



**Mwangi & another v Kamau (Civil Miscellaneous E374 of 2025)
[2025] KEHC 12198 (KLR) (Civ) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12198 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL MISCELLANEOUS E374 OF 2025
TW CHERERE, J
MAY 15, 2025**

BETWEEN

JOHN MWANGI 1ST APPLICANT

KIMARU THAIRU 2ND APPLICANT

AND

ALEX WANJOHI KAMAU RESPONDENT

RULING

“Justice does not only protect the merits of a case, but also the diligence of its pursuit. A party that sleeps on their rights must wake up to the consequences of delay.”

1. The Applicants moved the Court by way of a Notice of Motion dated 20th March 2025 brought under Sections 3, 3A, and 95 of the [Civil Procedure Act](#), and Order 22 Rule 22, Order 42 Rules 4 and 6, and Order 51 Rules 1 and 3 of the [Civil Procedure Rules, 2010](#). They seek the following orders:
 1. Leave to file an appeal out of time;
 2. Stay of execution of the judgment delivered on 11th September 2023 in Milimani MCCC No. E310 of 2021 pending the determination of the intended appeal;
 3. That costs of the application abide the outcome of the intended appeal.
2. The application is supported by the affidavit of Maureen Moranga, Advocate, sworn on 20th March 2025, and is based on the following grounds:
 1. Judgment was delivered in favour of the Respondent on 11th September 2023 in Milimani MCCC No. E310 of 2021;



2. It took time to obtain instructions from the Applicants;
 3. The Applicants are aggrieved by the said judgment;
 4. The intended appeal has high chances of success;
 5. The Applicants are willing to provide security for due performance of the judgment;
 6. The Respondent may not be able to refund the decretal sum should the appeal succeed.
3. The Respondent opposed the application by way of a replying affidavit sworn on 08th April 2025 and raised the following grounds:
1. There is no reasonable explanation for the delay in bringing the application;
 2. The Applicants are guilty of laches and do not deserve the equitable relief sought;
 3. The Applicants have not satisfied the conditions for stay under Order 42 Rule 6 of the [Civil Procedure Rules](#);
 4. Litigation must come to an end.

Issues for Determination

4. Having considered the application, the affidavits on record, and the respective submissions, the following issues arise for determination:
 1. Whether the Applicants have demonstrated sufficient cause to warrant extension of time to file an appeal out of time under Section 79G of the [Civil Procedure Act](#);
 2. Whether the Applicants have satisfied the conditions for the grant of stay of execution pending appeal under Order 42 Rule 6(2) of the [Civil Procedure Rules](#).
5. Under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), the court will only grant stay where:
 1. Substantial loss may result to the applicant unless the order is made;
 2. The application has been made without unreasonable delay; and
 3. Such security as the court may order is given.
6. To succeed, an applicant in the circumstances of the Applicant herein must satisfy all the three conditions for grant of stay. The court in *Trust Bank Limited vs Ajay Shah & 3 Others*, [2012] eKLR at page 23 stated that: - “The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff’s Notice of Motion dated 24th April, 2012 is without merit.”
7. On the issue of substantial loss, the Applicants have expressed apprehension that the Respondent may be unable to refund the decretal sum. It is now settled that such apprehension may, in appropriate circumstances, suffice to establish substantial loss.
8. In [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another](#) [2006] eKLR, the Court of Appeal held:

“This Court has said before and it is worth repeating, that while the legal duty is on the applicant to prove that the respondent will not be able to repay the decretal sum, it is



unreasonable to expect the applicant to know the resources available to the respondent. Once the applicant expresses a reasonable fear founded on acceptable grounds, the evidential burden then shifts to the respondent to show that he would be in a position to refund.”

9. I am satisfied that the Applicants have raised a reasonable apprehension supported by the circumstances of the case. Substantial loss is, in the present case, demonstrated.
10. On the issue of delay, the judgment was delivered on 11th September 2023, and this application was filed on 20th March 2025, a delay of approximately 1 year and 6 months.
11. Under Section 79G of the *Civil Procedure Act*, an appeal should be filed within 30 days from the date of the judgment. However, the court may admit an appeal out of time if sufficient cause is shown.
12. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231, the Court of Appeal laid down the applicable principles:

“The matters which a 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.”
13. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2014] eKLR stressed that:

“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... The delay should be explained to the satisfaction of the court.”
14. The impugned judgment was delivered on 11th September 2023, and this application was filed on 20th March 2025, a delay of approximately 1 year and 6 months.
15. The only explanation offered for the delay is that it took time to obtain instructions. That explanation is however vague and unsubstantiated as no supporting evidence such as correspondence or a litigant’s affidavit was provided to demonstrate the effort or impediments encountered in pursuing the appeal.
16. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2014] eKLR stressed that:

“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... The delay should be explained to the satisfaction of the court.”
17. Delay must be both reasonably explained and justified. With no reason provided for the delay, the Applicants cannot benefit from the court’s discretion where they have not demonstrated diligence, for equity is never meant to aid the indolent or to defeat the ends of justice.
18. In *Carter & Sons Ltd. V. Deposit Protection Fund Board & 2 Others* Civil Appeal No. 291 of 1997, at Page 4, the Court of Appeal stated that;

“.....the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. The applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”



19. And whereas the Applicants have offered security and asserted that their intended appeal is arguable, it is trite that neither the offer of security nor the arguability of an appeal, however meritorious, can excuse inordinate delay.
20. If the Applicants genuinely believed in the strength of their appeal, they had a duty to act promptly. Courts are guided not only by the strength of a case but also by the conduct of the litigants. As has been consistently held, equity assists the vigilant and not those who slumber on their rights. Delay, when unexplained, undermines the very pursuit of justice.

Disposition

21. Given the foregoing, the Notice of Motion dated 20th March 2025 is determined in the following terms:
 1. Leave to file an appeal out of time is declined
 2. Stay of execution of the judgment delivered on 11th September 2023 in Milimani MCCC No. E310 of 2021, pending the determination of the intended appeal, is similarly declined
 3. Respondent is awarded the costs of this application

DELIVERED AT NAIROBI THIS 15TH DAY OF MAY 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Abdirizack

For Applicants - N/A for Kimondo Gachoka & Co. Advocates

For Respondents - Ms. Sagwa for Shem Kebong'o & Co. Advocates

