



**Kimani v Kithaka (Suing as the Personal Representative of the Estate of John Ngulu Kithaka)  
(Miscellaneous Civil Application E184 of 2023) [2025] KEHC 5913 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5913 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS CIVIL APPLICATION E184 OF 2023**

**EN MAINA, J**

**MAY 8, 2025**

**BETWEEN**

**CLEMENT KIMANI ..... APPLICANT**

**AND**

**ROSE KAMENE KITHAKA (SUING AS THE PERSONAL REPRESENTATIVE  
OF THE ESTATE OF JOHN NGULU KITHAKA) ..... RESPONDENT**

**RULING**

1. The Applicant's Notice of motion dated 29<sup>th</sup> September 2025 is two pronged. First it seeks a stay of execution pending appeal and it also seeks leave to appeal out of time. In respect to the application for stay the Applicant also seeks to deposit a bank guarantee as security for costs.
2. The application is supported by the affidavit of Clement Kimani sworn on 29<sup>th</sup> September 2023. The gist of the application, as can be discerned from the grounds on its face thereof and in the affidavit, is that being aggrieved by the judgment of the lower court the Applicant is desirous of bringing an appeal; that the appeal is arguable and has high chances of success; that this application is brought in good faith and the Respondent stands to suffer no prejudice; that on the other hand, the Applicant stands to suffer substantial loss and that there has been no inordinate delay in bringing this application.
3. The application was opposed through a replying affidavit sworn by the Respondent on 18<sup>th</sup> October, 2023 where she deposes that the applicant is not deserving of the discretion of this court as does not meet the conditions for a stay of execution; that there was inordinate delay in bringing the application and that contrary to the assertion by the Applicant she is a person of means and hence can refund the decretal sum in the event the appeal succeeds. She also deposes that there is as yet no decree capable of being executed as the costs have not been agreed and that should the orders sought be granted, she will be kept away from enjoying the fruits of her judgment and further that the bank guarantee offered is only for 12 months from 6<sup>th</sup> July 2023 and there is no guarantee that the same will be renewed.



4. Learned Counsels for the parties agreed to canvass the application by way of written submissions. For the Applicant it was submitted that the delay in filing the intended Appeal was occasioned on the instructing client issuing the instructions after the prescribed time had lapsed and that there was no mandatory requirement that the instructions should be furnished to the court. It was submitted that the Applicant's right to access justice and fair hearing under Articles 48, 50 and 159 of *the Constitution* should be protected and not be watered down by a mere technicality of failure to file the Memorandum of Appeal within the prescribed timeline. Counsel relied on the case of Kenya Power & Lighting Company Ltd v Rose Anyango & another [2020] e KLR and Nicholas Kinto Arap Korir Salat v. Independent Electoral and Boundaries Commissions & others (2013) e KLR.
5. Further, that the draft memorandum of Appeal raises arguable issues and that the Respondent has not demonstrated that she is a person of means or has financial resources to pay the decretal amount in the event the intended appeal is filed succeeds. Learned Counsel for the Applicant placed reliance on the cases of Kenya Revenue Authority vs. Sidney Keitany Changole & 3 Others (2015) eKLR and Edward Kamau & Anor vs. Hannah Mukui Gichuki & Anor (2015) e KLR.
6. Relying on the cases of *Omar Shurie vs Marian Rashe Yafar, Civil Application no 107 of 2020* UR and Susan Ogutu Oloo and others vs Doris Odindo Omolo (2019)eKLR Learned Counsel for the Respondent submitted that the Applicant should not be granted leave to file the appeal out of time as nothing prevented Counsel for the Applicant from filing a memo of appeal which they could amend thereafter; that the intended appeal is an afterthought intended to forestall realization of the decretal sum as the Applicant did not file submissions on quantum in the Trial Court; that substantial loss has not been demonstrated and the applicant has not offered proper and adequate security since the bank guarantee will expire on 6<sup>th</sup> July 2024 and there is no guarantee that it will be renewed. Lastly, that there has been inordinate delay in bringing this application.

#### **Analysis and determination**

7. I have carefully considered the application, the rival submissions, the cases cited and the law. In regard to the first limb of the application I find that it falls short of the conditions requisite for grant of a stay of execution firstly as there is no appeal; secondly because the Applicant has not demonstrated that he stands to suffer substantial loss and thirdly because the delay in bringing the application has not been explained to the satisfaction of this court.
8. The impugned judgment was delivered on 18<sup>th</sup> August 2023 and the appeal should have been filed within 30 days. However, this application was filed after 45 days on 3<sup>rd</sup> October 2023. The reason given for the delay is that the client gave instructions for the delay late. In my considered view that explanation is not satisfactory in view of Sections 1A and 1B of the *Civil Procedure Act*. The discretion of the court is never exercised in favour of those who are indolent. To expect this court to grant a stay based on that ground is tantamount to asking it to act whimsically. Moreover, the Applicant has not demonstrated that the Respondent is a person of straw incapable of refunding the decretal sum were the appeal to succeed. On the issue of security, the bank guarantee that had been offered has since lapsed and become inoperative. The application for an order for stay of execution is not merited.
9. The issue of leave to file the Appeal out of time, reference is made to Section 79G of the *Civil Procedure Act* states that:

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.

10. On the second limb for leave to appeal out of time, this court is guided by the conditions laid by the Supreme Court in the case of Nicholas Kiptoo Korir Arap Salat vs IEBC and 7 Others Application no 16 of 2023 where it stated-

“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.”

11. The Applicant was late in bringing this application but so as not to impede his right to access to justice I shall grant him leave to file his appeal out of time. The appeal shall be filed and served within thirty (30) days from today and in default the leave granted shall lapse. The application succeeds to that extent only.

12. The costs of the application shall be borne by the Applicant.

Orders accordingly.

**RULING SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 8<sup>TH</sup> DAY OF MAY 2025.**

**E.N. MAINA**

**JUDGE**

In the presence of:

Ms Sirma for Mr. Mwiha for the Respondent

n/a for the firm of Kimondo Gachoka for the Applicant

Geoffrey – Court Assistant

