



REPUBLIC OF KENYA



**Barmasai & another v Ochung (Civil Appeal E058 of 2025)  
[2025] KEHC 6591 (KLR) (20 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6591 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E058 OF 2025  
RN NYAKUNDI, J  
MAY 20, 2025**

**BETWEEN**

**BENARD BARMASAI ..... 1<sup>ST</sup> APPELLANT**

**ELYVES SITUMA WANJALA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SAMUEL OMOLLO OCHUNG ..... RESPONDENT**

**RULING**

1. Before me for determination is the Appellants' Notice of motion dated 26<sup>th</sup> March, 2025 expressed to be brought under the provisions of sections 1A, 1B, 3, 3A and 63(e), 79(G) & 95 of the [Civil Procedure Act](#) Order 42 Rule 2 & 6, 51 Rule 1 of the Civil Procedure Rules in which they seek orders as follows:
  - a. Spent
  - b. That this honorable court do enlarge the time within which the appellants/applicants can file their appeal.
  - c. That the notice and memorandum of appeal dated and filed on 26<sup>th</sup> March, 2025 be deemed as properly on record upon payment of the requisite filing charges.
  - d. That pending the hearing and determination of this application inter-parties, there be stay of execution of the decree issued in Eldoret Civil Case No. E521 of 2003 and/or all its consequential orders.
  - e. That this court be pleased to issue any such further order/directions in the circumstances in order to safeguard justice.
2. The applicant anchored on grounds that:



- a. That the 1<sup>st</sup> applicant at all material times was the legal owner of motor vehicle registration number KAJ 614F, Subaru salon.
- b. That the aforesaid vehicle was involved in a road traffic accident in which the Respondent sustained bodily injuries.
- c. That the Respondent instituted Eldoret Civil Case No. E521 of 2003 seeking inter alia general damages for the injuries suffered.
- d. That the above suit proceeded ex-parte and judgment entered in favor of the Respondent as against the applicant and one Elyvas Situma Wanjala in the sum of Kshs. 2,078,374 inclusive of costs and interests.
- e. That the Respondent has commenced execution hence placing the appellants/applicants at risk of either being committed to civil jail for failure to satisfy the decree in force.
- f. That a warrant has already been issued against the appellants/applicants jointly and severally albeit the same being defective for having allegedly been issued on 11<sup>th</sup> May, 2025.
- g. That the accident forming the substratum of Eldoret Civil Case No. 521 of 2003 occurred during the period covered by the 1<sup>st</sup> Appellant/Applicant's insurance policy for which he is indemnified by sections 5(o) and 10(1) of Cap 405, laws of Kenya.
- h. That it is in the best interest of justice that there be stay of execution of the primary suit await the determination of the declaratory suit.
- i. That the indemnity provided under sections 4(1), 5(b) and 10(1) of Cap 405 of the Laws of Kenya is what forms the gist of the pending declaratory suit hence rendering appropriate orders necessary.
- j. That in the foregoing, if stay of execution is not granted as prayed, the pending declaratory proceedings will be rendered nugatory.
- k. That there is a likelihood of the declaratory suit being determined in favor of the appellants/applicants hence rendering stay orders necessary in the best interest of justice.
- l. That the 1<sup>st</sup> applicant has a meritorious claim against his insurer with very high chances of success.
- m. That the appellants may either be committed to civil jail yet they are legally indemnified from satisfying the decretal sum awarded in the primary suit.
- n. That the 1<sup>st</sup> applicant filed a similar application before this court vide Misc. Application E174 of 2024 but was advised to first exhaust the jurisdiction of the subordinate court with directions he complied with by filing an application dated 18<sup>th</sup> September, 2024 before the trial court.
- o. That the above application was dismissed hence rendering the instant application and appeal necessary.
- p. That the appellants/applicants are ready and willing to abide by any conditions that may be imposed by this court within reasonable timelines until the declaratory suit which has since been scheduled for hearing on 20<sup>th</sup> May, 2025 is heard and determined.



- q. That justice, fairness, equity and balance of convenience tilts towards granting of the orders sought.
  - r. That no prejudice shall be suffered by Respondent who will have the decretal sum ultimately paid to him by the 1<sup>st</sup> Appellant/Applicant's insurer once the declaratory suit heard and determined on merit.
  - s. That ends of justice will be served by allowing this application as prayed.
3. In response to the application, the Respondent through counsel filed a replying affidavit sworn on 1<sup>st</sup> April, 2025 in which he deposed as hereunder:
- a. That the application is made in bad faith, is frivolous, vexatious, an abuse of the court process and should be dismissed.
  - b. That I instituted Eldoret Civil Suit Number 521 of 2003 following a road traffic accident in which I sustained bodily injuries.
  - c. That the Appellants herein entered appearance and filed their defenses therein and therefore it is not true that they did not participate in the proceedings or that ex-parte judgment was entered.
  - d. That judgment in the said suit was delivered in my favor on 28th May 2019 and the Applicants were ordered to settle the decretal sum of Kshs. 2,078,374/= inclusive of costs and interest.
  - e. That since the delivery of judgment, the Applicants have failed, neglected and/or refused to satisfy the decretal sum despite numerous demands.
  - f. That the instant application is a deliberate attempt to frustrate, delay and deny me the right to enjoy the fruits of my judgment through unwarranted litigation.
  - g. That this matter has already been determined by the High Court in Eldoret Miscellaneous Civil Application No. E174 of 2024, where the 1<sup>st</sup> Applicant unsuccessfully sought similar orders.
  - h. That after dismissal of the said application the Applicants filed another application dated 18th September, 2024 in Eldoret Civil Suit Number 521 of 2003 to which the same was dismissed.
  - i. That I am advised by my Advocates on record whose advice I verily believe to be true that, the Appellants/Appellants did not seek leave to appeal the ruling delivered on 18th February, 2025 and proceeded to file another application dated 21st March, 2025 in Miscellaneous Civil Application number E174 of 2024, which they later withdrew only to file the instant appeal and application and as such the same amounts to forum shopping and an abuse of court process.
  - j. That even in the ruling which the Applicants intend to appeal against, they never prosecuted their application as when parties were directed to file submissions they stopped attending court. The matter was mentioned to confirm filing of submissions on 26<sup>th</sup> November, 2024 to which the Applicants sought leave to file a supplementary affidavit and Applicants' submissions out of time which was granted and the matter was slated for ruling however they failed to comply with court's orders.
  - k. That on the said ruling date which was taken by consent, the Applicants herein failed to attend court further demonstrating their dilatory conduct.



- l. That the Appellants/Applicants herein therefore have no audience before this court to appeal the ruling delivered on 18<sup>th</sup> February, 2024 as the right to appeal a ruling is not automatic in the circumstances and the same should have been made in the first instance to the court making the ruling and/or orders sought to be appealed from either orally or through an application.
- m. That the Applicants' actions are a deliberate attempt to prolong litigation in a matter that was filed in 2003, which was defended and concluded in 2019.
- n. That if at all the Appellants were bonafide Applicants then they could have filed the series of applications and declaratory suit promptly and not 2024, approximately six years later proving that even this instant application has been made in bad faith and in an attempt to delay justice.
- o. That be that as it may, this Honorable court already pronounced itself in this matter in the ruling that was delivered on 9<sup>th</sup> August, 2024.
- p. That the Applicants have also not demonstrated any substantial loss they stand to suffer if the orders sought are not granted.
- q. That the mere fact that the Appellants risk being committed to civil jail is not sufficient ground for the issuance of stay orders, as I am legally entitled to execute the decree in Eldoret Civil Suit number 521 of 2003 which suit, the Appellants do not dispute the judgment delivered therein.
- r. That while the Applicants claim they have filed a declaratory suit against the insurance company as they ought to be indemnified by an insurance policy, I am not a party to the contract between the Applicants and the insurance company.
- s. That the outcome of the declaratory suit that is, Eldoret Chief Magistrate's Court Civil Case number E349 of 2024 is unknown and I will be subjected to endless proceedings and delays due to matters that I am not a party to.
- t. That the Applicants must first settle the decretal sum and then thereafter seek indemnity from their insurer and the existence of a pending declaratory suit does not preclude me from enforcing the judgment against the Applicants.
- u. That the Applicants have made no effort to settle the decretal sum and are instead resorting to endless applications to evade their legal obligation.
- v. That justice demands that litigation must come to an end, and the Applicants cannot continue filing multiple applications seeking the same orders so as to delay my right to enjoy the fruits of a successful judgment.
- w. That the balance of convenience strongly tilts in my favor, as granting a stay of execution would result in undue delay in the enforcement of a valid judgment.
- x. That in any event, the Applicants have stated that they are ready and willing to abide by any conditions imposed by this court. That I therefore humbly urge this Honorable court to dismiss this application and the appeal and direct the Appellants to settle the decretal sum in Eldoret Chief Magistrate Civil Suit number 521 of 2003.
- y. That no prejudice will be suffered by the Applicants as they can seek indemnity from their alleged insurer in Eldoret Chief Magistrate Civil Suit number E349 of 2024, once the decretal sum is settled.



- z. That in light of the foregoing, the instant application lacks merit and is intended to delay justice.
4. The Respondent filed written submissions in which learned counsel Mr. Kitiwa couched three issues for determination:
- a. Whether the applicants have satisfied the threshold for stay of execution.
  - b. Whether the applicants have demonstrated sufficient cause to be granted leave to appeal out of time.
  - c. Whether the court should grant the orders sought.
5. On the first issue, learned counsel submitted that no leave to appeal the ruling delivered on 18<sup>th</sup> February, 2025 was sought and/or obtained by the appellants/applicants. Consequently, the applicants have no locus before this court to seek stay pending appeal they have no right to pursue. Counsel submitted that as a result, the instant application and consequently the appeal has no standing and is improper before this court. further that, as provided under Order 41 Rule 6(2) of the Civil Procedure Rules on stay of execution pending appeal have not been satisfied. That the applicants have failed to demonstrate substantial loss; offer or furnish security for due performance of the decree; explain the inordinate delay in acting considering ruling was delivered on 18<sup>th</sup> February, 2025 in Eldoret Civil Suit number 521 of 2003. Counsel therefore urged the court not to grant the order of stay of execution pending the hearing and determination of the appeal as the same is improper before this court and an abuse of court process and the laid down provisions of law.
6. It is submitted for the Respondent that the applicant did not appeal the judgment delivered on 28<sup>th</sup> May, 2019 by Hon. Wairimu in Eldoret Chief Magistrate Civil Case number 521 of 203 warranting the orders sought of stay of execution of the decree issued therein. That there is therefore no basis to grant the orders of stay of execution of the decree in Eldoret Chief Magistrate Court Civil Suit number 521 of 2003 as even the Respondent herein is not a party to Eldoret Chief Magistrate Civil case number E359 of 2024 which the applicants claim to be the declaratory suit. In support of their submissions, learned counsel cited the decision in *Kassam Hauliers Limited vs Mezgebu Gatachew Mammo (2022) eKLR*.
7. Mr. Kitiwa submitted that the declaratory suit filed by the applicants against the insurer cannot prejudice the Respondent's right to enforce a lawful decree. That the reliance of the applicants on indemnity under Section 4(1) and section 5(b) of the *Insurance Act* cannot absolve them of their primary duty as the judgment debtors. Further that the cause of action in Eldoret Chief Magistrate Civil case number E349 of 2024 is unknown as the applicants have also not provided this Honorable court with pleadings and or documents proving that the same is a declaratory suit seeking declaration orders that the insurer settles the decretal sum in Eldoret Chief Magistrate's court number 521 of 2003.
8. Learned Counsel further submitted that the applicants have also failed to demonstrate any irreparable harm they stand to suffer that cannot be compensated by an award of damages. The Respondent on the other hand, stands to suffer irreparable harm if this application is allowed as it will unjustly the realization of the fruits of the judgment. On this counsel cited the decision in *Some Kosgei v. Grace Jelel Boit (2020) eKLR*. That the applicants in their application merely allege they shall suffer substantial loss following execution but fail to show why they cannot satisfy the decree and subsequently pursue indemnity from the insurer. Counsel cited the case of *James Wangalwa & another v. Agnes Naliaka Cheseto* and submitted that execution is a lawful process, and the risk of execution does not constitute irreparable harm as envisaged in the law. It is submitted for the Respondents that the applicants herein have not provided evidence of substantial loss. The assertion that execution places them at risk of civil jail or sale of property is insufficient as these are lawful consequences of failing to satisfy a decree.



9. Mr. Kitiwa submitted that granting the stay of execution sought would prejudice the Respondent and further delay justice. That in contrast, the applicants can be ordered to settle the decree sum in Eldoret Chief Magistrate Civil Case Number 521 of 2003 and continue pursuing indemnity in the declaratory suit.
10. As to whether the applicants have demonstrated sufficient cause to be granted leave to appeal out of time, the Respondents submitted that the appeal is for orders that were made in a ruling that was delivered on 18<sup>th</sup> February, 2025 and therefore the applicants ought to have filed their appeal by 18<sup>th</sup> March, 2025. That the instant application was filed on 26<sup>th</sup> March, 2025 which delay has not been explained and to which appeal intending to be filed out of time, the applicants did not seek leave to appeal the said ruling. Counsel urged the court not to grant leave for the aforesaid reasons.
11. Finally, as to whether the applicants are entitled to the reliefs sought, counsel submitted that judicial discretion must aim to balance the rights of parties while ensuring justice. He submitted that granting orders of stay of execution herein would unfairly prejudice the Respondent and further delay the enforcement of the decree in Eldoret Chief Magistrates Civil Case number 521 of 2003. Counsel cited the case of Kenya Power and Lighting Company Limited v. Sheriff Molana Habib (2018) eKLR.
12. In Concluding counsel submitted that the applicants' conduct amounts to an abuse of court process and their failure to demonstrate substantial loss or justify their inordinate delay further disqualifies them from the discretionary relief sought. He submitted that the Respondent has the right to enjoy the fruits of a lawful judgment, and this Honorable court should not indulge the applicants' attempts to frustrate justice.

#### **Analysis and determination.**

13. This matter concerns an application by the Appellants/Applicants seeking leave to file an appeal out of time, and for stay of execution of the decree issued in Eldoret Civil Case No. E521 of 2003. The background of this case reveals a protracted legal dispute stemming from a road traffic accident involving the 1st Appellant's motor vehicle registration number KAJ 614F, a Subaru salon, in which the Respondent sustained bodily injuries.
14. The Respondent instituted Civil Case No. E521 of 2003 seeking general damages for injuries suffered, which culminated in a judgment delivered on 28<sup>th</sup> May 2019 in favor of the Respondent. The Appellants were ordered to pay Kshs. 2,078,374 inclusive of costs and interest. The Respondents contended that contrary to the Appellants' assertion that the matter proceeded ex-parte, they had in fact entered appearance and filed their defenses in the original suit.
15. Following the judgment, the Appellants have made multiple attempts to forestall execution. First, the 1<sup>st</sup> Appellant filed Miscellaneous Application E174 of 2024 before this court, but was advised to exhaust the jurisdiction of the subordinate court. Complying with these directions, the Appellants filed an application dated 18<sup>th</sup> September 2024 before the trial court, which was dismissed on 18<sup>th</sup> February 2025. Significantly, the Appellants did not seek leave to appeal this ruling at that time.
16. The Appellants have subsequently filed a declaratory suit (Eldoret Chief Magistrate's Court Civil Case No. E349 of 2024) against their insurer, contending that they are indemnified under Sections 4(1), 5(b), 5(o), and 10(1) of Cap 405 of the Laws of Kenya for the accident that forms the basis of the primary suit. This declaratory suit is scheduled for hearing on 20<sup>th</sup> May 2025.
17. The Appellants now approach this court seeking enlargement of time to file their appeal, validation of their notice and memorandum of appeal dated 26<sup>th</sup> March 2025, and crucially, a stay of



execution pending determination of their appeal. The Respondent strongly opposes the application, characterizing it as an abuse of the court process and a deliberate strategy to delay the enforcement of a judgment rendered after full litigation.

18. The task before this court is to determine whether the Appellants have established sufficient grounds for the extraordinary reliefs sought, balancing the competing interests of a judgment debtor's right to pursue available legal remedies against a judgment creditor's entitlement to enjoy the fruits of litigation that has already been determined on merits.

**Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;**

19. Section 79G of the *Civil Procedure Act* states: -

“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 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.”

20. Section 79G of the *Civil Procedure Act* establishes an unequivocal threshold: applicants seeking extension of time must demonstrate good and sufficient cause for their delay before the court may exercise its discretionary power. This fundamental principle was authoritatively articulated in *Diplack Kenya Limited vs William Muthama Kitonyi* [2018] eKLR, where the court held that an applicant requesting enlargement of time to file an appeal, or seeking admission of an already filed appeal, bears the burden of establishing compelling justification for such exceptional relief.

21. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that: -

“The underlying principles a court should consider in exercise of such discretion should include: -

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.”



22. In the same vein, the Court of Appeal in *Paul Musili Wambua vs Attorney General & 2 Others* [2015] eKLR while considering an application for extension of time stated as follows:
- “.....it is now 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 whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of 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.”
23. Applying the above principles to the case at hand, I must consider the entire procedural history and not merely the technical aspects of the current application. The judgment that the Appellants seek to forestall was delivered on 28<sup>th</sup> May 2019. Rather than pursuing a timely appeal against this substantive judgment, the Appellants embarked on what appears to be a calculated series of applications designed to delay execution.
24. The first notable application was Miscellaneous Civil Application No. E174 of 2024, filed nearly five years after the judgment. When this application was unsuccessful, the Appellants filed another application dated 18<sup>th</sup> September 2024 before the trial court. Only after the dismissal of this second attempt did they initiate the present application. This chronology reveals not merely a delay in filing the current appeal, but a broader pattern of prolonging litigation that has already spanned more than two decades since the original suit was instituted in 2003.
25. The Supreme Court in *Nicholas Kiptoo Korir arap Salat* emphasized that extension of time is an equitable remedy available only to a deserving party. Equity, as the maxim provides, aids the vigilant and not the indolent. The record before me paints a picture of applicants who have demonstrated neither vigilance nor diligence in pursuing their legal remedies. The nearly five-year gap between the judgment and their first application for stay speaks volumes about their true intentions.
26. Furthermore, the Respondent’s affidavit reveals troubling aspects of the Appellants’ conduct during the proceedings below. They reportedly failed to attend court sessions, neglected to file submissions as directed, and disregarded court orders even after being granted indulgences. When the matter was scheduled for ruling, the Appellants were conspicuously absent, despite the date having been set by consent. Such conduct cannot be rewarded with the discretionary relief they now seek.
27. In my considered view, in considering whether to extend time, this court must assess the chances of the appeal succeeding if the application is granted. The Appellants’ central contention appears to be that they are indemnified by their insurer under various provisions of the *Insurance Act*. This argument, however, misconceives the legal relationship between judgment debtors and their insurers. The pendency of a declaratory suit against an insurer does not suspend a judgment debtor’s primary obligation to satisfy a decree. The correct legal position, as recognized in established jurisprudence, is that judgment debtors must first satisfy the decree and thereafter seek indemnification from their insurers.
28. The prejudice to the Respondent is substantial and concrete. Having secured judgment in 2019 after litigation that began in 2003, the Respondent has been systematically denied the fruits of his judgment through a succession of applications that appear designed primarily to delay rather than to address any genuine legal grievance. Justice demands that litigation must reach finality, and courts must be vigilant against attempts to transform procedural mechanisms into instruments of injustice.



- 29. Having carefully weighed all relevant factors, the inordinate delay in seeking appropriate legal remedies, the Appellants' demonstrated lack of diligence in prosecuting their case, the absence of compelling grounds for appeal, and the significant prejudice to the Respondent, I am satisfied that this is not a case where the court's discretionary power to extend time should be exercised. The Appellants have failed to demonstrate good and sufficient cause as required by Section 79G of the Civil Procedure Act.
- 30. Having determined that the Appellants have failed to demonstrate good and sufficient cause for extension of time, the issue of stay of execution subsequently becomes moot. The application for stay cannot pass this threshold, having been dismissed at the first hurdle. Moreover, considering the inordinate time lapse since the original judgment in 2019, and the sequential pattern of applications evidently designed to forestall execution, granting stay at this juncture would be tantamount to sanctioning an abuse of the court process and perpetuating injustice against the Respondent who has patiently awaited the fruits of litigation for over half a decade.
- 31. The instant application therefore lacks merit and is dismissed with no orders as to costs.
- 32. Orders accordingly.

**SIGNED, DATE AND DELIVERED AT ELDORET THIS 20<sup>TH</sup> DAY OF MAY 2025.**

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**R. NYAKUNDI**

**JUDGE**

