



**Mbuba v Waweru & another (Miscellaneous Civil Application
E002 of 2025) [2025] KEHC 4923 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4923 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CIVIL APPLICATION E002 OF 2025**

EM MURIITHI, J

APRIL 24, 2025

BETWEEN

JANE KAGENDI MBUBA APPLICANT

AND

MARGARET WAITHIRA WAWERU 1ST RESPONDENT

PATRICK GATHUMBI WACHIRA 2ND RESPONDENT

RULING

1. By Notice of Motion dated 16/1/2025 the Applicants seeks extension of time to file appeal and stay of execution pending appeal in specific reliefs as follows:
 1. That this Application be certified urgent and be initially heard *ex parte* on account of its urgency.
 2. That the firm of Kiruki & Kayika Advocates be granted leave to come on record for the Appellant.
 3. That the Appellant/Applicant be granted leave to appeal out of time on quantum against the judgement of the Hon. David M. Ireri, delivered on 29th November 2025 at Baricho.
 4. That there be a stay of execution of the decree on quantum emanating from the judgement in Baricho CMCC No. E119 of 2023 - *Margaret Waithira Waweru & Anor v Jane Kagendi Mbuba* pending the hearing and determination of this application.
 5. That there be a stay of execution of the decree' emanating from the judgement delivered in Baricho CMCC o. E119 of 2023 - *Margaret Waithira Waweru & Anor v Jane Kagendi Mbuba*, pending the hearing and determination of the intended Appeal.
 6. That the Memorandum of Appeal annexed hereto be deemed as duly filed and served.



7. That the costs of this application be provided for.”
2. The application is found on grounds set out in the application, principally, inadvertent delay and risk of substantial loss by imminent execution, and supported by a Supporting Affidavit by Cheryl Odipo, the Legal Officer, Old Mutual Insurance Company Limited, the Applicants' Insurer, in the same terms, as follows:
 - “2. On 29th November 2024, the Chief Magistrate's Court (Hon. David M. Ireri) delivered a Judgment in Baricho CMCCNo. E119 of 2023 -*Margaret Waithira Waweru & Anor v Jane Kagendi Mbuba*, where the Court awarded the Plaintiff damages of KShs.3,356,200/= plus costs and interests. (A true copy of the Judgment is annexed hereto and marked 'CO-1').
 3. The applicants are aggrieved and dissatisfied with the said judgement on quantum and have instructed the firm of Kiruki & Kayika to come on record, to appeal against the same.
 4. I am the only person authorized to review judgements and issue instructions on behalf of the applicants' insurer.
 5. When judgment was delivered, I was away on compassionate leave and hence I was unable to go through the same and give instructions to appeal on time. Our offices also closed for the December holidays.
 6. I resumed office on 10th January 2025 and upon perusal of the judgment I noticed that the quantum awarded by the learned magistrate was inordinately high which required an appeal.
 7. On the same day, I sent the instructions to appeal against the said judgement via email and by then, stay of execution and time to appeal had already lapsed. (A true copy of the email is annexed hereto and marked 'CO-2').
 8. Failure to Appeal on time was not deliberate but was due to the fact that I was away on compassionate leave and by the time I resumed office, stay of execution and the time to appeal had already lapsed.
 9. The mistake on the part of the Applicant's insurer ought not to be visited upon the Applicant to deny them an opportunity to challenge the trial court's judgement.
 10. I verily believe that the delay occasioned herein is not so inordinate as to be inexcusable and I humbly ask this Court to so find.
 11. The Applicant faces an imminent and real danger of execution by the Respondent to satisfy the decree emanating from the above judgement.
 12. The Applicant stands to suffer substantial loss if the application herein is not allowed as the Respondent will proceed with the process of execution.
 13. The Appellant has lodged an appeal in this Honourable Court as the Judgment of the Honourable Magistrate is not supported by evidence that was tendered in court by the parties. (A draft copy of the memorandum of appeal is annexed hereto and marked 'CO-3').



14. The Appellant/ Applicant is ready and willing to abide by the conditions and orders that this Honourable Court may impose for the application to be allowed to appeal out of time.
 15. The Appellant's intended appeal has a high probability of success and it will be rendered nugatory if this application is not allowed.
 16. The application has been made in good faith and without any unreasonable delay.”
3. The Respondents oppose the application by a Replying Affidavit sworn by the 1st Respondent on 30/1/2025 seeking to enjoy the fruits of the judgment in her favour as follows:
3. That Judgement in this matter was entered on my behalf on 29th November, 2024 for Kshs.3,356,200 plus costs and interest.
 4. That the award is as a result of a fatal accident where y husband Julius Waweru Wachira died as a result of road traffic accident on 27th October, 2021.
 5. That my husband was a business man and was the sole bread earner for my family.
 6. That I have three young children being
 - a) VWV
 - b) VNV
 - c) SSM

As is indicated by their birth certificates attached herein and marked as LKW 1, 2 and 3.
 7. That I am not able to pay their school fees and maintenance.
 8. That no sufficient reasons have been adduced by the applicants as to the delay caused in filing this application.”

Submissions

4. Counsel for the Parties filed written submissions, ad ruling was reserved.

Jurisdiction and Principles for the grant of extension of time

5. The jurisdiction to grant extension of time is incontestable. See section 79G and 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules*.
6. In *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR, the Court of Appeal observed citing *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), that:

“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”.



7. The principles for the grant of application for extension of time are now truly settled by the Supreme Court decision in *Salat v Independent Electoral and Boundaries Commission & 7 others* (Application 16 of 2014) [2014] KESC 12 (KLR) (4 July 2014) (Ruling) emphasizing the discretion of the Court as follows:
 85. This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

“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; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; Whether there will be any prejudice suffered by the respondents if the extension is granted; Whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
8. In accordance with section 79 G of the *Civil Procedure Act*, the appeal from the judgment of the trial court herein delivered on 29/11/2024 should have been filed, discounting the period of 21/12/2024 to 13/1/2025 in terms of Order 50 Rule 4 of the *Civil Procedure Rules* - by 22/1/2025.
9. The Memorandum of Appeal herein having been filed on 16/1/2025 was filed within the 30-day period provided for appeal under section 79G of the *Civil Procedure Act*. I respectfully think there consider that there was no delay in this case and there is no occasion for the application of the settled principles for extension of time.

Principles for grant of stay of execution pending appeal

10. An application for stay of execution fall to be considered under the principles set out in Order 42 Rule 6 of the *Civil Procedure Rules*, which the Courts require in establishing a sufficient cause that the applicant demonstrates an arguable case, that the applicant will suffer substantial loss, or - in words adopted from the case authorities of the extension of time in the Court of Appeal - that the appeal would be rendered nugatory if stay if refused; that the appropriate security for the due performance of the decree as may become binding on the applicant in the event of unsuccessful appeal, and the application has been made without undue delay.

Arguable case

11. In assessing the sufficient cause for the grant of stay of execution courts look for the existence of an arguable case for presentation to the appellate court for hearing and determination. The draft Memorandum of Appeal filed by the appellant herein challenges as excessive the damages award in the suit as follows:
12. As inordinately high damages is one of the factors that may justify the appellate interference with an award of damages (see *Butt v. Khan* [1981] KLR 349), the Memorandum of Appeal does raise an arguable case and it cannot be said to be frivolous.



Substantial loss

13. The decretal amount of Kshs.3,356,200 plus costs and interest is not insubstantial and to be compelled to pay the amount and risk non recovery, in the event of a successful appeal is clear substantial loss. The Replying affidavit of the Respondents does not show themselves as able to refund the huge amount in the even of successful appeal.
14. The applicant herein did not express fear of inability to recover money paid in execution in the event of a successful appeal and merely asserted that
 - “ 11. The Applicant faces an imminent and real danger of execution by the Respondent to satisfy the decree emanating from the above judgement [and]
 12. The Applicant stands to suffer substantial loss if the application herein is not allowed as the Respondent will proceed with the process of execution.”
15. The means of a respondent to repay is matter within special knowledge of the respondent in terms of section 112 of the *Evidence Act*. I should respectfully agree with the Court of Appeal in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR that –

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.”

[Emphasis mine]

Delay in making the application for stay

16. The application for stay of execution pending appeal was filed on 16/1/2025 about one and half (1½) months after the Judgment. This delay cannot be said to be inordinate and it has been explained by the compassionate leave of the Counsel for the appellant who has the conduct of the question of preference of appeal as deponed to in the supporting Affidavit. The explanation is reasonable and the Court does not visit it to the Counsel’s client the appellant herein.

Security

17. Order 42 Rule 6 (2) requires the provision of security as follows:

“ [Order 42, rule 6.] Stay in case of appeal.

6. No appeal or second appeal shall operate as a stay of execution or proceedings
 - (1) under a decree or order appealed from except appeal case of 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 order set aside.

- (2) No order for stay of execution shall be made under subrule (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.”

18. In balancing the interests of the appellant who is exercising her right of appeal and the right of the respondent as the successful plaintiff to enjoy the fruits of her judgment, and noting that the issue presented to the appellate court by the Memorandum of Appeal is merely one of quantum of the award of damages, the Court will make an order for the payment of a reasonable proportion of the award for the benefit of the respondent and her children who lost their husband and father in the accident subject of the suit and make provision for the securing the balance for the benefit of both parties by provision of a bank guarantee.

Costs

19. Order 50 Rule 6 of the [Civil Procedure Rules](#) is instructive as follows:

“[Order 50, rule 6.] Power to enlarge time.

6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

Orders

20. Accordingly, for the reasons set out above, the Court grants the application dated 16/1/2025 for extension of time and stay of execution pending appeal upon terms as follows:

1. The Memorandum of Appeal dated 16/1/2025 is deemed properly filed and served.
2. The Appellant shall pay to the Respondent the sum of Ksh.1,000,000/- approximating one third of the decretal sum within thirty (30) days.
3. The appellant shall provide a banker’s Guarantee for the balance of the decretal sum within thirty (30) days.
4. The Appellant shall file the Record of Appeal within sixty (60) days.



5. In default of any of the orders 1-4 above, the order for stay of execution shall lapse and be of no effect.
21. The costs of the application shall be paid by the Applicant in terms of Order 50 Rule 6 of the *Civil Procedure Rules*.
- Order accordingly.

DATED AND DELIVERED THIS 24TH DAY OF APRIL 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Ontita for the Applicant.

Ms. Bundi and Mrs. Waweru for the Respondent.

