



**Kiplagat v Nyakundi (Suing as the Legal Representative of the
Late Mary Wambui Mwangi) (Miscellaneous Civil Application
E336 of 2024) [2025] KEHC 3569 (KLR) (19 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3569 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E336 OF 2024
SM MOHOCHI, J
MARCH 19, 2025**

BETWEEN

EDWIN KIPLAGAT APPLICANT

AND

GEOFFREY MOMANYI NYAKUNDI RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE LATE MARY WAMBUI
MWANGI**

RULING

1. The Applicant in the Notice of Motion Application dated 17th October, 2024 brought under Sections 3A, 79G and 95 of the *Civil Procedure Act* and Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 & 3 of the *Civil Procedure Rules* and Article 159 (2) (a) (b) and (d) seeks:
 - i. Spent
 - ii. That this Honourable Court be pleased to grant an order of stay of execution the judgement of the Honourable Learned Magistrate Bildad Ochieng entered on the 16th May 2024 at Nakuru Chief Magistrate Court Civil Case No. E160 of 2021 pending hearing and determination of this Application inter-parties and the Appeal
 - iii. That this Honourable Court be pleased to extend time and grant leave to the Applicant to file appeal out of time and that Memorandum of Appeal attached be deemed filed upon payment of the requisite Court fees
 - iv. That the costs of this application be provided for.
2. The Application is premised on the grounds on its face and the annexed supporting affidavit sworn by the applicant on the same date.



Applicant's Case

3. It is the Applicant's case that following the entry of judgement in Civil Case No. E160 of 2018, he agreed with his insurer to appeal the decision on the award of loss of expectation of life and loss of dependency. The insurers agreed to engage the same advocates who had conduct of the lower Court matter and that all along he had the belief that the appeal had been filed until 7th October, 2024 when he was served with proclamation, warrants of attachment and sale.
4. That he contacted his insurers to be informed that they would only settle Kshs. 3,000,000 which was contrary to their initial agreement. That the Applicant is aggrieved by the trial judgment and would prefer an appeal and cannot file a Memorandum of Appeal when time for lodging the appeal had lapsed.
5. That the appeal has high chances of succeeding and unless the Respondent is restrained from executing the judgement, the appeal will be rendered nugatory. That the delay in filing the appeal was not intentional or negligent and was occasioned by his insurer by undertaking that the appeal would be lodged by the Advocates in the Lower Court.
6. He stated that he is ready to abide by any reasonable conditions for security and unless the appeal is allowed, he will suffer substantial loss and irreparable damage as the Respondent will proceed to execute the judgement.
7. The Applicant swore a further Affidavit on 8th November, 2024. He stated that he was not aware of the Memorandum of Appeal or the Application for stay in E133 of 2024 as the advocates appointed by the insurance company ever informed him. he denied knowledge of the consent nor was his consent sought and learnt of the consent orders when they were served with the Reply to the Applicant Application.
8. He also denied knowledge of the agreement on account opening and the exchanges between the firms of Sheth Wathigo Advocates and Gekonga Advocates or the request for extension to comply with the purported consent orders. He claimed he opted to appeal since the award was excessive and he was unable to raise the difference of Kshs. 2,000,000.

Respondent's Case

9. The Respondent opposed the Application by way of Replying Affidavit 29th October, 2024. He stated that the Applicant filed Nakuru HCCA No E133 of 2024 and thereafter an application for stay pending Appeal. That the Application was compromised on 24th July, 2024 where a consent was recorded with the application for stay allowed on condition that the entire decretal amount be deposited in a joint interest earning account of both advocates. On default the execution would issue.
10. He averred further that the account opening documents were sent on 17th August, 2024 which were executed and sent back. That the Applicant's counsel sought an extension to enable them comply with stay conditions where a consent was executed. That the Applicant failed to comply with the consent order and thus the Respondent commenced execution proceedings.
11. The Respondent argued that the Applicant lied on oath and withheld material fact knowing he could not get back to the same Court for orders.

Applicant's Submissions

12. On whether the requirement of Order 42 Rule 6 of the *Civil Procedure Rules*, it was submitted that the reason for the delay was that he only became aware that the appeal had not been filed when he was



served with the warrants and the insurance company made him believe that they acted on promptly through their advocates.

13. On security it was submitted that the Applicant is willing to furnish Court with sufficient security that is reasonable and that the Court deems fit and relied on the case of *Gianfraco Manethi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR where the Court held that the Applicant must show and meet the conditions of payment of security.
14. On substantial loss it was submitted that that the insurance was contemplating settling their part of Kshs 3 million and the difference of Kshs 2,807,715 is outstanding for the Applicant to settle and he stands to suffer substantial loss if stay is not extended. That the economic status of the Respondent is unknown. Reliance was placed in *Kelvin Kinyua Macharia vs Aisha Motor Dealers Limited & 3 Others* [2019] eKLR.
15. On the prayer of enlargement of time within which to appeal, it was submitted that, the Applicant only found of the existing appeal upon being served with the response by the Respondent. That although there is an appeal filed by the former advocates; leave is necessary so that counsel on record can properly file a memorandum reflecting the instructions from the Applicant.

Analysis and Determination

16. I have considered the Application is that and the following are the issues for determination identified by the Court: -
 - i. Whether the Court should exercise its discretion and grant the Applicant leave to appeal out of time
 - ii. Whether the Court can issue stay of execution of the judgement and decree of the Court in Civil Case No. E160 of 2021 pending the intended appeal.
 - iii. Costs
17. Under Section 79G of the *Civil Procedure Act* stipulates 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 a good and sufficient cause for not filing the appeal in time.
18. Further, Section 95 of the *Civil Procedure Act* provides that: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
19. The take away from the wording of Sections 79G and 95 of the *Civil Procedure Act* is that extending or enlarging time is within the jurisdiction and discretion of this Court but before this Court can exercise its discretion to extend the time to appeal, the Applicant has to convince this Court that he has a good and sufficient reason for filing the appeal out of time.



20. The principles applicable were enunciated by the Supreme Court in the case of Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] KESC 12 (KLR) stated *inter alia* that: -

“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 under-lying principles that a Court should consider in exercise of such discretion: 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; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; Whether there will be any prejudice suffered by the respondents if the extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time”

21. The discretion to extend time to appeal is a statutory provision and an instrument of equity. For the Court to afford a party such a privilege the party has to do equity.
22. This Application was filed about 5 months after entry of judgement. The reason the Applicant afforded the Court to lay basis that he was not to blame for the delay was that he was not aware that an appeal was filed by the advocates that had conduct of the Trial Court case, that he found out that another appeal had been filed when the Respondent served him with his Replying Affidavit. He also averred that he was not aware of the decision of the insurance to not settle the full amount when auctioneers attached his property.
23. The Respondent argued that the Appellant had already filed an appeal and an application for stay pending appeal and therefore the Application was an abuse of Court process and a concealment of facts.
24. The Court on 14th November, called for Civil Appeal No. E133 of 2024 and noted that the only document on record was the Memorandum of Appeal dated and filed on 11th June, 2024 filed by the firm of Sheth Wathigo & Co. Advocates. The Court also noted that there were no proceeding and that there was no interlocutory Application pending appeal nor a record of appeal on file. The said the firm did indeed file an appeal but did not prosecute it further.
25. A delay of five months is considered inordinate but by the reason given by the Applicant the insurance and their lawyers are acting individually and opted to settle part of the amount leaving the Applicant with the balance which he contends is an amount that is too high. Further that the said amount is subject to appeal based on the draft grounds of appeal.
26. The Applicant has not availed any information to prove that the insurance would only cover the said Kshs. 3000,000 as alleged or that it was not aware that the insurance lawyers had entered into a consent or were acting without informing him. There is however no contrary information to rebut those allegations. The Court is also alive to the provisions of Section 5 (b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act where it cannot be held liable for claims in excess of three of million.
27. I have perused the intended Memorandum of Appeal and the judgment of the Trial Court and noted that the appeal does raise pertinent issues of law. I also take cognizant of the fact that; an appeal does not necessarily have to succeed but is arguable. As such, the appeal can be said to be arguable in the circumstances. The firm of Sheth Wathigo Advocates represented the interests of its client the Applicant has sought to appeal individually as he claims he will suffer substantially.



28. In my view, having been abandoned by the insurance lawyers despite agreeing on an approach for appeal and the insurance going ahead to intimate a settlement without informing the Applicant. I am of the view that the Appellant should have his day in Court.
29. On whether the Court can grant an order for stay of execution pending appeal, under Order 42 Rule 6 (2) of the Civil Procedure Rules, there are certain requirements that a party must convince the Court that in order for the Court to grant an order for stay of execution Order 42 Rule 6 of the Civil Procedure Rules stipulates: -
- (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 1st 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.
30. The Applicant should therefore satisfy the Court that: substantial loss may result to him unless the order is made; that the application has been made without unreasonable delay; and that he has given such security for due performance of such decree.

Substantial Loss

31. The Applicant has submitted and averred that he found out that the insurance company opted to settle part of the decretal amount. He submitted that the difference of Kshs 2,807,715 of the decretal amount is huge for the Applicant to settle and he stands to suffer substantial loss if stay is not extended as his property has been attached for sale. Further that the economic status of the Respondent is unknown and has not adduced any evidence to show he would be able to reimburse the amount.
32. In James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, the Court held that;
- “the fear of execution cannot be considered as substantial loss since execution is a lawful process. The Applicant being afraid that the Respondent will proceed with execution is not an arguable reason for substantial loss”.
33. The decreed amount is yet to be paid. To add on to the prejudice of the Respondent, despite the insurance company through its lawyers entering into consent for payment, the Respondent is yet to enjoy even part of the decretal amount yet the appeal is partial. Claiming that the Applicant is a man of straw and would not be able to refund the money should the appeal succeed is also not a proper ground for substantial loss. Financial ability of lack thereof is not the sole reason why a decree holder should be denied fruits of his judgment.
34. Be that as it may the sum of Kshs. 5,807,715 is a substantial amount to be borne by one individual having that the insurance company is yet to settle the consented amount of Kshs. 3000,000. Further, if the appeal does go through, recovering that amount from the estate of the deceased would be an uphill task for the Applicant. The idea is not to cause unnecessary hardships to either party.
35. In the case of G. N. Muema P/A (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bisbar & Another [2018] eKLR, the Court stated as follows: -
- “It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the



decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

Undue Delay

36. On the second limb of delay, the same has been found to be convincingly explained as stated above and hence no need to belabour on it.

Security

37. That an order of deposit of security is necessary where a judgement debtor has preferred an appeal against the judgment. The Applicant has averred that he is ready to abide by the decision of the Court in terms of security for due performance.

38. The issue of security being discretionary, it is always good for the Applicant to provide security but also intimating willingness to abide by the decision of the Court is also allowed being that even if the Applicant proposes a form of security the Court can still decline it.

39. The Court in *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR, stated 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. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

40. In considering the Applicants’ Right of Appeal and his rights to a fair trial under a competent Court of law under Article 50 (1) of the *Constitution* I have to also taken into account the Respondent’s right under Article 159 (2)(d) of the *Constitution* that justice delayed is justice denied. I have to also weighed, based on the circumstances of the case, which party has the likelihood to suffer a greater prejudice.

41. I am of the considered view that the Applicant will suffer injustice more if he lacked an opportunity to ventilate the Appeal on merit or granted order for stay of execution pending Appeal. Nonetheless, the Respondent should not suffer prejudice without remedy.

42. As the Applicant is only appealing on part of the judgment, I see no reason why the Applicant should not receive the amount that is not in dispute that is the special damages in the sum of Kshs. 184,000 less 10% contribution. See *Joseph Mutuku Ndavi v Zipporah Syombua Mwangangi* [2021] eKLR.

43. With the foregoing in mind, the Notice of Motion dated 17th October, 2024 is allowed on the following conditions:

- a. That leave is hereby granted to the Applicant to file an Appeal out of time.
- b. Execution of the judgment, decree and all consequential orders arising from Nakuru Chief Magistrate Court Civil Case No. E160 of 2021 are hereby stayed pending the hearing and determination of this Appeal.
- c. The Applicant to deposit the sum of Kshs. 2,500,000 in an interest-earning joint account in the names of both advocates within sixty (60) days of this Ruling.



- d. Special damages in sum of Kshs 165,000 shall forthwith be released to the Respondent's counsel for onward transmission to the Respondent within sixty (60) days hereof.
- e. The Respondent shall have thrown away costs of this Application assessed to the tune of Kshs. 20,000 to be paid within sixty (60) days of this Ruling.
- f. In the event of failure to comply with Order (c), (d) and (e) above, the stay of execution orders shall automatically be vacated and the Respondent shall be at liberty to proceed with execution.
- g. The Applicant shall file the Record of Appeal within (60) sixty days of this Ruling.

It is so Ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 19TH DAY OF MARCH, 2025

MOHOCHI S.M

JUDGE

