



REPUBLIC OF KENYA



KENYA LAW

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**Karora & another v Savai (Civil Miscellaneous E065 of 2024)
[2025] KEHC 2402 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2402 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL MISCELLANEOUS E065 OF 2024
JK SERGON, J
MARCH 13, 2025**

BETWEEN

PETER KARORA 1ST APPLICANT

JOSEPHAT MWANGI NGUTHI 2ND APPLICANT

AND

PERIS MINAYO SAVAI RESPONDENT

RULING

1. The application coming up for determination is a notice of motion dated 11th November, 2024 seeking the following orders;
 - (i) Spent
 - (ii) That the Applicants herein be granted leave to appeal out of time against the whole judgment of Honourable Japhet Bii (SRM) delivered on the 26th day of September 2024 in Kericho Chief Magistrate's Civil Suit No. 376 of 2016.
 - (iii) That the draft Memorandum of Appeal annexed to the application be deemed as duly filed and served upon payment of the requisite fees.
 - (iv) Spent.
 - (v) Spent.
 - (vi) That this Honourable Court be pleased to grant a stay of execution of the judgment/decree in Kericho CMCC number 376 of 2016 delivered on the 26th September 2024, pending the hearing and full determination of the intended appeal.
 - (vii) That this Honourable Court be pleased to grant a stay of proceedings in Milimani CMCC NO. 5553 Of 2024 Peris Minayo Savia Versus Directline Assurance, pending the hearing and



determination of the intended appeal. (viii) THAT upon grant of prayers No. ii and iii above, this Honourable Court be pleased to order that the Applicants do provide sufficient security in the form of a suitable Bank Guarantee from a reputable financial institution to secure the Judgment herein for Kshs. 262,430/= pending hearing and determination of this appeal.

- (ix) That costs of this application to abide by the outcome of the appeal.
2. The application is based on grounds on the face of it and the supporting affidavit of Peter Karora, the insured of motor vehicle registration no. KCF 836G which forms the subject matter of the Application herein with the authority of the 2nd Applicant.
 3. He avers that under the principle of subrogation his insurer Directline Insurance instructed the firm of Kimondo Gachoka & Company Advocates to enter appearance and defend him in Kericho CMCC number 376 of 2016, which they did.
 4. He avers that he was advised by his advocates on record M/S Kimondo Gachoka & Company Advocates that on 26th September 2024, in their absence, the trial court, Honourable Japhet Bii delivered judgment in Kericho Cmcc number 376 of 2016, Peris Minayo Savia Versus Peter Karora and Josephat Mwangi Nguthi, in favour of the respondent for Kshs. 250,000/= as special damages and Kshs. 12,430/= as general damages and respectively.
 5. He avers that the judgment was delivered in their absence but counsel for the respondent never served his advocates on record with a notice of entry of judgement.
 6. He avers that the advocates for the respondent never served the advocates for the applicants with their bill of costs and neither did they serve them with a draft decree for their approval or disapproval before proceeding with execution vide the Declaratory suit Milimani CMCC NO. 5553 Of 2024 Peris Minayo Savia versus Directline Assurance.
 7. He avers that his advocates only became aware that the judgment in Kericho CMCC 376 of 2016 had been delivered when the respondent served the Applicants' insurer i.e. Directline Assurance Company limited with a declaratory suit being Milimani CMCC NO. 5553 Of 2024 Peris Minayo Savia Versus Directline Assurance.
 8. He avers that he and the co- applicant are aggrieved by the judgment on liability and quantum and are desirous of challenging the decision of the trial court however the time within which to file an appeal has lapsed.
 9. He avers that the failure of filing the Memorandum of appeal within the statutory period was occasioned by the respondent who did not serve the applicants with the notice of entry of judgment, notice of assessment nor draft decree as required by law.
 10. He avers that a mistake of an advocate should not be visited upon an innocent litigant
 11. He avers that the intended appeal, has triable issues with high chances of success.
 12. He avers that being dissatisfied with the judgment delivered on 26th September 2024, he wishes to be afforded a chance to canvas the intended appeal on merit on account of the issues raised in the annexed draft memorandum of appeal, which appeal has high chances of success.
 13. He avers that the respondent has since commenced execution vide Milimani CMCC NO. 5553 Of 2024 Peris Minayo Savia Versus Directline Assurance, which execution will cause substantial loss and damage.
 14. He avers that it is a trite law that an appeal does not operate as a stay of execution.



15. He avers that the applicants are willing and ready to abide by the conditions for stay of execution pending the intended appeal whilst noting that the respondent's financial stability is unknown and he is unlikely to refund the decretal sums after execution, in the event the intended appeal succeeds.
16. He avers that the instant application is therefore necessary to preserve their property pending the hearing and determination of the instant application and the intended appeal, the execution already commenced by the respondent will render the intended appeal nugatory and an academic exercise.
17. He avers that the Respondent will not be prejudiced as the Applicants are ready, willing and able to furnish security by providing a bank guarantee as security for a sum of Kshs. 262,430/=.
18. He avers that unless this Application is heard and stay granted, the respondent will proceed with execution vide Milimani CMCC NO. 5553 Of 2024 Peris Minayo Savia Versus Directline Assurance thus rendering this Application together with the intended appeal nugatory and greatly prejudicing the Applicants.
19. The Respondent filed grounds of opposition in response to the applicants' application dated the 17th day of February 2025, based on the following grounds: -
 - a. The Application is incompetent, misconceived and otherwise an abuse of the court process and the Respondent shall at the first instance apply for its dismissal.
 - b. The application is meant to defeat the overriding objective of the court as per the provisions of Sections 1A & B of the Civil Procedure Act.
 - c. The applicant was in court when dates for delivery of Judgement were issued by the court.
 - d. The trial court's Judgement was posted on the CTS platform soon after delivery and the applicant was further notified of the delivery of judgement
 - e. The applicant was served with the respondent's request for Decree and Draft Decree.
 - f. No reason or no good reason has been given for the delay in filing the intended Appeal within the prescribed time or the delay in the making of the application herein. There has been inordinate delay herein and no plausible explanation has been given for the inordinate delay herein
 - g. That execution has been done and the application has been overtaken by events and therefore the application is intended to frustrate and defeat the execution process.
 - h. The applicant has not satisfied the conditions set down under Order 42 Rule 6(2) of the Civil Procedure Rules 2010 and in particular on substantial loss.
 - i. The Applicants have not shown how the intended appeal (if any) will be rendered nugatory if the orders of stay are not granted.
 - j. The Applicant has not shown that their intended appeal has high chances of success.
 - k. The Respondent stands to suffer prejudice if this application is granted. That the application is not merited and is made in bad faith and only meant to deny the respondent the enjoyment of the fruits of the judgment and decree. The respondent is not a man of straw.
 - m. The annexed guarantee form is for the year 2023 and does not meet the threshold of security as per the provisions of the law.



- n. Without prejudice to the foregoing, in terms of security, the Applicants should deposit the decretal amount in an interest earning account inclusive of cost and interest in any event within set time frames within which the Applicants should comply.
- o. Without prejudice to the foregoing and in the interest of justice leave to appeal out of time can be granted with a condition on time frame and the applicant does pay the respondent's costs.
20. The matter came up for inter partes hearing, Ms. Lydia Ongwacho learned counsel for the stated applicants stated that they served the application upon the respondent, however, there was no response on the part of the respondent. There was no representation on the part of the respondent.
21. 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, grant stay execution pending appeal and a stay of the proceedings of the declaratory suit in Milimani CMCC NO. 5553 Of 2024 Peris Minayo Savia Versus Directline Assurance, pending the hearing and determination of the intended appeal.
22. 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." Regarding the length of delay, it is evident from the pleadings on record herein that the judgement that the applicant is seeking to appeal against was delivered on 26th September 2024. The instant application was filed on the 11th November, 2024, occasioning a delay slightly under a month and the applicant submitted that the delay in lodging the appeal was occasioned by failure of the advocate of the respondent to inform the advocate of the applicants of the said judgment and therefore the mistake of an advocate should not be visited upon an innocent client. In the circumstances, I am inclined to allow the applicant leave to file the intended appeal noting that the delay is not inordinate.
23. On the issue as to whether to grant a stay of execution, the judgment was delivered on 26th September, 2024 while the present application was filed on 11th November, 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.” This court notes that the instant application was not filed timeously, this notwithstanding, on one part, the applicant contended that they would suffer substantial loss and damage if stay is not granted and that the intended appeal will be rendered nugatory and they were willing to offer a bank guarantee of the entire decretal amount as security. On the other part, the respondent contended that a stay of execution is conditional and therefore the applicant should be ordered to deposit the entire decretal sum in a joint interest bearing account in the name of the counsel on record for both parties within specific timelines. 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.

24. On the issue as to whether to grant a stay of the proceedings of the declaratory suit in Milimani CMCC NO. 5553 Of 2024 Peris Minayo Savia Versus Directline Assurance, pending the hearing and determination of the intended appeal. In the case of Kenya Wildlife Service Vs James Mutembei (2019) eKLR, Gikonyo J held that: “Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on the right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent.” Thus, for this court to stay proceedings pending in another court, there have to be sufficient grounds demonstrated by an Applicant to justify such a decision. In the present case, in my view, the Applicants have not shown or demonstrated any such sufficient grounds for stay of proceedings in the magistrates’ court. I therefore decline to stay the proceedings in Milimani CMCC NO. 5553 Of 2024 Peris Minayo Savia Versus Directline Assurance.
25. I find that the applicant is entitled to pursue the appeal. I hereby partially allow the notice of motion dated 11th November, 2024 in the following terms:-
- (i) Leave is granted to the applicant to file appeal out of time against the judgment delivered in Kericho CMCC number 376 of 2016 within 14 days from the date hereof.
 - (ii) An order for stay of execution of the judgment/decreet in Kericho CMCC number 376 of 2016 pending the hearing and determination of the intended appeal is granted on condition that the applicant deposits the entire decretal sum of Kshs. 262,430/= in an interest earning account in the names of both advocates appearing in this matter within forty five (45) days hereof. In default the order of stay shall automatically lapse.
 - (iii) Costs to abide in the outcome of the appeal.

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

J.K. SERGON

JUDGE

In the Presence of:

C/Assistant – Rutoh

Miss Obaga for Respondent

Ongwacho for Applicant

