



**Mwangombe v Mjwasi & another (Suing as the Legal Representatives of the Estate of Sylvia Wanjala Maganga) (Miscellaneous Civil Application E360 of 2024) [2025] KEHC 8334 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 8334 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CIVIL APPLICATION E360 OF 2024**

**G MUTAI, J  
MAY 9, 2025**

**BETWEEN**

**PHILIP M MWANGOMBE ..... APPLICANT**

**AND**

**PETER MJWASI & MARCUS G PETER (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF SYLVIA WANJALA MAGANGA) ..... RESPONDENT**

**RULING**

1. Vide an application dated 9<sup>th</sup> December 2024 the applicant sought several orders, among which were stay of execution of the judgment of the Court below and leave to file an appeal out of time.
2. The application was premised on the alleged fact that the applicant’s insurers became aware of the matter in the Court below only after the judgment was entered and after the period within which the appeal could be lodged without seeking leave had lapsed. The applicant was apprehensive that given the fact that a declaratory suit to wit, Mombasa CMCC NO 1766 of 2024; Peter Mjwasi & Marcus G Peter vs Madison Insurance Co Ltd had been filed, there was an urgency in the matter. It was also averred that there was a grave danger that the applicant’s insurer, the applicant herein, would suffer grave prejudice.
3. The application was opposed. The 2<sup>nd</sup> Respondent averred that the applicant’s insurer was served with a statutory notice prior to the institution of the suit. It was averred that the said insure lacked the locus to file the appeal as no letters of administration had been obtained. It was stated that the application was ill motivated, made in bad faith and was only calculated to delay the successful litigants from enjoying the fruits of a judgment in their favour.
4. The application was canvassed by way of Written Submissions.



5. The submissions of the Applicant are dated 12<sup>th</sup> March 2025, wherein it was urged that this Court has inherent powers to extend time to file an appeal. Reliance was placed in the Court of Appeal decision in *Mwangi vs Kenya Airways Ltd* [2003]eKLR. In the said case, the said Court referred to the holding in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), wherein it was held as follows:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this 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.”

6. Counsel urged that there was a mistake on the part of the counsel which should not be visited on the client. In support of the said averment, the Court was referred to the case of *Murai vs Wainaina* (No 4) (1982) KLR 38 where it was held that:-

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel, though in the case of a junior counsel, the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a person of experience who ought to have known better has made a mistake. The Court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictates.

It is known that courts of justice themselves make mistakes which is politically referred to as erring, in their interpretation of law and adoption of a legal point of view which Courts of Appeal sometimes overrule. It is also not unknown for a final Court of Appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so required. It is also done in the interest of justice.”

7. It was urged that a delay of less than 60 days, as in this case, was not ordinary. Counsel relied on the case of *David Ngugi v The Board of Governors, Kamahuha Girls High School* [2016] KEELC 400 (KLR), where a delay of 5 months was deemed inordinate, but the applicant was allowed to file his appeal out of time on the basis that the delay had been adequately explained.
8. The counsel for the applicant submitted that his client had an arguable case, as the suit was brought against a deceased person without a grant having been first obtained. He urged that the conditions for granting a stay under Order 42, Rule 6(2) of the Civil Procedure Rules had been met. He denied that the application was brought in bad faith.
9. The submissions of the Respondent are dated 6<sup>th</sup> March 2025.
10. It was urged that before a Court can grant leave for an appeal out of time, it must be convinced that there are good and sufficient reasons for filing an appeal out of time. Reliance was placed on the decision of the Court in *Githau v Kagiri & another* [2024] KEHC 6320 (KLR) and *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] KEHC 4858 (KLR).
11. It was urged that the appeal does not raise triable issues. Counsel for the Respondent denied that the draft Memorandum of Appeal had been filed to show that the intended appeal had any chances of success.



12. Counsel also relied on the case of *Salat v Independent Electoral and Boundaries Commission & 7 others* (Application 16 of 2014) [2014] KESC 12 (KLR) and of *Paul Musili Wambua vs Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out 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.”

13. Counsel thus urged that the application be dismissed with costs.

14. I have considered the application, the responses thereto, as well as the parties' oral and written submissions. In my view, the issues I am expected to determine are twofold: whether to grant leave to file an appeal out of time and, if so, whether to issue a stay pending appeal.

15. Should this Court grant the applicant an extension of time to file an appeal? The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR set out the principles applicable in an application for leave out of time. The apex court stated 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.”

16. I have considered the application filed herein. In my view, the application raises triable issues. Whether or not the insured person was deceased at the time the court below heard the case is a pertinent matter. The insurer has claimed that they were not aware of the suit and could not have defended it. This, in my view, explains the delay on their part and justifies the exercise by this Court of the discretion to extend time. It will be in the best interest of justice to allow the application so that the applicant's insurer can ventilate its appeal.

17. What of orders staying the execution of the judgment pending appeal? The conditions under which the court may grant a stay of execution pending appeal are provided in Order 42 Rule 6(2) of the Civil Procedure Rules. These are that:-



- a. The application must show that he will suffer a substantial loss unless a stay is granted;
  - b. The application was filed without undue delay; and
  - c. Security for the due performance of the decree, which may ultimately be binding, has been provided.
18. The application herein was filed within 60 days of the delivery of the impugned judgment. The delay on the part of the applicant, though inordinate, is, as we have seen, not inordinate.
  19. The applicant has offered to deposit the entire decretal sum in court or a joint interest-earning account. To my mind, therefore, the third condition stated above has also been met.
  20. Has the 1<sup>st</sup> condition been met?
  21. The court defined what constitutes a substantial loss in the case of *James Wangalwa & another v Agnes Cheseto* [2012] KEHC 1094 (KLR). The court stated as follows:-

“ 11. No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory.”

22. It is not at all clear to me if the respondents have the means to repay the decretal amount if the appeal is successful. In my view, they may not be able to do so. Clearly, then, if the appeal is successful, the applicant will suffer a substantial loss.
23. The upshot of the foregoing is that the application filed herein has merit. I allow the application dated 9<sup>th</sup> December 2024, on the condition that the entire decretal amount is deposited into a joint interest-earning account in the names of both parties' counsels within 30 days of the date hereof. Costs shall be in the cause.
24. It is so ordered.



**DATED AND SIGNED AT MOMBASA THIS 9<sup>TH</sup> DAY OF MAY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Mr Mauko, for the Applicants;

Mr Otwere, for the Respondents; and

Arthur – Court Assistant.

