered days past the period prescribed and thus proceeded to withdraw the appeal and filed the present application.

34. In my view, the explanation by the Applicant is acceptable. Moreover, the delay was just for a few days so there is no unreasonable delay.

35. I think that there will be more prejudice caused to the Applicant if they are denied the chance to ventilate their intended appeal than to the Respondents who can be compensated by way of costs.

36. The court has looked at the draft memorandum of appeal. It was based on the question of Jurisdiction of the trial court to have handled the claim. This is a triable issue. I have already made a declaration on the issue in High Court Civil Appeal No. E158 of 2024 where I found that whereas a plaintiff or claimant can elect to file a claim before the County Conservation and Compensation Committee or a suit before the court, he/she cannot be allowed to pursue both claims simultaneously. The court will have to determine if the respondent had filed such a claim or not.

37. Therefore, I will grant the Applicant leave to file appeal out of time. I will give directions on the issue shortly.

38. The Applicant also sought stay of execution pending the intended appeal. Order 42 of 6 of the Civil Procedure Rules provides as follows:-

“ 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 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 of stay 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 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”

39. Thus, under the said rule, an applicant should satisfy the court that:

- a. Substantial loss may result to him/her unless the order is made;
- b. That the application has been made without unreasonable delay; and
- c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

40. On substantial loss, it is deponed that garnishee proceedings have been taken out. The applicant has not exhibited evidence that she can refund the decretal sum if the intended appeal is successful. That, in my view, is sufficient proof that the Applicant stands to suffer substantial loss.

41. For reasons stated while addressing the question of extension of time, I find that the application was filed without unreasonable delay.

42. On Security, it is clear that the Applicant has not offered any but given the finding in the Appeal file that I referred to, the same may not be necessary if the court is to find that the lower court had no jurisdiction.

43. In conclusion, I make the following orders:-

- a. The Applicant is granted leave to file its memorandum of appeal within 14 days from the date hereof.
- b. There will be a stay of execution of the decree from the lower court pending hearing and determination of the intended Appeal.
- c. In default of (a) above the leave shall lapse automatically and stay orders will stand vacated in that reference to court.
- d. The Appellant shall bear the costs of this Application.

**DATED, SIGNED AND DELIVERED AT MERU THIS 20<sup>TH</sup> DAY OF MARCH 2025.**

**H. M. NYAGA**

**JUDGE**

