



REPUBLIC OF KENYA



KENYA LAW
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Chelogoi v JMK (Of Unsound Mind Suing through VKO Next Friend) (Miscellaneous Civil Application E004 of 2025) [2025] KEHC 7066 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7066 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
MISCELLANEOUS CIVIL APPLICATION E004 OF 2025**

RK LIMO, J

MAY 23, 2025

BETWEEN

TOLBERT KEMBOI CHELOGOI APPLICANT

AND

JMK (OF UNSOUND MIND SUING THROUGH VKO NEXT FRIEND) RESPONDENT

RULING

1. Before this court is an application dated 14/2/25 principally seeking for two prayers namely;
 - i. Extension of time to file appeal against the judgment delivered on 2/10/2019 vide Kitale CMCC NO.178 of 2017.
 - ii. That pending the determination of this application and the intended appeal there be issued an order staying execution of the judgment and decree in Kitale CMCC No.178 of 2017.
2. The grounds are;
 - a. That the applicant was not served with summons to enter appearance in the lower court but instead his insurers Xplico were served.
 - b. That Xplico did not notify him.
 - c. That he learnt about judgment on 23/1/25 which judgment was delivered on 2/10/2019.
 - d. That he has raised triable issues in the intended appeal.
3. The applicant has sworn and affidavit sworn on 14/2/25 to support the grounds raised in this application.



4. The applicant avers that the firm of Kamoing & Co Advocates who appeared for him at the trial court appears to have been instructed by Xplico Insurance Co Ltd because the appointed advocate never sought his instructions.
5. He avers that he never got an opportunity to tender his defence and was condemned unheard.
6. He further depones that he learnt of the existence of the suit when auctioneers visited his home in Kitale on 23/1/25 to proclaim his properties.
7. He contends that his right to be heard has been violated and seeks to be given a chance through extension of time to appeal.
8. In his written submissions through his counsel M/S Katama Ngeiywa & Co Advocates, the applicant insists that he wishes to appeal against the judgment delivered in Kitale CMCC No.178 of 2017.
9. He submits that this court has discretion to enlarge time under Order 50 Rule 6 of the [Civil Procedure Rules](#) and that the respondent will not be prejudiced by the extension of time sought.
10. He relies on the case of [Aviation Allied Workers Union \(K\) v K O & 3 Others](#) (2015)eKLR.
11. He contends that the court ought to exercise its discretion to dispense substantive justice to parties. He relies on [Zacharia Okoth Obado v Edward Akon'go Ayugi & 2 Others](#) (2014)eKLR and [Fabim Yasin Twaba v Timothy Issa Abdalla & 2 Others](#) (2015)eKLR.
12. The respondent has opposed this application through a replying affidavit sworn on 15/5/25.
13. The respondent faults the applicant for inordinate delay stating that the applicant has not given explanation for 6 years delay.
14. He contends that the application herein offends the provisions of Order 42 Rule 1 & 7 of the [Civil Procedure Rules](#).
15. The respondent avers that the case at the trial court was defended and the applicant was represented by Kamoing & Co Advocates.
16. He avers that the issue of legal representation of the applicant does not involve him and that the application is intent at delaying his fruits of judgment.
17. In his written submission dated 20/5/25, done through learned counsel Gekong'a & Co Advocates, the respondent submits that the applicant entered appearance and defended the suit in the lower court adding that the insurance company (Xplico) was not a party to the suit.
18. He submits that the applicant has not met conditions for stay of execution and relies on [Elena Doudoladova Korir v Kenyatta University](#) (2014)eKLR where the court set the conditions to be established as sufficient cause, substantial loss, furnishing of security and timelines in filing the application.
19. The respondent submits that the applicant has not demonstrated any substantial loss he will suffer if stay is not granted. He relies on [Equity Bank Ltd v Taiga Adams Co Ltd \(citations not given\) and Mutua Kilonzo v Kioko David](#) (2008)eKLR.
20. The respondent submits that the applicant never appealed or has filed an application after 6 years since judgment was delivered. He submits that no reasons have been given for delay yet the applicant was duly represented. He submits that the applicant has not established any cause for extension of time. He relies on [Gitau v Kagiri & Anor](#) (2024)KEHC 6320 (KLR) (6 June 2024).



21. This court has considered this application and the grounds upon which it is made. I have also looked at the grounds raised in opposition.
22. The applicant seeks for enlargement of time to appeal against the judgment entered in the lower court in Kitale CMCC NO.178 of 2017. That judgment was delivered on 2/10/2019 in presence of the respondent and applicant's counsel.
23. The gist of this application is that the applicant was not aware of the suit and that his insurer namely Xplico might have been served and went ahead to defend him without his knowledge.
24. However there is no evidence placed before me to demonstrate that the said insurer acted on its own without involving the applicant. What is clear from the record is that the applicant was duly represented by counsel and Xplico Insurance Company was not a party in the proceedings to have proceeded in the case in the absence or instructions from the applicant. The applicant duly entered appearance through counsel in the trial court.
25. This court also finds it strange that the applicant claims that he was not served with summons to enter appearance or the plaint in the lower court yet he wants to appeal the judgment entered instead of moving the trial court under the provisions of Order 10 Rule 11 of *Civil Procedure Rules*. A party who feels aggrieved by judgment because of non-service is given a chance under those provisions to move the court to set aside the judgment for non-compliance of Order 10 which includes service of summons and plaint.
26. The applicant can only challenge the issue of service of summons and plaint under the provisions of Order 10 of the *Civil Procedure Rules* and not through an appeal unless he is stating that the trial court failed to exercise its discretion well to set aside the judgment on grounds of non-service.
27. The draft memorandum of appeal raises no ground touching on service of summons and plaint. The grounds raised in the application before me are not in tandem with the grounds raised in the intended appeal. There is a disconnect between grounds raised in this application and the draft memorandum of appeal.
28. The intended appeal raises issues on capacity of the respondent to file the suit and the quantum awarded.
29. The applicant has every right to appeal against the judgment passed but that right must be exercised within the specified period which is 30 days from the date of judgment.
30. The applicant did not exercise the right to appeal on time or at all yet he was duly represented by counsel. I do not find that he was duly represented by counsel because the record from the lower court indicates so. Now he has come to this court for enlargement of time but he has come after 6 years from the time judgment was delivered. That is a long period of time and there is no explanation offered for the delay.
31. The law requires that before I exercise my discretion under Order 50 Rule 6 *Civil Procedure Rules*, an applicant must show or demonstrate sufficient cause.
32. The applicant avers that he did not instruct the firm of Kamoing & Co Advocates to act for him but there is no evidence in terms of either a letter of protest to either LSK or this court complaining that an advocate acted without instructions. Besides that the said advocate has not sworn an affidavit to confirm the allegations that he was instructed by Xplico Insurance Company and not the applicant or that he did not make or get any communication from the applicant with respect to the case during trial.



33. I also find the averment in paragraph 5(a) of the affidavit in support of this application to be interesting because the applicant is denying that his name is Tolbert Kemboi Chelogoi but he at same time contending that, that is his actual name.
34. The other issues regarding his ID and his place of residence are matters that ought to be canvassed under the provisions of Order 10 Rule 11 of *Civil Procedure Rules* if service was disputed.
35. This court finds that the explanation given for 6 years delay in filing an appeal or applying for extension of time is inordinate and the reasons given by the applicant are insufficient to warrant enlargement of time.

In the premises this court finds no merit in the application for enlargement of time. In the absence of enlargement of time the application for stay cannot be sustained.

In the premises the application dated 14/2/25 is dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT KITALE THIS 23RD DAY OF MAY , 2025.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Ruling delivered in open court

In the presence of;

Owino holding brief for Ngeiywa for Applicant

Gekong'a for Respodnent – absent

Duke/Chemosop – Court assistants

