



**Mwai & another v Njiru (Miscellaneous Civil Case E171 of 2024)
[2025] KEHC 2646 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL CASE E171 OF 2024
FN MUCHEMI, J
MARCH 6, 2025**

BETWEEN

JULIANA WAMBUI MWAI 1ST APPLICANT

RICHARD M WAMBUGU 2ND APPLICANT

AND

CAROLINE WAWIRA NJIRU RESPONDENT

RULING

Brief Facts

1. The application dated 7th November 2024 seeks for orders of leave to file an appeal out of time against the judgment in Thika Small Claims Court SCCC No. E559 of 2023 delivered on 26th September 2024. The applicants further seek for orders of stay of execution of the said judgment pending appeal.
2. The respondent opposed the application and filed a Replying Affidavit dated 14th November 2024.

Applicants' Case

3. The applicants state that judgment in Thika SCCC No. E559 of 2023 was delivered on 26th September 2024 where the trial court found them 100% liable and awarded the respondent Kshs. 326,390/- as general damages. Being aggrieved with the said judgment, the applicants are desirous to lodge an appeal against the said judgment but the statutory period within which to file an appeal already lapsed. The applicants aver that the decree is for a substantial sum of money and if paid to the respondent they are apprehensive that they will not be able to recover the whole sum.
4. The applicants state that there is an impending risk of sale of the 1st applicant's motor vehicle registration number KCE 076Y by the respondent which is the subject of the appeal, which will render the intended appeal nugatory. The applicants further state that unless the application is heard and



orders granted, the respondent will proceed to execute the decree rendering the appeal nugatory and prejudicing the 1st applicant.

5. The applicants aver that their insurer, Directline Assurance Company Limited is ready, willing and able to furnish the court with a bank guarantee from Family Bank as security to the court.
6. The applicants further aver that it is in the interest of fairness and justice that the entire decretal sum be secured through a bank guarantee without any partial payment/settlement as the intended appeal is primarily on the trial court's determination on the issue of quantum which determination is vehemently disputed. Furthermore, the applicants are apprehensive that if any part payments are ordered to be paid to the respondents as a condition for stay of execution, such payments will be utilized and alienated by the respondent and recovery of the same will be arduous in the event the appeal succeeds.
7. The applicants state that their intended appeal raises pertinent issues and has high chances of success. Further, the applicants aver that the application has been brought promptly and without unreasonable delay.

The Respondent's Case

8. The respondent states that the applicants have not made any admission that they were not aware when the trial court delivered its judgment on 26th September 2024 because the date of the delivery of the judgment was in the judiciary website. Furthermore, the applicants have admitted that they were represented by the firm of Kimondo Gachoka & Co. Advocates in the trial and they filed their defense and participated in the suit before the trial court. The applicants also admit that their advocates on record informed them on the contents of the judgment and therefore the applicants were all along aware of the judgment and its terms but chose not to appeal within time.
9. The respondent states that the applicants have failed to give any sufficient reason or reasonable explanation as to why they did not file their appeal within the stipulated time yet they were aware when the judgment was delivered since they participated in the case before the trial court.
10. The respondent further states that the applicants' advocates make no admission whether they have now received the judgment and date of such receipt, hence the filing of the application now, since if they have not yet received a copy of the judgment, they have no explanation why they did not file the appeal within the statutory timelines.
11. The respondent argues that extension of time is not a right of a party rather it is an equitable remedy that is only available to a deserving party at the discretion of the court.
12. The respondent states that the delay in bringing their appeal prejudices her and such prejudice cannot be compensated by way of costs for the reason that the cause of action arises out of a road traffic accident whereby she suffered physically and psychologically as well as incurred financial loss.
13. The respondent argues that the applicants have failed to satisfy the conditions for stay of execution and further that the applicants have not filed their appeal.
14. The respondent further argues that the applicants have only merely stated that they stand to suffer substantial loss but have failed to prove specifically details of such loss. The respondent states that if the court is inclined to grant stay, the court ought to direct the applicants to pay her half of the decretal sum and the other half deposited in a joint interest earning account in the name of the parties' advocates within strict timelines as the proposal by the applicants to offer a bank guarantee for the entire decretal



award is extremely unfair to her despite having successfully litigated her claim against the applicants in the lower court.

15. The respondent avers that the allegations that she will not be able to refund the decretal sum is demeaning and dismissive of her financial standing. The respondent argues that the burden is upon the applicants to prove that she will not be able to refund to them any sums paid in satisfaction of the decree. Furthermore, the respondent states that the applicants averments that her means are unknown is not enough to shift the burden on her to swear an affidavit of means.
16. The respondent states that having been the successful party at the trial court, she is entitled to the fruits of the judgment and ought not to be prevented from doing so on bare averments. The respondent avers that the applicants have not offered any material to show that they will suffer any prejudice if their application for leave is declined whereas she is in a continued state of suffering mental, physical and economic prejudice if the application is allowed.
17. Directions were issued that the application be canvassed by way of written submissions and from the record only the respondent complied by filing her submissions on 23rd January 2025. The applicants on the other hand had not filed their submissions by the time of writing this ruling.

The Respondent's Submissions

18. The respondent refers to Section 79G of the *Civil Procedure Act* and the case of Patel vs Waweru & 2 Others [2003] KLR 361 and submits that the applicants have failed to give sufficient reasons why they did not file their appeal in time having participated in the lower court's proceedings until the date of delivery of judgment on 26th September 2024. Further the applicants were represented by their advocates at the lower court and the date of delivery of the judgment was also posted in the judiciary website.
19. The respondent submits that the lower court granted thirty days stay of execution of the judgment to the applicants to file their appeal which time the applicants ignored and deliberately chose not to appeal within the stipulated timelines even after being in full knowledge of the judgment. The respondent further submits that a notice of entry of the judgment was also served upon the applicants on 1st October 2024 and the applicants do not dispute in their application the fact that they were in knowledge of the judgment delivered.
20. The respondent submits that the prayer for extension of time is moot and an afterthought as it was made after she initiated execution proceedings and the applicants received service of warrants of attachment of moveable property and proclamation notices dated 5th November 2024.
21. The respondent refers to the case of Mombasa County Government vs Kenya Ferry Services & Another (2019) eKLR and submits that the prayer for extension of time is not a right of a party but rather it is an equitable remedy that is only available to a deserving party at the discretion of the court. The respondent argues that the court should not grant leave to the applicants to file their appeal out of time as their inordinate delay prejudices her and the applicants have failed to give sufficient reasons for their delay in filing the appeal within the stipulated timelines.
22. The respondent relies on Order 42 Rule 6 of the Civil Procedure Rules and the cases of Vishram Ravji Halai vs Thornton Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR and Samvir Trustee Limited vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997 and submits that stay is incapable of being granted as in the present case there is no appeal filed and the applicants only intend to file an appeal yet leave to file the appeal is not automatic.



23. The respondent relies on the case of Kenya Shell Limited vs Kibiru [1986] KLR 410 and argues that it is she who stands to suffer substantial loss since she will be denied to enjoy the fruits of the judgment. Furthermore, the applicants have not provided any sufficient reason why they failed to file the appeal within the stipulated timelines but rather waited for her to commence execution and then rushed to court to seek leave to appeal out of time.
24. The respondent argues that in the event the court is inclined to grant the stay orders, the court should direct the applicants to pay half the decretal sum to her and the other half deposited in a joint interest earning account in the name of the parties' advocates within strict timelines.
25. The respondent requests the court to reject the applicants' proposal to offer a bank guarantee for the entire decretal award as she has successfully litigated her claim against them in the lower court.

The Law

Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;

26. 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.

27. 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.
28. 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.
29. 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.”
30. Applying the above principles to the present case, the judgment herein was delivered on 26th September 2024 and the applicant filed the current application on 11th November 2024. This is approximately sixteen (16) days outside the time limited for filing an appeal. The applicants have not given any reasons for their delay.
31. On perusal of the record, the applicants were represented by the firm of Kimondo Gachoka & Co. Advocates to defend them in the suit Thika Small Claims Court SCCC No. E559 of 2023. The said advocates filed a defence and defended their interests in the lower court. The date of judgment was put up in the judiciary website and thus the applicants were aware of the date of judgment. Notably, they have not denied such fact. The applicants have admitted in their affidavit that their advocates on record informed them that judgment was delivered on 26th September 2024 and the particulars of the judgment. Thus, the applicants and their counsel were aware of the contents of judgment. Furthermore, the trial court granted the applicants stay of execution for 30 days. However from the record, the applicants did not file any appeal during that period. Furthermore, a notice of entry of judgment was served by the respondent to the applicants on 1st October 2024. Evidently, the applicants have not given any reasons as to why they did not file their appeal within the statutory time. Although the delay of 16 days may not be inordinate, but in the instant case, the applicants have not given any plausible explanation on the reasons of the delay.
32. I have further perused the draft Memorandum of Appeal and noted the grounds of appeal raise points of law which are arguable. It is noted that the applicants have not annexed a copy of the judgment to give the court an opportunity to peruse it and appreciate the trial court’s finding. Thus, without delving into the merits of the appeal, it is my view, that the intended appeal arguable. Accordingly, I find that the applicants have not established to the satisfaction of the court that time ought to be enlarged to enable them file their appeal.

Whether the applicants have satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

33. 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 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.
34. 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.
35. 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.
36. The applicants in their affidavit argue that should the respondent proceed with execution and the appeal is successful, they may not recover the same from the respondent.
37. 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 how execution shall irreparably affect him or will alter the status quo to its detriment therefore rendering the appeal nugatory. In the instant case, the applicants have shown that they do not know the respondent’s financial capabilities and that they may not recover the said amount from the respondent in the event the appeal succeeds. The evidentiary burden at that point shifted to the respondent to show that she is a person of means and would be able to settle the decretal sum should the appeal succeed. The respondent in this case failed to do so. Thus, it is my considered view that the applicants have demonstrated the substantial loss they stand to suffer.



Has the application has been made without unreasonable delay

38. Judgment was delivered on 26th September 2024 and the applicants filed the instant application on 11th November 2024. The trial court further granted stay of execution for 30 days. As such, the application was filed timeously.

Security of costs

39. 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.

40. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicants have stated that their insurer Directline Assurance Company Limited is ready and willing to furnish the court with a bank guarantee from Family Bank as security. Having perused the bank guarantee as annexed by the applicants, I have noted that the bank guarantee is dated 6th July 2023 and is for a period of one year, which has since lapsed and therefore it is not viable. Furthermore, the bank guarantee is between Family Bank and the insurer, nowhere does it mention the applicants. Moreover, the same is not fully executed. That notwithstanding, it is my considered view that a bank guarantee is not proof of money.

41. 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.”

42. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondent her right of enjoying her judgment. On the grounds of appeal, the applicant has referred to points of law which hopefully will be ventilated during the hearing of the appeal.

43. From the foregoing, the applicant has met the threshold of granting stay of execution pending appeal. Accordingly, the application dated 7th November 2024 is merited and is hereby allowed in the following terms: -



- a. That the applicant has 14 days leave to file his appeal and serve the memorandum upon the respondent.
 - b. That stay pending filing of the appeal is hereby granted on interim basis to be confirmed upon filing of the appeal in compliance with Order 42 Rule 60 of Civil Procedure Rules.
 - c. That mention to confirm filing of the appeal be on 02/04/2025.
44. The respondent shall have the costs of this application.
45. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 6TH DAY OF MARCH 2025.

F. MUCHEMI

JUDGE

