



REPUBLIC OF KENYA



**KENYA LAW**  
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**Dambe v CIC General Insurance Ltd (Commercial Suit 97 of 2015)  
[2025] KEHC 4292 (KLR) (Commercial and Tax) (4 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4292 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL SUIT 97 OF 2015**

**NW SIFUNA, J**

**APRIL 4, 2025**

**BETWEEN**

**OSMAN DADI DAMBE ..... PLAINTIFF**

**AND**

**CIC GENERAL INSURANCE LTD ..... DEFENDANT**

**RULING**

1. This ruling is on the Defendant's Notice of Motion dated 12<sup>th</sup> December 2023. The same is seeking leave to appeal out of time, against the Judgment of Hon. Okwany J, delivered on 5<sup>th</sup> October 2023 out of time. It also seeks a stay of execution of the decree pending the hearing and determination of the intended appeal. The motion is made under Section 7 of the *Appellate Jurisdiction Act* and Sections 1A, 1B and 3A of the *Civil Procedure Act*.
2. The motion is supported by an affidavit sworn by its Claims/ Legal Manager Joseph Karanja on 20<sup>th</sup> December 2023 and a supplementary affidavit sworn by its legal officer Phylis Mutua on 17<sup>th</sup> July 2024.
3. The Application was canvassed through oral submissions. The Applicant urged the Court to allow the application for extension as the delay is not inordinate. The explanation for the delay was that there was a delay in the file getting back to the registry as the Judgment was delivered in Nyamira. The Applicant needed a copy of the judgment before deciding whether to appeal. By the time its counsel got the judgment and instructions, time had expired.
4. The Applicant also submitted that it is willing to offer security for the due performance of the decree.
5. There was no response from the Plaintiff/ Respondent or his advocates despite being served with the application and the hearing notice.



## Analysis and Determination

6. I have considered the Application, and found the following to be the issues for determination:

1. Whether the Applicant has met the threshold for the grant of leave to appeal out of time.
2. Whether the Applicant has met the threshold for a stay of execution pending appeal.

7. Section	7 of the <u><a href="#">Appellate Jurisdiction Act</a></u> provides as follows:  “Power of High Court to extend time  The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:  Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”
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8. The Court’s power to grant leave to appeal out of time is discretionary. The discretion ought to be exercised based on principle. The principles for consideration for determining whether or not to grant leave to appeal were pronounced by the Court of Appeal in *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231, as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.” (Emphasis mine) See also *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others* (Sup. Ct Application No. 16 of 2014) [2014] eKLR”

9. In this matter, the Applicant seeks leave to appeal against the Judgment of Hon. Okwany’ J. of 5<sup>th</sup> October 2023.

10. Rule 77 of the [Court of Appeal Rules, Legal Notice 40 of 2022](#), provides as follows:

“(1)

A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.”



(2)

“Each notice under subrule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.”

11. From the above, the Applicant should have filed a notice of appeal on Tuesday 21<sup>st</sup> October 2023. This is because the 14<sup>th</sup> day from the decision date fell on a Sunday 19<sup>th</sup> and the following day the 20<sup>th</sup> was a public holiday. The Applicant filed the instant application on 20<sup>th</sup> December 2023, 60 days from the deadline. In my view, the delay of 60 days is not inordinate.
12. In any case, the explanation for the delay is the paramount factor. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR the Court of Appeal observed as follows:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
13. The explanation for the delay given is that there was a delay in the file getting back to the registry as the Judgment was delivered in Nyamira. The Defendant needed a copy of the judgment before deciding whether to appeal. By the time the Defendant’s counsel obtained the judgment and got instructions, time had expired.
14. In *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling), the Court noted as follows:

“Excusable delays are delays that are unforeseeable and beyond the control of the party. Non-excusable delays are delays that are foreseeable or within the party’s control. Obviously, the distinction between these two is significant in that it determines whether a party is liable for the delay.”
15. Guided by the above, it is my view that the Defendant has given a sufficient explanation for the delay as the delay was beyond its control.
16. On whether the Plaintiff will be prejudiced if the extension is granted, I note that there was no response to the application and that at the hearing of the application on 18<sup>th</sup> July 2024, the Plaintiff was not represented. The Applicant’s Counsel, Mr. Itonga mentioned that he served the application upon the Respondent’s Counsel who notified him that the Respondent passed on. The Court must balance between the Respondent’s right to enjoy the fruits of the judgment and the Applicant’s right to appeal.
17. Rule 87 1 (2) of the *Court of Appeal Rules* states as follows:

“An appeal shall not be incompetent by reason only that the respondent was dead at the time when it was instituted but the Court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased person.”
18. The above provision intends to keep such an appeal alive. See *Kabocho & 2 others v Kamau & Another* [1987] eKLR. Therefore, I find that there is no prejudice to be suffered if the extension is granted as the Respondent’s legal representative may be made a party in his place.



19. On the other hand, if the extension is not granted, the Applicant shall be robbed of an opportunity and the right to pursue an appeal. As such, I am satisfied that it is just and fair for me to grant leave to the Defendant to lodge a Notice of Appeal out of the prescribed period of 14 days.
20. The next issue is whether I should grant stay pending the intended Appeal or even entertain that limb of this Application. That prayer is hereby declined at the moment as there is no valid Notice of Appeal on record yet. The Defendant may file an Application for stay, once the Notice has been filed and is on record.

### **Final Determination**

21. I find that the application dated 12<sup>th</sup> December 2023 has merit, and accordingly allow it in the following terms:
  - a. The Defendant is hereby granted leave to lodge a Notice of Appeal out of time. The same be lodged within 7 days from the date of this ruling, failing which the leave shall automatically lapse.
  - b. In the meantime there be a temporary stay for only 7 days from today, pending the filing of a formal application for stay pending Appeal.
  - c. There shall be no order as to the costs of this Application.

**DATED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF APRIL 2025.**

**PROF (DR) NIXON SIFUNA**

**JUDGE**

