



**Directline Assurance Company Ltd v Njenga (Miscellaneous Application
E135 of 2024) [2025] KEHC 5133 (KLR) (11 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS APPLICATION E135 OF 2024**

RC RUTTO, J

APRIL 11, 2025

BETWEEN

DIRECTLINE ASSURANCE COMPANY LTD APPELLANT

AND

CHARLES NJAU NJENGA RESPONDENT

RULING

1. Before this court for determination is a Notice of Motion Application dated 28th August 2024 seeking leave to appeal out of time against the judgment in Thika SCCC No. E048 of 2024 delivered on 21/06/2024 and an order to stay execution of the judgment and Warrants of Attachment dated 22/08/2024 pending hearing and determination of the Applicant's intended appeal.
2. The Application is based on the following grounds: that the subordinate court in its judgment dated 21st June 2024 declared the Appellant liable to satisfy the judgment in Thika SCCC E308 of 2023 (the primary suit); that the Appellant did not have an existing insurance policy for Motor Vehicle Registration Number KCE 839P; that under Section 10(1) and (4) of the *Insurance (Motor Vehicle Third Party Risks) Act*, the Appellant is only obligated to satisfy judgments entered against its insured; that the intended appeal indeed is time barred, and execution proceedings have been initiated; that the Appellant stands to suffer irreparable loss if orders for a stay of execution are not granted.
3. The Respondent opposed the Application by filing an unsworn Replying Affidavit. In summary, the Respondent stated that the Applicant is the judgment debtor in Thika SCCC E048 of 2024, a declaratory suit arising from the primary suit, Thika SCCC E308 of 2023, which was determined in his favor for a decretal sum of Kshs.236,666/=. The Respondent further stated that the investigation officer, as indicated in the police abstract, confirmed that the accident motor vehicle KCE 839P was insured by the Appellant under Policy No. 99XXXXXXXX TPO. Before filing Thika SCCC E308 of 2023, a demand letter and statutory notice were issued to the Applicant, and no objection was raised.



4. The Respondent also asserted that after judgment was delivered in Thika SCCC E308 of 2023, letters were copied to the Appellant, yet it did not raise any objection regarding its alleged lack of insurance coverage for the accident motor vehicle. Similarly, after the judgment in Thika SCCC E048 of 2024, letters were again copied to the Appellant, but it failed to contest the issue of insurance coverage. It was only after the Applicant was served with the warrant of attachment and sale that it sought to file an appeal, which the Respondent considers belated.
5. Pursuant to the directions issued by the Court, a stay of execution was granted pending the hearing and determination of this application and parties filed written submissions. The Applicant filed its submissions dated 20th November 2024, while the Respondent's submissions are dated 3rd December 2024.

Applicant's Submissions

6. The Applicant addressed two key issues: whether it should be granted leave to appeal out of time and whether there should be stay of execution of the judgment delivered on 21st June 2024 in the declaratory suit pending the hearing and determination of the intended appeal.
7. With regard to the first issue, whether it should be granted leave to appeal out of time, the Applicant relied on Section 79G of the *Civil Procedure Act* as well as the cases of *Mugo & Others v Wanjiru & Another* 1970 EA 482 and *Thuira Mwangi v Kenya Airways Limited* [2003] eKLR, to submit that the delay was not deliberate but rather due to legal and financial constraints facing it. The Applicant explained that it was embroiled in Milimani HCCOMMISC E470 of 2024, where the court ordered the freezing of its accounts, thereby preventing it from utilizing its funds for any transactions, including the payment of court and filing fees.
8. As to whether there should be stay of execution pending the hearing and determination of the intended appeal the Applicant relied on Order 42, Rule 6(1) of the *Civil Procedure Rules* and the cases of *Cooperative Bank of Kenya Limited v. Banking Insurance & Finance Union (Kenya)* [2015] eKLR and *Chris Munga N. Bichage v. Richard Nyagaka Tongi & 2 others* [2013] eKLR. The Applicant submitted that the intended appeal is arguable. The contentious issue being that the Applicant was not the insurer of Motor Vehicle Registration Number KCE 839P at the time of the alleged accident and, therefore, had no obligation to pay the decretal sum. The Applicant stated that despite defending the declaratory suit in Thika SCCC No. E048 of 2024 and denying the obligation to satisfy the judgment in the primary suit on the grounds that it was not the insurer of Motor Vehicle Registration Number KCE 839P, the court nonetheless proceeded to entered judgment in favor of the Respondent.
9. On whether the appeal, if successful, would be rendered nugatory, the Applicant, while relying on the case of *Reliance Bank Limited v. Northlake Investments Limited* [2002] 1 EA 227, submitted that it is a reputable insurance company. It argued that if the orders are not granted, the Respondent will proceed with the execution of the decree and may subsequently be unable to refund the amount in the event the appeal succeeds, thereby subjecting the Applicant to substantial financial loss and damage.
10. On whether the appeal was made without unreasonable delay, the Applicant relied on the case of *Jaber Mohsen Ali & Another v. Priscillah Boit & Another* E & L No. 200 of 2012 [2014] eKLR, in submitting that the delay was caused by the freezing of its accounts in HCCMISC E470 of 2024, which prevented it from filing the appeal within time. The Applicant further stated that upon being served with warrants of attachment dated 22nd August 2024, it moved expeditiously to seek stay orders while also applying for leave to appeal out of time. Therefore, it contended that the application was timeous and made without unreasonable delay, despite the financial constraints it faced.



11. The Applicant submitted that it is willing to abide by any conditions set by the court as security and therefore prayed that the Application be granted.

Respondent's Submissions

12. The Respondent, in its submissions, identified three issues for determination: whether the court should grant a stay of execution of the judgment entered on 7th June 2024, whether the Applicant has met the settled legal principles in law to warrant leave to file appeal out of time, and what should be the orders of costs.
13. On the first issue, the Respondent, relying on Order 42 Rule 6(2) of the *Civil Procedure Rules* and the case of *James Wangalwa & Another v. Agnes Naliaka Cheseto* [2012] eKLR, to submit that the Applicant has not demonstrated or proved that it will suffer substantial loss if the stay order is not granted. Instead, the Respondent argued that he is the one who stands to suffer substantial loss, noting that he has been pursuing justice for more than one and a half years. He contended that unless the court intervenes, he will continue to suffer indefinitely.
14. On whether the Applicant has met the settled legal principles in law to warrant leave to file appeal out of time, the Respondent referred to the case of *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR which impose on courts a duty to ensure that the factors to consider to warrant leave to file out of time are consonant with the overriding objective of civil proceedings litigation that is just, expeditious, proportionate and affordable resolution of disputes before court. The Respondent further submitted that the explanation for delay in filing the appeal given did not give any particulars of its financial constraints and how the same frustrated their efforts to file the Appeal within the set timelines. He also relied on the cases of *George Mwenda Muthuri v Mama Day Nursery and Primary School Nyeri* CA No. 4 of 2014 (UR2/14) and *Willis Oneko Opiata v Fredric Omondi Wera* [2021] eKLR, to urge that financial constraints are not a valid reason for delay. The Respondent further submitted that the appeal is not arguable but it is full of denials, and does not raise pertinent issues of law and it is only meant to mislead and waste the court's time.
15. The Respondent submitted that he will suffer prejudice by being subjected to further litigation on appeal and being deprived of the enjoyment of his judgment for almost two years since the primary suit was concluded. Regarding the delay, the Respondent submitted that the judgment being appealed against was delivered on 23rd June 2024, while the present application was lodged on 30th August 2024, a period of over two months, which he contended constitutes inordinate and unexplained delay.
16. In conclusion, the Respondent urged the court to dismiss the application with costs. However, should the court consider granting the Applicant's plea, he requested that the Applicant be ordered to deposit the decretal amount in court as security.

Analysis and Determination

17. I have considered the rival affidavits by parties and submissions made in respect of the motion and it is my view that the two issues for determination are:
 - i. Whether the Applicant has met the legal threshold to warrant grant of leave to file appeal out of time, and
 - ii. Whether the court should grant a stay of execution of the judgment entered on 7/06/2024 and the warrants of attachment dated 22/08/2024 pending the hearing and determination of the appeal.



Whether the Applicant has met the settled legal principles in law to warrant leave to file appeal out of time

18. The power of the Court to enlarge time for filing an appeal out of time is expressly donated by Section 79G of the *Civil Procedure Act* which 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.”

19. The principles governing the grant of leave to appeal out of time are settled. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 others* (2014) eKLR the Supreme Court set out the following underlying principles in determining whether a matter qualify for grant of leave to appeal our of time:

- “1. 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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

20. Guided by the above authority, a successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. Underpinning this requirement is that the entire period of delay must be stated and accounted for. In this instance it is not in dispute that judgment in Thika SCCC No. E048 of 2024 was delivered on 21/06/2024, while the present application was filed on 30/08/2024, exactly 2 months and 9 days later. The Applicant explains that the delay was due to financial constraints arising from the institution of a suit by the Insurance Regulatory Authority in Milimani HCCOMMISC E470 of 2024, which led to the freezing of its accounts, thereby preventing it from filing the appeal within the 30 days statutory limit. The Respondent, however, contends that the Applicant failed to provide specific details regarding its financial constraints and how they impeded the timely filing of the appeal.

21. I have reviewed exhibit KN2 attached to the Applicant’s affidavit in support of the Motion. It is evident that the orders granted in Milimani HCCOMMISC E470 of 2024 were temporary in nature. They were issued on the 6th June 2024 and were to lapse on the 18th June 2024. Notably these orders had



already expired by the time judgment was delivered on 21st June 2024 in Thika SCCC No. E048 of 2024. If the alleged freezing order had still been in effect and was impacting the Applicant's operation beyond 18th June 2024, the applicant ought to have informed the trial court at the time of judgment and promptly sought a stay of execution. Furthermore, the applicants have not submitted any additional evidence to demonstrate that the freezing orders on their accounts continued to remain in force.

22. Moreover, the Respondent's letters to the Applicant, which allegedly went unanswered, have not been refuted by the Applicant. If the Applicant was indeed experiencing financial constraints, an appropriate response would have sufficed. However, the undisputed annexures confirm that the letters were received but not responded to.
23. I therefore find that the delay in filing the appeal is excessive and has not been adequately explained. I agree with the Respondent that the Applicant has failed to demonstrate "good and sufficient cause." Allowing this motion would clearly prejudice the Respondent, whose case in the lower court was filed nearly two years ago. While the Applicant's constitutional right to be heard on appeal is important, it is not absolute and must be weighed against the Respondent's right to a timely resolution of the case. The Respondent should not suffer the consequences of the Applicant's inaction and lack of diligence in pursuing the appeal.

Whether the court should grant a stay of execution of the judgment entered on 7/06/2024 and the warrants of attachment dated 22/08/2024 pending the hearing and determination of the appeal;

24. Order 42 Rule 6(1) of the [Civil Procedure Rules](#) makes it evident that an order for stay of execution pending appeal presupposes the existence of an appeal. The filing of an appeal is, therefore, a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6(1).
25. It follows therefore, that the invocation of this court's jurisdiction under Order 42 Rule 6(1) or 6(6) of the [Civil Procedure Rules](#) must be preceded by the filing of an appeal or compliance with the procedure for filing an appeal and specifically, the filing of a memorandum of appeal as required under Order 42 Rule 1. Until a memorandum of appeal is duly filed, the court risks acting in vacuo by entertaining the Applicant's prayer for a stay of execution pending a non-existent appeal.
26. The Court of Appeal in [Abubaker Mohamed Al-Amin v Firdaus Siwa Somo](#) [2018] eKLR while citing with approval the decision of the High Court in [Rosalindi Wanjiku Macharia v James Kiingati Kimani \(Suing as the Legal Representative of the Estate of Martin Muiruri \(Deceased\)\)](#) [2017] eKLR approved the foregoing reasoning cited by Meoli J as follows;

“In my view, even if the prayer to appeal out of time had been granted, and the said prayer for stay pleaded in the Motion, would still have failed for the reason that the existence of an appeal is a condition precedent to the exercise of this court's discretion under Order 42 Rule 6 (1) of the [Civil Procedure Rules](#).

...

It would seem that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the [Civil Procedure Rules](#) must be preceded by the filing of an appeal, or compliance with the procedure for filing appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the [Civil Procedure Rules](#)). Until the memorandum of appeal is filed, the court would be acting in vacuo by granting a stay of execution pending appeal.”



- 27. Turning to the present application, it is evident leave to file an appeal out of time has been declined hence no appeal has been filed, and therefore, this court lacks the basis upon which to exercise its discretionary jurisdiction to grant an order of stay of execution as sought by the Applicant. Consequently, the prayer seeking a stay of execution of the judgment in Thika SCCC No. E048 of 2024, delivered on 21/06/2024, as well as a stay of execution of the judgment and Warrants of Attachment dated 22/08/2024, pending the hearing and determination of the Applicant’s intended appeal, lacks a legal basis and must therefore fail.
- 28. In that regard, the Application dated 28th August 2024 is therefore dismissed with costs to the Respondent.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 11TH DAY OF APRIL, 2025.

RHODA RUTTO

JUDGE

..... for Applicant
..... for Respondent
Sam : Court Assistant

