



REPUBLIC OF KENYA



**Gathu v Kasuba & another (Miscellaneous Application E639 of 2024)  
[2025] KEHC 4233 (KLR) (Civ) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4233 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS APPLICATION E639 OF 2024**

**JN MULWA, J**

**APRIL 3, 2025**

**BETWEEN**

**GIDEION GITHII GATHU ..... INTENDED APPELLANT**

**AND**

**HUMPHREY MASIBO KASUBA ..... 1<sup>ST</sup> RESPONDENT**

**JOHN NYAMWANCHA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By an Application dated 1/07/2024, the 1<sup>st</sup> Respondent Gideon Githii Gathu sought an order for extension of time to file an intended appeal out of time, and the Memorandum of Appeal annexed hereto be deemed as properly filed as well as an order for stay of execution of the judgment and decree of the trial court in Milimani CMCCC NO. 4614 of 2017 between the parties hereto pending hearing and determination of the intended appeal.
2. Grounds for the application are stated on its face and in the supporting affidavit he swore on an even date, stating that he did not know the existence of the case until the time he was served with a Notice of Entry of Judgment, upon which he instructed his former advocates Ms. J. G. Kamau & Co. Advocates who by a motion dated 13/03/2023 sought to set aside the exparte judgment but which motion was dismissed. He avers that upon dismissal his advocate failed to inform him upto when he was served with a Proclamation Notice on 24/06/2024, which then prompted him to file the instant application.
3. It is the Applicant's deposition that he was condemned unheard and that execution will cause substantial loss to him and render the intended appeal nugatory.
4. In opposing the application, the Respondents Advocate Josephine Maangi swore a Replying Affidavit on 18/07/2024 in which she avers that it was not true that the applicant was not served with the



trial court summons as the same were served upon the 2<sup>nd</sup> Respondent on his behalf, that upon being served with the Notice of Entry of Judgment, he called his office to enquire about the notice, which he was duly explained but did nothing save filing the motion for setting aside which upon hearing was dismissed on 12/04/2024. The Respondents therefore have urged the court to find no merit in the application.

5. The court has considered the affidavit arguments by both parties. It is trite that a party should not be condemned unheard and should be afforded a chance to defend himself in a court of law, being one of the tenets of law and justice including fair hearing.
  6. An order for stay of execution is anchored on Order 42 Rule 6 of the [Civil Procedure Rules](#) that provides for the condition that an applicant ought to comply with, thus:-
    - a. Demonstrate that the application was brought without undue delay.
    - b. That the court is satisfied that the applicant shall suffer substantial loss if the order is denied
    - c. That security for the due performance of the decree must be provided as the court may order.
  7. On delay, the court is satisfied that there was no delay in bringing the motion. In respect of substantial loss, the court in the case of [James Wangalwa & Another v. Agnes Naliaka Cheseto](#) [2012] eKLR held that:-

“execution is a lawful process, that it is not a ground for granting stay orders that the applicant must show other circumstances that will irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory.”
- See also the case of [Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union \(Kenya\)](#) [2015] eKLR. Here, the Applicant deposes that it was his advocates failure to advise him of the progress of the case, that if stay is not allowed his appeal that he deems to be meritorious will be rendered nugatory, and that his vehicle which was duly insured by Monarch Insurance would be attached and sold as he believes that his vehicle was not to blame for the accident, that given a chance to defend the suit, he would show that it was the Respondents vehicle that was at fault.
8. On the matter of security the court notes that the judgment was for Kshs. 503,550/=. The applicant has not offered any security to cushion the Respondents should the intended appeal not be successful.
  9. Upon consideration of the totality of the application and the rival arguments, the court finds that the Applicant indeed sought leave to file appeal out of time contrary to the Respondents' arguments. It is also not clear whether the Applicant was properly served with the summons to enter appearance in the primary suit as by their reply to the motion the Respondents state to have not served the Summons to appear personally but through another party on his behalf. It is trite that a party ought to be properly served personally unless the third party has been given express authority to accept service on his behalf.
  10. Section 3A, 1A and 1B of the [Civil Procedure Act](#) mandates courts to dispense substantive justice, as opposed to elevating technical dictates clearly shown in the application. Both parties' interests ought to be considered and whereas the applicant has not fully complied with preconditions for grant of stay orders pending appeal, I find it appropriate to allow the applicant to be heard on his intended appeal in conformity with Article 50 of the [constitution](#) on according each person an opportunity to be heard by a competent court.
  11. Consequently:



- a. The Applicant is granted leave to file an Appeal out of time. The Memorandum of Appeal shall be filed and served within 7 days and the Record of Appeal within 60 days.
- b. The Applicant is granted an order of stay of execution pending hearing and determination of the Intended Appeal subject to deposit of Kshs. 200,000/= in court as security within 21 days. In default, the stay order shall lapse automatically.
- c. The Applicant shall pay costs of the application to the Respondents.

This ruling brings a close to the application before this court.

**DELIVERED, DATED AND SIGNED IN NAIROBI BEFORE THIS COURT ON 3<sup>RD</sup> APRIL, 2025.**

**JANET MULWA.**

**JUDGE**

