



**Ngeno & another v Koech (Civil Miscellaneous E070 of 2024)  
[2025] KEHC 2880 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2880 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL MISCELLANEOUS E070 OF 2024  
JK SERGON, J  
MARCH 13, 2025**

**BETWEEN**

**PAUL NGENO ..... 1<sup>ST</sup> APPLICANT**

**CAROLINE C. KORIR ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOHN K. KOECH ..... RESPONDENT**

**RULING**

1. The application coming up for determination is a notice of motion dated 2nd December, 2024 seeking the following orders;
  - (i) Spent.
  - (ii) That the Honorable Court do issue an order for extension of time to file the Applicants Memorandum of Appeal and Record of Appeal against the decision of the Chief Magistrate's Court at Kericho Civil Case No. 131 of 2021 by Hon. Fredrick Nyakundi (PM) which found the Applicants guilty of uttering defamatory words against the Respondents.
  - (iii) Spent.
  - (iv) That the Honorable Court do issue an order for stay of execution of judgement of the Chief Magistrate's Court at Kericho Civil Case No. 131 of 2021 by Hon. Fredrick Nyakundi (PM) and all consequential orders and Decree arising from the said judgement pending the Appeal.
  - (v) That this Honourable court allows the Applicants to surrender Land Title No. Kericho/ Kapsurer/3563 measuring approximately 0.30 Hectares, belonging to Reuben Kipchumba Rono as the guarantor and valued at Kenya Shillings Three Million (Ksh. 3,000,000/=), as security for the appeal if need be.



- (vi) That the cost of this Application be in the cause and any other orders That the Honorable Court may deem fit.
2. The application is based on grounds on the face of it and the supporting affidavit of Paul Ngeno, the 1st Applicant herein with the authority of the 2nd Applicant to swear the supporting affidavit.
  3. He avers That a judgment was entered in favour of the Respondent against the Applicants in Civil Case No. E 131 of 2021 by Hon. Fredrick Nyakundi (PM) on the 9th day of October 2024 and the Applicants were found guilty of uttering defamatory statements against the Respondent in the said judgment.
  4. He avers That the Respondent was awarded general damages of Ksh. 1,000,000/= aggravated and exemplary damages of Ksh. 300,000/= emotional distress of Ksh. 200,000/= and costs of the suit.
  5. He avers That the firm of lawyers on record for the Applicants after the judgment was delivered on the 9th day of October 2024 tried to trace the Applicants for instructions but failed to procure them vide their normal channels of communication as the Applicants had travelled and upon their return and/or being procured by their firm of advocates on record and issuing their counsel on record with proper instruction, the Applicants advocate on record drafted and sent a letter to the Executive Officer Chief Magistrate's Court at Kericho on the 31st day of October 2024 requesting for certified copy of proceedings, Certified copy of Judgment and Decree upon payment of requisite fees.
  6. He avers That on the 29th day of November 2024, the Applicants firm of Advocate in record paid for the certified copy of proceedings after the Applicants instructed the same and That they are yet to receive the certified copy of proceedings as prayed and paid for.
  7. He avers That the period which the Applicant was required to file the Memorandum and Record of Appeal has passed, the delay was because the Applicants had travelled and failed to give instructions to their firm of advocates in record and could not be procured through the normal channels of communication and That despite various efforts to trace the Applicants they could not be procured within the time set to file an appeal. He further avers That the delay was not deliberate and not informed of any ill will or to cause any prejudice to the Respondent.
  8. He avers That the Appeal has merit with a high probability of success and That no prejudice should be caused to the Respondent should the orders sought be allowed.
  9. He avers That they are old and poor with no source of employment nor title to their name hence the necessity of a guarantor since they come from a communal society where the residents are aware of the injustice occasioned to them thus they agreed to assist by surrendering Land Title No. Kericho/Kapsurer/3563 measuring approximately 0.30 Hectares, belonging to Reuben Kipchumba Ronoas the guarantor and valued at Kenya Shillings Three Million (Ksh. 3,000,000/=), as security for the appeal if need be and That they are open to a valuation of the above property to confirm the value of the said property.
  10. John K. Koech the Respondent filed a replying affidavit in response to the instant application.
  11. He avers That the said application is frivolous, unmerited and therefore the Honourable Court should dismiss it with costs.
  12. He avers That the applicants herein have not provided cogent reasons as to the delay to file their memorandum of appeal on time and the assertion That the Applicants had travelled is untenable. He avers That the delay to file the memorandum of appeal is inordinate and the reason advanced by the Applicants is inexcusable. The Applicants have not attached/annexed any travel documents in support



of their allegations if at all the Applicants had travelled outside the country or to any other destination in which they were unreachable.

13. He avers That the sole aim and purpose of the present application is to deny him the fruits of the judgment which was delivered by the Honourable Court in Kericho MCCC E131 of 2021 delivered by Hon Fredrick Nyakundi on the 9th day of October 2024.
14. He avers That the Applicants have proved to be indolent litigants undeserving of the orders sought and they continue with their conduct exhibited in the lower court suit MCCC E131 of 2021 where they failed to enter appearance despite being served with the Court process and they applied to set aside the judgment which had been entered by the Court.
15. He avers That the attached draft memorandum of Appeal does not raise any triable issues and the same is devoid of merit.
16. He avers That in the event the Honourable Court is inclined to award an order of stay and to allow the appeal, he urged the Court to uphold the general principle and standard That the decretal amount be deposited in a joint interest earning account in the name of Counsels for both parties.
17. He reiterated That there should be a proper security and the assertion That a third party wishes to tender a security for the appeal is untenable and the same stands to render the entire appeal as an academic exercise since he cannot execute against a third party who is a stranger to the suit in the event That the appeal fails.
18. He avers That the present application is a dilatory attempt by the Applicants to continue to forestall execution in relation to a judgment which was delivered in his favour and he stands to suffer prejudice from the continued infringement of his rights granted by the Court if the instant application is allowed.
19. He reiterated That the Applicants are engaging in delay tactics with intent of denying him the fruits of the judgment and therefore urges the Court to frown upon the same.
20. 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 and grant stay of execution pending appeal.
21. 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 9th October 2024. The instant application was filed on the 2nd December,



2024, occasioning a delay of over a month and the applicants submitted That the delay in lodging the appeal was occasioned by failure of the advocate to trace the applicants to inform the applicants of the contents of the said judgment and obtain further instructions as the applicants had travelled out of the country, they were therefore unreachable and the delays in procuring certified copies of the proceedings. In the circumstances, the delay notwithstanding, which this court finds is not inordinate, this court is inclined to grant an extension of time to file the Applicants Memorandum of Appeal and Record of Appeal against the decision of the Kericho Chief Magistrate's Court at Kericho Civil Case No. 131 of 2021.

22. On the issue as to whether to grant a stay of execution, the judgment was delivered on 9th October, 2024 while the present application was filed on 2nd December, 2024, over 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 surrender Land Title No. Kericho/Kapsurer/3563 measuring approximately 0.30 Hectares, belonging to one Reuben Kipchumba Ronoas the guarantor and valued at Kenya Shillings Three Million (Ksh. 3,000,000/=), as security for the appeal. On the other part, the respondent contended That the applicants have proved to be indolent litigants undeserving of the orders sought and they continue with their conduct exhibited in the lower court suit MCCC E131 of 2021 where they failed to enter appearance despite being served with the Court process and they applied to set aside the judgment which had been entered by the Court. The respondent further contended That the attached draft memorandum of Appeal does not raise any triable issues and the same is devoid of merit. The respondent was of the view That in the event this court is inclined to award an order of stay and to allow the appeal, he urged the Court to uphold the general principle and standard That the decretal amount be deposited in a joint interest earning account in the name of Counsels for both parties. The respondent was adamant That there should be a proper security and the assertion That a third party wishes to tender a security for the appeal is untenable and the same stands to render the entire appeal as an academic exercise since he cannot execute against a third party who is a stranger to the suit in the event That the appeal fails.
23. 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 conditional stay of execution as he ventilates his intended appeal. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR Musyoka J. held 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.”
24. I hereby allow the notice of motion dated 2nd December, 2024 in the following terms:-



- (i) Leave is granted to the applicant to file a memorandum of appeal and record of appeal against the judgment delivered in Kericho Chief Magistrate's Court at Kericho Civil Case No. 131 of 2021 within fourteen (14) days hereof.
- (ii) An order for stay of execution of the judgment/decreet in Kericho Chief Magistrate's Court at Kericho Civil Case No. 131 of 2021 pending the hearing and determination of the intended appeal is granted on condition That the Applicant deposits half the decretal sum of Kshs.750,000/= in an interest earning account in the joint 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.**

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**J.K. SERGON**

**JUDGE**

In the Presence of:-

C/Assistant – Rutoh

Moturi for Applicant

Kirui for Respondent

