



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimani v Berebere (Civil Appeal E253 of 2024)  
[2025] KEHC 2637 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2637 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E253 OF 2024  
FN MUCHEMI, J  
MARCH 6, 2025**

**BETWEEN**

**ROBERT KIMANI ..... APPELLANT**

**AND**

**VERSITY BEREBERE ..... RESPONDENT**

**RULING**

**Brief Facts**

1. The application dated 26<sup>th</sup> September 2024 seeks for orders of stay of execution in respect of the judgment in Thika SCCCOMM No. E742 of 2023 delivered on 9<sup>th</sup> May 2024 pending the hearing and determination of the appeal. The applicant further seeks for leave to file his appeal out of time.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 3<sup>rd</sup> October 2024.

**Appellant's/Applicant's Case**

3. The applicant states that the judgment in Thika SCCCOMM No. E742 of 2023 was delivered on 9<sup>th</sup> May 2024 whereby the lower court awarded the respondent Kshs. 300,000/-. The applicant states that judgment was delivered in the absence of his counsel and himself. He further states that his counsel did not inform him of the outcome of the said judgment.
4. The applicant states that he knew of the judgment after more than twenty (20) days from the date its delivery. Upon learning of the existence of the said judgment, he instructed his advocates on record to file an appeal and an application for stay of execution.
5. The applicant states that it was on 13<sup>th</sup> September 2024 that he learnt that his advocates did not file an application for stay of execution or lodge an appeal. This was at the time he was served with a Notice to Show Cause in execution of the decree. The applicant thus avers that the delay in filing the appeal



was not intentional and was due to lapses on the part of his advocates who were duly instructed but did not take any steps to comply with instructions of their client.

6. The applicant states that he remains exposed to execution of the decree to which he has serious issues of law to raise so as the court can pronounce itself on appeal. He further argued that unless the court allows extension of time to file appeal, he shall be left without a remedy.
7. The applicant argues that his grounds of appeal are arguable. Among the grounds of appeal raised are issues of whether it is justiciable to enforce refund of monies exchanged during social and romantic relationships of persons when such a relationship breaks down.
8. The applicant avers that the application has been filed expeditiously and without any delay. The applicant further avers that no prejudice will be suffered by the respondent that cannot be compensated while the loss that may be caused to him would be monumental and with reparations in the event that the orders sought are denied.

### **The Respondent's Case**

9. The respondent avers that the instant application fails to prove salient principles of law to warrant issuance of the orders of stay of execution.
10. The respondent states that the appeal as per the memorandum of appeal dated 23<sup>rd</sup> September 2024 does not raise weighty issues of law and fact thus not arguable and cannot stand the test of law as it will be inexorably dismissed.
11. The respondent states that the trial court in awarding her Kshs. 300,000/- was fair. He further states that the issues arising from the grounds of appeal were satisfactorily addressed by the magistrate's court.
12. The respondent avers that execution is a lawful process that she intends to pursue against the applicant herein. Furthermore, the respondent argues that execution itself does not amount to substantial loss as it is a lawful process. The respondent further states that the applicant has not tendered any evidence to prove that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.
13. The respondent states that the applicant's averments on putting blame on his previous advocates M/s Kimani Wakimaa & Co. for failure to file an appeal or an application for stay of execution falls short of the evidentiary burden of proof in that the document annexed is wanting for lack of signature and stamp proof that instructions indeed were issued to the said firm.
14. The respondent states that the applicant has not shown that she is a woman of straw and thus unable to refund the said sums in the event the appeal succeeds. The respondent avers that she is an accomplished teacher and seasoned farmer owning a motor vehicle and properties within the country thus should the appeal succeed, she would seamlessly repay the decretal sum to the applicant.
15. The respondent avers that should the court be inclined to grant the applicant stay of execution, she urges the court to direct that the applicant pay the entire decretal sum of Kshs. 398,800/-.
16. The respondent states that the application is bad in law, an abuse of the court process and embarrassing and prejudicial to her.
17. The applicant has filed a Further Affidavit dated 6<sup>th</sup> November 2024 and states that execution by way of civil jail will cause irreparable harm on him considering that the exchange of monies between him and the respondent was never anywhere near commercial transactions as they were in a romantic relationship.



18. The applicant further states that any execution will be extremely prejudicial to him especially in light of the nature of the intended appeal he has filed which will result into a punishment for a failed romantic relationship rather than genuine execution of the decree, in any event once the court renders itself on the intended appeal, the respondent will be at liberty to execute her decree.
19. The applicant avers that he is a teacher by profession and he will take up a loan facility to pay up the decretal sum at the conclusion of the appeal and therefore the respondent will not be prejudiced in any way if a stay of execution is allowed.
20. The applicant states that his intended appeal is meritorious and raises pertinent legal issues on questions surrounding the legal actionability of a commercial nature concerning gifts and monies exchanged in the course of a romantic relationship gone sour as captured in the judgment.
21. The applicant avers that his instructions to his previous counsel to lodge the appeal in time was well communicated to the said advocates including payment of a deposit of legal fees and the failure to lodge the same was extremely prejudicial to him and the failure by his advocates should not be attributed to him as he has always been keen to appeal the judgment of the small claims court on very cogent legal grounds.
22. Parties disposed of the application by way of written submissions.

### **The Applicant's Submissions**

23. The applicant relies on Section 79G of the *Civil Procedure Act* and the case of *Thuita Mwangi vs Kenya Airways* [2003] eKLR and submits that mistakes of counsel cannot and should not be visited on a helpless litigant who has taken time to do all that needs to be done in the matter. The applicant submits that he instructed his advocates on record to file an appeal less than 14 days after the date of judgment being on 25/5/2024. The applicant argues that the delay was for three months and thus the length of delay is excusable and not prejudicial to any party.
24. The applicant further submits that the delay was occasioned by factors beyond his control despite having done his part in instructing and keeping in touch of with his counsel.
25. The applicant submits that the appeal has overwhelming chances of success as the analysis of the judgment points to existence of a romantic affair before the bitter breakup. Thus gifts exchanged during the romantic affair cannot give rise to commercial claims afterwards.
26. The applicant relies on the case of *Kenya Shell Limited vs Kibiru* [1986] KLR 40 and submits that he has been threatened with civil jail and stands not only to lose his liberty but his teaching job stands threatened.
27. The applicant further refers to the case of *Jaber Mohsen Ali & Another vs Priscillah Boit & Another* [2012] eKLR and submits that the application was filed without undue delay as it was filed immediately upon him learning of the commencement of execution having had a false belief all along that the application was made prior and that the appeal was filed prior.
28. Relying on the case of *Ndubiu Gitabi vs Warugongo* [1988] KLR 621, the applicant submits that the court should direct that he gives an undertaking on payment of the decretal sum in the event the appeal fails.
29. The applicant refers to the cases of *Global Tours & Travels Ltd Nairobi Winding up Cause No. 43 of 2000* and *Butt vs Rent Restriction Tribunal* (1982) KLR 417 and submits that stay ought to be granted so that an appeal may not be rendered nugatory should a decision be reversed.



## The Respondent's Submissions

30. The respondent relies on the cases of *Patriotic Guards Ltd vs James Kipchirchir Sambji* Civil Application No. 240 of 2016 (UR 192) and *Butt vs Rent Restriction Tribunal* [1982] KLR 417 and submits that the applicant's appeal has no chances of success as the applicant admitted to receiving the said Kshs. 300,000/- and therefore he ought to have reimbursed the same to the respondent. The respondent further refers to the cases of *Housing Finance Company of Kenya vs Sharok Kber Mohammed Ali Hirji & Another* (2015) eKLR; *Kenya Railways Corporation vs Edermann Properties Ltd* Civil Appeal No. Nai 176 of 2012 and *Ahmed Musa Ismael vs Kumba Ole Ntamorua & 4 Others* Civil Appeal No. Nai 256 of 2013 and submits that the applicant has failed to adduce even one arguable ground of appeal.
31. The applicant relies on the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2014] eKLR and submits that the applicant never mentioned substantial loss in his application dated 26<sup>th</sup> September 2024 and his further affidavit dated 6<sup>th</sup> November 2024. The applicant only mentioned the issue of substantial loss passively in his submissions and after the respondent raised the same in her replying affidavit. The respondent refers to the case of *Fibre Link Limited vs Star Television Production Limited* [2015] eKLR and submits that written submissions is not evidence and cannot be an avenue to adduce unsubstantiated evidence. Thus substantial loss having not been pleaded in the application should not be introduced at the submissions stage.
32. The respondent further submits that the applicant has only mentioned that his teaching job stands threatened should he be committed to civil jail. The respondent argues that those are merely uncorroborated assertions as no iota of evidence has been tabled to prove the same. The applicant ought to adduce documentary evidence before the court that not only is he a teacher but payment of the decretal sum will lead to collapse of his teaching job worse his teaching threatened.
33. The respondent refers to the case of *Mainkam Limited & Another vs Multichoice Kenya Limited* Civil Application No. 361 of 2019 (UR 316) and submits that should the appeal succeed, she would not have any difficulty in repaying back the decretal sum as she is an accomplished teacher, a seasoned farmer and she owns a motor vehicle and properties within the country. Relying on the case of *Equity Bank Ltd vs Taiga Adams Company Ltd* (no citation given), the respondent submits that the applicant has not shown that she is a person of straw that may not be able to repay the decretal sum in the event the appeal succeeds.
34. The respondent further relies on the cases of *Masisi Mwita vs Damaris Wanjiru Njeri* (2016) eKLR; *Hassan Guyo Wakalo vs Straman EA Ltd* (2013) eKLR and *Kenya Hotel Properties Ltd vs Willesden Properties Ltd* (no citation given) and submits that the applicant has failed to show that the appeal shall be rendered nugatory if the orders sought are not granted.
35. The respondent relies on the case of *Little Africa Kenya Limited vs Andrew Mwiti Jason* Civil Case No. 149 of 2011 and submits that the applicant ought to be condemned to pay costs.

## The Law

### Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;

36. Section 79G of the *Civil Procedure Act* states:-

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 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.

37. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs 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.

38. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should 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 on a case by 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.

39. Similarly in the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now 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 whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of 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.”

40. Applying the above principles to the present case, the judgment herein was delivered on 9<sup>th</sup> May 2024 and the applicant filed the current application on 26<sup>th</sup> September 2024. This is approximately three months and seventeen (17) days outside the time limited for filing an appeal. The applicant has attributed the delay in filing his appeal to his former advocates failing to lodge an appeal yet he



instructed them to do so within the stipulated time. The applicant urges this court not to visit the mistakes of his advocate to him.

41. Whereas it is true that mistakes of an advocate should not be visited on a litigant, it is also true that suits belong to the parties not their advocates. Thus where a litigant has instructed an advocate in a matter, he or she has an obligation to follow up on instructions given to ensure that they were executed and executed in good time. This principle was enunciated in the Court of Appeal in *Habo Agencies Limited vs Wilfred Odhiambo Musingo* (2015) eKLR where the court stated:-

It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.

42. Similarly in *Bi-Mach Engineers Limited vs James Kaboro Mwangi* (2011) eKLR, the court reiterated the duty of an applicant to follow up on instructions given to an advocate and expressed itself as follows:-

The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up on the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy.

43. The applicant has not demonstrated that he instructed his advocates to lodge an appeal. The applicant ought to have annexed correspondence or other documents to support his allegation. He only states that he instructed his advocates to lodge an appeal without explaining why the instructions were not complied with. Thus, it is evident that the applicant slept on his rights to lodge an appeal. It is therefore my considered view that the applicant has not given any plausible reasons for the delay in filing the appeal.

44. I have carefully perused the intended Memorandum of Appeal and the judgment of the lower court. It is evident that the appeal does not raise pertinent issues of law. As such, I find that the applicant has not established to the satisfaction of the court the justification to enlarged time to lodge his appeal.

#### **Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal**

45. 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*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-

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 to 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 orders set aside.
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 1<sup>st</sup> 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.

46. Thus, under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. 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.

47. Substantial loss was clearly explained in the case of [James Wangalwa & Another vs Agnes Naliaka Cheseto](#) [2012] eKLR:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

48. As argued by the respondent, the appellant did not plead substantial loss in his supporting affidavit. He only brought up the said issue in his submissions making it look like an afterthought. He said that the loss he is likely to suffer is loss of liberty if he is arrested and put in jail because his teaching job will be threatened.

49. 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 that execution shall irreparably affect him or will alter the status quo to its detriment and thus rendering the appeal nugatory. In the instant case, the applicant has not shown that he stands to suffer substantial loss. Thus, it is my considered view that the applicant has not demonstrated substantial loss which is a paramount requirement in an application of this nature.

#### **Has the application has been made without unreasonable delay**

50. Judgment was delivered on 9<sup>th</sup> May 2024 and the applicant filed the instant application on 26<sup>th</sup> September 2024. It took the applicant four (4) months and 17 days between the date of delivery of judgment to the time he filed the instant application. It is therefore my considered view that the delay of 4 months and 17 days is inordinate and inexcusable.

#### **Security of costs**

51. The purpose of security was explained in the case of [Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others](#) [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish



the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

52. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has not offered any form of security for the performance of the decree.
53. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”
54. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question that arises is whether there is just cause for depriving the respondent her right of enjoying her judgment.
55. I have perused the grounds of appeal and without going into the merits of the appeal, it is my considered view that the said grounds do not raise arguable points of law. It is trite law that appeals against judgments or rulings of the small claims court must only be on points law. This is provided for under Section 38 of the *Act*. This appeal has not raised issues of law and therefore, has no chances of success.
56. Accordingly, it is my considered view that the application dated 26<sup>th</sup> September 2024 lacks merit and is hereby dismissed with costs.
57. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 6<sup>TH</sup> DAY OF MARCH 2025.**

**F. MUCHEMI**

**JUDGE**

