



**Kanyi v Orondo & another (Civil Appeal E1156 of 2024)  
[2025] KEHC 12190 (KLR) (Civ) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12190 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL APPEAL E1156 OF 2024  
TW CHERERE, J  
MAY 8, 2025**

**BETWEEN**

**JAMES KANYI ..... APPELLANT**

**AND**

**OMONDI PETER ORONDO ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL MUGENDI T/A CLEAR REAL AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

Justice leans in favour of those who falter, so long as they do not abandon the path.

1. Before me is the Applicant’s Notice of Motion dated 2nd October 2024 seeking the following orders:
  1. Leave for the firm of Mathenge & Mathenge Advocates to come on record for the Applicant
  2. Leave to file an appeal out of time against the judgment delivered on 07<sup>th</sup> December 2023 in Milimani SCCCOM E3668 of 2023
  3. Stay of execution of the said judgment pending the intended appeal.
  4. Temporary injunction restraining the Respondent from interfering with the Applicant’s business.
2. The application is supported by the Applicant’s affidavit sworn on even date and is premised on the grounds, inter alia, that:
  1. The Applicant has appointed new advocates,



2. The Appellant was unaware of the delivery of judgment
  3. Time to file an appeal has lapsed
  4. There exists an arguable appeal
  5. Execution has commenced by warrants of attachment issued on 23rd May 2025.
3. The 1<sup>st</sup> Respondent opposed the application by way of a Replying Affidavit sworn on 25<sup>th</sup> October 2024. The 1<sup>st</sup> Respondent contends that:
1. The judgment was delivered in the presence of counsel for both parties
  2. The Applicant failed to file an appeal within the prescribed timelines
  3. The present application was brought more than ten months after delivery of judgment.
  4. The delay is inordinate and unexplained
  5. The application is an afterthought aimed at frustrating lawful execution.

### **Submissions**

4. The Applicant, through written submissions dated 10<sup>th</sup> April 2025, submitted that he has satisfied the conditions necessary for the exercise of the Court’s discretion in his favour. Reliance was placed on *First American Bank of Kenya v Gulab P. Shah & 2 Others* [2002] 1 EA 65, wherein the Court of Appeal observed:
- “The decision whether or not to extend time is discretionary. The discretion is unfettered except that it must be exercised judicially, that is to say, not arbitrarily, capriciously or whimsically but in accordance with sound legal principles. Among the factors to be considered are the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and the degree of prejudice to the respondent if the application is granted.”
5. The Applicant also submitted that the delay in filing the appeal has been sufficiently explained, citing *Zacharia Kinyua v Muriithi Kallen & Alex Mutua Misc E066 of 2021*, where the Court held that:
- “The court must balance the right to appeal with the need for finality in litigation. A satisfactory explanation for delay must be given before the court can exercise its discretion.”
6. On the existence of an arguable appeal, the Applicant relied on *Kimani & Another v Benson Civil Appeal E006 of 2023*, where where the court expressed itself that:
- “An arguable appeal is not one that must succeed but one which deserves consideration by the court.”
7. Further support was drawn from *Nairobi Women’s Hospital v Purity Kemunto* [2018] eKLR and *Medical Laboratory Technicians and Technologists Board v Prime Communications Ltd* [2014] eKLR, which emphasized that an arguable appeal need not necessarily succeed but must raise bona fide and triable issues.



8. In addressing the issue of prejudice, the Applicant cited Philip Chemwolo & Another v Augustine Kubende [1986] eKLR, where the Court stated:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case heard on merit. The court is concerned with doing justice, and unless injustice or prejudice would result to the other side which cannot be compensated by costs, mistakes should not necessarily result in the dismissal of a case.”

9. The Applicant further cited Mwangi v Kenya Airways Ltd [2003] eKLR to underscore that not all mistakes are fatal, particularly where no substantial prejudice is occasioned.

10. On the issue of extension of time operating as stay of execution, the Applicant cited Oriental Construction Co. Ltd v Rift Valley Water Services Board Civil Application No. 161 of 2012, where it was held:

“The fact that an application for extension of time is made does not automatically entitle the applicant to stay of execution. Each application must be considered on its own merits and compliance with the conditions for stay of execution.”

11. The 1<sup>st</sup> Respondent on the other hand relied on the submissions dated 23<sup>rd</sup> April 2025, argued that the Applicant has not met the threshold for extension of time. Reliance was placed on Salat v IEBC & 7 Others [2014] eKLR, where the Supreme Court held:

“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 extension of time must lay a basis to the satisfaction of the court.”

12. It was submitted that it is not enough to blame the former advocate. The Applicant ought to have demonstrated efforts to follow up on his case, as held in Paul Musili Wambua v Attorney General & 2 Others [2015] eKLR, Scania East Africa Ltd & 2 Others v Patrick Mutisya Kioko [2020] eKLR, Bi Mach Engineers Ltd v James Kahoro Mwangi [2011] eKLR, and Rajesh Rughani v Fifty Investments Ltd & Another.

13. The 1<sup>st</sup> Respondent likewise argued that delay prejudices him as the successful party, citing Mohamed Salim t/a Choice Butchery v Nasserpuria Memon Jamat [2013] eKLR and Portreitz Maternity Hospital v James Karanga Kabia Civil Appeal No. 63 of 1997.

14. Finally, it was contended that execution per se does not constitute substantial loss, citing James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, and that extension of time does not operate as stay, as emphasized in Kamau v Nyoike Civil Appeal No. 10 of 2023 [2024] eKLR.

### **Issues for Determination**

15. From the affidavit evidence and submissions on record, the following issues fall for determination:

1. Whether the firm of Mathenge & Mathenge Advocates can properly come on record
2. Whether the Applicant has satisfied the conditions for leave to appeal out of time
3. Whether the Applicant has satisfied the conditions for stay of execution pending appeal
4. Whether the Applicant has made a case for a temporary injunction.



## **Analysis and Determination**

### **1. Whether the firm of Mathenge & Mathenge Advocates can properly come on record**

16. Order 9 Rule 9 of the Civil Procedure Rules requires leave of court or consent of the previous advocate where there is a change of advocate after judgment has been entered in the same suit or proceedings.
17. This application has been brought in a new and separate proceeding, namely HCCA E1156 of 2024. It does not constitute continuation of the original suit Milimani SCCCOM E3668 of 2023.
18. In *Tobias M. Wafubwa v Ben Butali* [2017] eKLR, the Court of Appeal addressed the applicability of Order 9 Rule 9 and held:

“Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court... Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.”
19. Accordingly, the firm of Mathenge & Mathenge Advocates need not have sought leave to come on record for the Applicant and a notice of appointment of advocate suffices.

### **2. Whether the Applicant has satisfied the conditions for leave to appeal out of time**

20. The principles guiding extension of time were succinctly set out by the Supreme Court in *Salat v Independent Electoral Boundaries Commission & 7 Others* [2014] eKLR. Although the discretion is unfettered, the Applicant must show, inter alia, a satisfactory explanation for delay, and that no undue prejudice will result to the opposing party.
21. The Applicant blames his former advocate but has not demonstrated diligence in following up on his matter. It is not enough to shift blame to the advocate (See *Bi Mach Engineers Ltd v James Kahoro Mwangi* [2011] eKLR). The delay of over 10 months is grossly inordinate and unjustified and Applicant does not even disclose how the judgment came to his attention.
22. However, the right to be heard on appeal is a fundamental principle of justice which the Court must guard jealously, particularly where the intended appeal raises an arguable issue, even if only a single triable issue exists. (See *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR; *Jaber Mohsen Ali & Another v Priscillah Boit & Another* [2014] eKLR).
23. Although the Applicant has not satisfactorily explained the inordinate delay of over ten (10) months, the Court is persuaded that the intended appeal raises an arguable point deserving consideration on appeal. In the circumstances, and in the interests of justice, the Court is inclined to exercise its discretion in favour of the Applicant. Accordingly, the application for leave to file the appeal out of time is hereby allowed.

### **3. Whether the Applicant has satisfied the conditions for stay of execution**

24. Under Order 42 Rule 6 of the Civil Procedure Rules, an applicant for stay of execution must satisfy three conditions: demonstrate that substantial loss may result if the stay is not granted; file the application without unreasonable delay; and provide security for the due performance of the



decree. It is well settled that the mere fact of execution does not constitute substantial loss (See James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR). As further emphasized by the Court of Appeal in Butt v Rent Restriction Tribunal [1982] KLR 417, the provision of security is a mandatory consideration in the exercise of discretion to grant stay.

25. In the present case, the Applicant has neither demonstrated any exceptional or peculiar circumstances amounting to substantial loss nor tendered any offer of security.
26. Accordingly, as stated in Kamau v Nyoike Civil Appeal No. 10 of 2023 [2024] eKLR, although the Applicant has been granted extension of time to file his appeal, it should be remembered that the extension does not automatically operate as a stay of execution. Although the Applicant has not met the conditions for stay, the existence of an arguable appeal entitles him to stay pending appeal.

#### **4. Whether the Applicant is entitled to a temporary injunction**

27. The principles governing the grant of a temporary injunction are well established. In Giella v Cassman Brown & Co. Ltd [1973] EA 358, the Court held that an applicant must demonstrate: (i) a prima facie case with a probability of success; (ii) that they will suffer irreparable injury which cannot be adequately compensated by an award of damages; and (iii) if in doubt, the court will decide the application on a balance of convenience.
28. These principles were reaffirmed by the Court of Appeal in Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, where it was emphasized that these conditions are sequential and must all be satisfied.
29. Execution of a decree is a lawful court order and a party seeking to suspend it must comply with the requirements for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules. Equity does not restrain what the law permits. An injunction is therefore not the appropriate remedy to restrain lawful execution and it cannot issue to prevent enforcement of a valid judgment.

#### **Disposition**

30. Upon consideration of the Notice of Motion dated 02<sup>nd</sup> October 2024, the Court makes the following orders:
  1. The firm of Mathenge & Mathenge Advocates need not have sought leave to come on record for the Applicant and a notice of appointment of advocate suffices.
  2. The prayer for a temporary injunction to restrain execution is similarly declined.
  3. Leave to file an appeal out of time against the judgment delivered on 07<sup>th</sup> December 2023 in Milimani SCCCOM E3668 of 2023 out of time is hereby granted.
  4. The memorandum of appeal shall be filed and served within 14 days from today's date
  5. There shall be stay of execution of the judgment in Milimani SCCCOM E3668 of 2023 on condition that the Applicant deposits the total decretal sum with the court
  6. The costs shall abide the outcome of the appeal

**DELIVERED AT NAIROBI THIS 08<sup>TH</sup> DAY OF MAY 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances



Court Assistant - Nyambala

For Applicant - Ms. Kinaro for Mathenge & Mathenge Advocates

For 1<sup>st</sup> Respondent - Mr. Mugambi for NOW Advocates LLP

For 2<sup>nd</sup> Respondent - N/A

