



REPUBLIC OF KENYA



**Thuo & another v Kaghai (Civil Appeal E013 of 2024)
[2025] KEHC 5665 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5665 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E013 OF 2024
FN MUCHEMI, J
MAY 8, 2025**

BETWEEN

JOSEPH NJOROGE THUO 1ST APPLICANT

EDEN PARK COUNTRY GARDEN LIMITED 2ND APPLICANT

AND

JAMES KARIUKI KAGHAI RESPONDENT

*(Appeal against the ruling in Thika Small Claims Court
SCCCOMM No. E122 of 2024 delivered on 14th June 2024.)*

RULING

Brief facts

1. The application dated 31st October 2024 seeks for orders of leave to file an appeal out of time against the ruling in Thika Small Claims Court SCCCOMM No. E122 of 2024 delivered on 14th June 2024.
2. The respondent opposed the application by filed a Replying Affidavit dated 2nd December 2024.

Applicants' Case

3. The applicants state that judgment in Thika SCCCOMM No. E122 of 2024 was delivered on 14th June 2024. Being aggrieved by the decision of the trial court, the applicants state that they filed a Notice of Appeal on 18th June 2024 and they were in the process of filing their memorandum of appeal.
4. The applicants aver that the respondent instructed Mamalo Auctioneers who attached the property of the 1st applicant. The 1st applicant then filed objection proceedings dated 13th August 2024 which was heard and determined in his favour on 4th September 2024. The applicants state that despite the



respondent being served with the Notice of Appeal, he has taken out a warrant of sale of moveable property in execution of the money decree against the 2nd applicant dated 30th October 2024.

5. The applicants state that the respondent has instructed Mamalo Auctioneers to execute the said warrant of sale of moveable property and the said auctioneers have attached their property and given them seven days to pay up the decretal sum of Kshs. 784,836/-.
6. The applicants aver that they wish to challenge the judgment of the adjudicator in the trial court however the statutory time within which to file an appeal has lapsed. The applicants argue that the delay in filing the appeal was not intentional as the 1st applicant was challenging the attachment of the respondent's goods at the Small Claims Court and knowing well that the respondent has been served with the notice of appeal and that the status quo would be maintained.
7. The applicants aver that the intended appeal is arguable with a high chance of success.

The Respondent's Case

8. The respondent states that the trial court entered judgment in his favour for a sum of Kshs. 700,000/- and assessed costs at Kshs. 25,000/- plus costs and interest of the suit from the date of filing. The trial court further granted 30 days stay of execution.
9. The respondent avers that his advocates sent an email to the applicants' advocates on 19th June 2024 advising them to settle the decretal amount however they have continuously ignored the said communication. The respondent states that he pursued his legal right of execution after the 30 days stay of execution lapsed.
10. The respondent states that the 1st applicant stated in court that he would not refund him the sum of Ksh. 700,000/= which he said he paid to the 1st applicant directly. The respondent believes that the 1st applicant continues to disobey court orders deliberately to make him suffer financial loss and hinder him from enjoying the fruits of his judgment.
11. The respondent argues that the instant application is ill conceived as it seeks to delay justice. Further the applicants have not demonstrated any sufficient reason why they did not file an appeal within the statutory period. The respondent states that the intended appeal and application have brought up issues which were already determined by the trial court. Furthermore, the respondent states that the applicants are guilty of sleeping on their right to appeal as they failed to file an appeal within the statutory period.
12. The respondent states that the intended appeal has no probative value and has no chances of success.
13. Parties filed written submissions to dispose of this application.

The Applicants' Submissions

14. The applicants rely on the case of Nicholas arap Korir Salat vs Independent Electoral Boundaries Commission & 7 Others [2014] eKLR and submits that the delay in filing the appeal was caused by the existence of a pending application in the Small Claims Court which took time to resolve. The applicants submit that they were under a genuine and reasonable belief that the resolution of the application would have a bearing on the appeal, thus the appeal could not be filed until the said application was determined. Relying on the case of Thuita Mwangi vs Kenya Airways Ltd [2003] eKLR, the applicants argue that they have given a reasonable explanation for the delay.
15. The applicants rely on the case of Mongira & Another vs Makori & Another [2005] eKLR and submit that the delay is not inordinate given the circumstances of the case. It is further submitted that upon the



disposal of the pending application, the applicants took immediate steps to file the instant application demonstrating diligence and good faith.

16. The applicants further rely on the case of Stanley Kahoro Mwangi & 2 Others vs Kanyamwi Trading Company Limited [2015] eKLR and submit that the intended appeal is arguable and raises substantial questions of law and fact.
17. The applicants submit that the respondent will not suffer any prejudice that cannot be remedied by an award of costs. To support their contentions, the applicants rely on the case of Julius Kamau Kithaka vs Waruguru Kithaka Nyaga & 2 Others [2013] eKLR. The applicants submit that granting leave to file the appeal will serve the interests of justice and allow the dispute to be determined on its merits rather than being dismissed on procedural technicalities.

The Respondent's Submissions

18. The respondent submits that the court ordered the applicants to deposit half the decretal amount in court within 30 days and in default the stay orders would be vacated. The respondent submits that the applicants have since failed to remit the amount to his advocates and should therefore not be given any audience before the court as their actions goes to show their deliberate disregard for court orders and directions. To support his contentions, the respondent relies on the case of Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another (no citation given).
19. The respondent submits that the appeal has no probative value and with no minimal chances of success as the issues are ancillary, repetitive, prolixous and a waste of judicial time. The respondent argues that the case is very straightforward and further submits that the applicants unjustly enriched themselves under several misrepresentation of facts and misleading information in order obtain monies from him. The specific business services were not rendered to him despite paying Kshs. 700,000/-. The respondent argues that he proved his case in the court below and thus the court ordered a refund of the said amount.
20. The respondent submits that he has suffered a grave financial loss of Kshs. 700,000/- without consideration of the interest in land he was led to believe the applicants held. The respondent argues that allowing the application would continue to deny him the fruits of his judgment. Further the delay by the applicants is deliberate and intentional yet they have the capability to refund him his money but they refuse to do so.
21. The respondent submits that the delay is inordinate as the judgment in the trial court was delivered on 14th June 2024 and the applicants filed an application for stay of execution in the trial court on 13th August 2024, after the 30 days stay that was granted lapsed. Furthermore, the applicants failed to lodge a Notice of Appeal within the prescribed 30 days provided for under Section 79G of the *Civil Procedure Act*.
22. The respondent argues that the application made before the trial court was only filed after he sought to execute the decree following lapse of orders for stay of execution. The applicants never moved to lodge an appeal on time despite having been given the statutory time to do so. They chose to sleep on their right of appeal and now seek to abuse the appeal process. To support his contentions, the respondent relies on the case of Aviation Cargo support Limited vs St. Mark Freight Services Limited [2014] KECA 835 (KLR).



The Law

Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;

23. Section 79G of the *Civil Procedure Act* states:-

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.

24. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

25. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia 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.

26. Similarly in the case 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 the following:-

“.....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.”

27. Judgment in the case that led to filing of this application was delivered on 14th June 2024. The applicant filed the current application on 31st October 2024. This is approximately three (3) months outside the time provided for by the law of filing an appeal. The applicants have attributed the delay in filing the appeal to the fact that they were challenging the attachment of the 1st applicant’s goods at the trial court knowing well that the respondent had been served with the Notice of Appeal and that status quo would be maintained.
28. On perusal of the record, the judgment in Thika SCCCOMM No. E122 of 2024 was delivered on 14th June 2024 in the presence of both advocates for both parties. Thus the parties herein and their advocates were aware of the judgment and its contents and they were in a position to file an appeal. Furthermore, the trial court granted 30 days stay of execution to the applicants. The applicants thereafter filed an application on 15th August 2024 upon the respondent executing his decree right after the lapse of the 30 days stay of execution. Thus it is evident that the applicants are indolent and failed to exercise their right to appeal and were prompted to act only after the respondent began executing the decree. The applicants did not lodge an appeal even after execution commenced. It is clear from the record that the applicants filed a Notice of Appeal on 18th June 2024 demonstrating his intention to file an appeal. The applicant claims that they were waiting for the outcome of their application before the trial court. It is therefore my considered view that a delay of 3 months is not inordinate. However, the applicants have not given any plausible explanation on the reasons of the delay.
29. I have further perused the draft Memorandum of Appeal and noted the grounds of appeal do not raise arguable points of law. Furthermore, although the applicant did not annex a copy of the judgment, this court has had an opportunity to read and appreciate the trial court’s reasoning. Thus, without delving into the merits of the appeal, the intended appeal has no high chances of success in that I is not grounded on points of law as provided for under Section 38 of the Small Claims Act. Accordingly, I find that the applicants have not established to the satisfaction of the court that time should be enlarged to enable them file their appeal.
30. Accordingly, the application dated 31st October 2024 lacks merit and is hereby dismissed with costs to the respondent.
31. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 8TH DAY OF MAY 2025.

**F. MUCHEMI
JUDGE**

