



REPUBLIC OF KENYA



KENYA LAW
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Kenya Orient Insurance Limited v Nderi (Miscellaneous Civil Application E1039 of 2024) [2025] KEHC 4782 (KLR) (Civ) (6 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4782 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CIVIL APPLICATION E1039 OF 2024

TW CHERERE, J

MARCH 6, 2025

BETWEEN

KENYA ORIENT INSURANCE LIMITED APPLICANT

AND

PETER KIRIMI NDERI RESPONDENT

RULING

Introduction

1. The Respondent filed Milimani CMCC E7074 seeking a declaration the applicant was obliged to compensate him based on a contract of insurance.
2. By judgment dated 26th July 2024, the applicant was ordered to compensate the Respondent for the damages to his vehicle and further pay him KES. 3000 per day from the date of the accident until payment in full.
3. Following the judgment, the Respondent instructed auctioneers who have proclaimed the Applicant's assets in execution of the decree.
4. The Applicant, Kenya Orient Insurance Limited, has now approached this Court vide a Notice of Motion dated 21st November 2024, seeking the following orders:
 - a. Leave to file an appeal out of time against the judgment delivered on 26th July 2024 in Milimani CMCC No. E7074 of 2021
 - b. Stay of execution of the said judgment pending the hearing and determination of the intended appeal.



5. The application is supported by the affidavit of Catherine Kendi, sworn on 20th November, 2024, who avers that the delay in filing the appeal was inadvertent and arose due to a breakdown in communication between the Applicant and its advocates. The Applicant further argues that:
 - a) Unless stay of execution is granted, the Respondent may proceed with execution, exposing it to substantial loss
 - b) The financial capacity of the Respondent is unknown, making it difficult to recover the decretal sum if the appeal succeeds c) The Applicant is willing to provide security for the due performance of the decree.
6. The Respondent opposes the application through his Replying Affidavit sworn on 13th December 2024, contending that:
 - a. The four-month delay in filing the appeal is unexplained and unjustified.
 - b. The draft Memorandum of Appeal does not raise arguable grounds.
 - c. The Applicant has not demonstrated substantial loss or proved that the Respondent lacks financial capacity to refund the decretal amount.
 - d. The Applicant has not specified any security for the due performance of the decree.

Issues for Determination

7. I have considered the application and identified the following issues for determination.
 - a. Whether the Applicant has met the threshold for leave to file an appeal out of time
 - b. Whether the Applicant has satisfied the conditions for stay of execution under Order 42 Rule 6(2) of the Civil Procedure Rules.

Analysis and Determination

(a) Leave to Appeal Out of Time

8. Section 79G of the *Civil Procedure Act* provides that an appeal from a subordinate court to the High Court must be filed within 30 days from the date of the decree or order. However, the court has discretion to extend time where sufficient cause is shown.
9. In *Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, the Supreme Court held that:

“ 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 extension of time has the burden of laying a basis to the satisfaction of the court.”
10. The Respondent argues that the four-month delay has not been sufficiently explained. However, courts have held that a delay, though unexplained and not necessarily inordinate, is not fatal to an application for an extension of time.
11. In *Paul Njage Njeru v Kariya K Mugambi* [2021] KEHC 760 (KLR), the court allowed an appeal to be filed after one and a half years, noting that discretion should be exercised where an appeal raises arguable issues.



12. In the present case, while the Applicant has not fully explained the delay, the four-month period is not inordinate or excessively prejudicial to the Respondent. Further, the draft Memorandum of Appeal raises arguable issues concerning whether Respondent had breached the terms of the insurance policy, which merit consideration by this Court.

13. Consequently, I find that leave to file an appeal out of time is merited.

(b) Stay of Execution

14. The conditions for granting stay of execution are set out under Order 42 Rule 6(2) of the Civil Procedure Rules, which requires that an applicant must:

- a. Demonstrate substantial loss if stay is not granted.
- b. Apply without unreasonable delay
- c. Provide security for the due performance of the decree.
 - i. Substantial Loss

1. The Court of Appeal in *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR held that:

“Substantial loss is the cornerstone of the jurisdiction for granting stay. The applicant must establish that execution will create a state of affairs that will irreparably affect or negate the very essence of the appeal.”

16. The Applicant argues that the Respondent’s financial means are unknown, making it difficult to recover the decretal sum should the appeal succeed.

17. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR, the Court of Appeal held that:

“Once an applicant expresses doubt as to the respondent’s financial capability, the evidentiary burden shifts to the respondent to prove that he can refund the decretal sum if paid and the appeal succeeds.”

18. The Respondent has not provided any evidence to demonstrate his financial ability to refund the decretal sum. This raises a legitimate concern of substantial loss on the part of the Applicant.

i. Right to enjoy fruits of judgment

19. The Respondent contends that an appeal per se should not prevent him from enjoying the fruits of his judgment. In *Machira t/a Machira & Co. Advocates v East African Standard* [2002] eKLR, the Court held that:

“An appeal does not operate as an automatic stay, and the right of a successful litigant to enjoy the fruits of his judgment should not be taken away lightly.”

20. However, where substantial loss is demonstrated and the appeal is arguable, a stay should be granted to preserve the subject matter of the appeal.



i. Security for Due Performance

21. The Applicant has expressed willingness to provide security. In *Gianfranco Manenthi & Another v Africa Merchant Assurance Co. Ltd* [2019] eKLR, the court held that:

“Where security is ordered, the most appropriate measure is to direct the deposit of the decretal sum in a joint interest-earning account in the names of both advocates.”

22. To balance the interests of both parties, this Court finds that a stay of execution should be granted, subject to security being provided.

Conclusion

23. In light of the foregoing, I make the following orders:

- a. Leave to file an appeal out of time is granted. The Applicant shall file the Appeal within 14 days from the date of this ruling.
- b. Stay of execution is granted, subject to the Applicant depositing ½ of the decretal sum with the court within 30 days from the date of this ruling.
- c. In default of compliance with (a) and (b) above, the stay order shall automatically lapse
- d. Costs of this application shall abide by the outcome of the appeal.

DELIVERED AT NAIROBI THIS 06TH DAY OF MARCH 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Applicant - Ms. Muchomba for Munene Wambugu & Kiplagat Advocates

For Respondent - Mr. Muuo for P.K. Mbabu & Co. Advocates

