



**Anchinga v Ndiangui (Civil Appeal E128 of 2024)  
[2025] KEHC 10136 (KLR) (11 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 10136 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E128 OF 2024  
GL NZIOKA, J  
JUNE 11, 2025**

**BETWEEN**

**JUSTINE ORENGE ANCHINGA ..... APPLICANT**

**AND**

**MOSES NDUNGU NDIANGUI ..... RESPONDENT**

**RULING**

1. By a notice of motion application dated 9<sup>th</sup> October 2024 brought under the provisions of section 42 and 42 of the *Small Claims Court Act* No 2 of 2016 and all other enabling provisions of law, the applicant is seeking for the following orders: -
  - a. Spent
  - b. That this Honourable Court be pleased to stay the execution of the judgment and order of Hon. Emily Cherop Jerotich delivered on 30<sup>th</sup> May, 2024 involving SCCC E168 of 2024 pending the hearing and determination of the appeal.
  - c. That the order for payment to the respondent in the sum of Kshs. 145,530 as against the applicant be stayed pending the hearing and determination of the appeal.
  - d. That this Honourable Court grant any other such order it deems fit to meet the ends of justice.
  - e. Costs of this suit be provided for.
2. The application is supported by the grounds thereto and the affidavit sworn by Tom Wachakana, an Advocate representing the applicant. In a nutshell he avers that, the applicant is dissatisfied with the decision of the trial Magistrate and has since filed a memorandum of appeal that is yet to be determined on its merits, and is exposed to massive financial loss and damages and is apprehensive that he stands to suffer irreversible harm, loss and grave prejudice if the court fails to intervene.



3. However, the application was opposed vide a replying affidavit sworn on 5<sup>th</sup> November 2024 by Maurine Wangari, a legal officer of the respondent's insurer, Britam Insurance Limited.
4. In a nutshell, she avers that, Britam Insurance Co. Ltd had comprehensively insured the respondent's motor vehicle KCH 428W under policy number NRB/MPRV/POL/2139622. That, on 26<sup>th</sup> March 2021, the respondent's vehicle was involved in a road traffic accident with the applicant's motor vehicle registration number KAS 175U along the Mai Mahiu road at Suswa area. That as a result the respondent's vehicle was extensively damaged and as per the police abstract the applicant's motor vehicle was blamed.
5. That subsequently, the respondent's insurance company in exercise of its right of subrogation instituted a suit Naivasha SCCC No. E168 of 2024 to recover from the applicant the sum of Kshs. 170,444 plus interest and costs. That the applicant entered appearance and filed a statement of defence and on 30<sup>th</sup> May 2024 the trial court delivered a judgment and awarded the respondent Kshs. 145,580 plus costs and interest, but granted the applicant 30 day stay of execution.
6. The respondent avers that, the application herein is an afterthought and an abuse of the court process as it was filed five (5) months after the delivery of the judgment. That, the applicant is guilty of indolence in filing the application with the intention to prolong the matter and in a deliberate attempt to obstruct and/or delay justice.
7. Further, the applicant has not fulfilled the requirements for the granting of stay of execution in line with Order 42 Rule 6 of the [Civil Procedure Rules](#). That, the fact that execution is likely, does not amount to substantive loss under the afore provision. That, it is incumbent on the applicant to demonstrate substantial loss by way of material evidence for the court's consideration.
8. That, if the application is allowed the respondent will be prejudiced considering that the judgment is lawful and no justifiable reason has been given to warrant the orders sought. That, the applicant will not be prejudiced if the orders are not granted as he was aware of the judgment but took no action to settle the decretal amount.
9. The respondent further filed a notice of preliminary objection dated 5<sup>th</sup> November 2024 based on the following grounds that: -
  - a. The Court lacks jurisdiction to entertain the appeal as the applicant failed to seek leave of this Honourable Court prior to filing the Memorandum of Appeal within the set timelines as stipulated under the provisions of Section 79G of the [Civil Procedure Act](#).
  - b. The notice of motion application and the Memorandum of Appeal both dated 18<sup>th</sup> October 2024 are not among the applications exempted under the provision of Order 43 of the [Civil Procedure Rule](#) thus this Honourable Court lacks jurisdiction to entertain the subject application and appeal.
  - c. The notice of motion application and the Memorandum of Appeal are fatally defective, incompetent and bad in law and the same ought to be struck out *Ex- Debito Justitiae*.
10. However, the preliminary objection was opposed vide grounds of opposition (though described as grounds of objection) dated 3<sup>rd</sup> March 2025 on the grounds that, the appeal is against the judgment of Hon. Emily Cherop Jerotich in Naivasha SCCC No. E168 of 2024 which was delivered on 30<sup>th</sup> May, 2024 whereas the appeal was filed on 11<sup>th</sup> June, 2024. Accordingly, under section 79G of the [Civil Procedure Act](#) every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against.



11. That the appeal filed within thirty (30) days before the Nakuru High Court and subsequently transferred to Naivasha High Court.
12. The preliminary objection was disposed of by filing submissions. The respondent in submissions dated 3<sup>rd</sup> April 2025 relied on the case of, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 where the Court of Appeal stated a preliminary objection consists of a pure point of law that has been pleaded or arises by clear implication out of the pleadings which if argued may dispose the suit.
13. The respondent submitted that, the preliminary objection meets the threshold as it is grounded on section 79G of the *Civil Procedure Act* which provides that an appeal from the subordinate court to the High Court shall be filed within thirty (30) days from the date of the decree or ordered appealed against.
14. That, the applicant did not file an appeal within the prescribed time, neither sought and obtained leave to file it out of time. Further, Order 43 of the *Civil Procedure Rules*, outlines the categories of orders that are applicable as a right. However, the applicant has not demonstrated that the application herein falls within the ambit of the appealable orders.
15. However, the applicant in response submissions dated 3<sup>rd</sup> April 2025, similarly referred the court to the case of; *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 where the court stated that a preliminary objection constitutes a point of law which has been pleaded.
16. The applicant submitted that, he has complied with the provisions of section 79G of the *Civil Procedure Act*. That the trial court delivered its judgment on 30<sup>th</sup> May 2024 and he filed the appeal on 11<sup>th</sup> June 2024. That, the appeal was filed at the Nakuru High Court and transferred to the Naivasha High Court. Furthermore, the preliminary matters before the court are matter of fact and not law that requires evidence.
17. I have considered the preliminary objection and the submissions by both parties. It is settled law that a preliminary objection is based on points of law per se as stated in the case of; *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 by D-F Law JA as follows: -

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
18. In the present case, the respondent contends that the applicant failed to file the appeal within the requisite timelines as stipulated under section 79G of the *Civil procedure Act*. The said section 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 to the appellant of a copy of the decree or order:”
19. The proviso thereto states 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.



20. A perusal of the trial court file indicates that the impugned judgment was delivered on 31<sup>st</sup> May 2024, therefore the applicant had thirty (30) days within which to file his appeal, that is up to 30<sup>th</sup> June 2024.
21. A perusal of the court file shows that the memorandum of appeal dated 11<sup>th</sup> June 2024 was filed in the High Court at Nakuru on 12<sup>th</sup> June 2024.
22. That, on the 18<sup>th</sup> October 2024, the applicant filed an application under certificate of urgency seeking to stay execution of the trial court judgment pending the hearing and determination of the appeal. The High Court sitting at Nakuru in considering the application noted that the impugned judgment was delivered by the Small Claims Court at Naivasha and ordered the matter to be transferred to Naivasha High Court for hearing and determination.
23. From the afore, it is clear that the applicant indeed filed the appeal within the thirty (30) day timeline as provided for under section 79G of the *Civil Procedure Act*. Further, the applicant filed his memorandum of appeal within the thirty (30) days as required under section 79G of the *Civil Procedure Act*. Consequently, the preliminary objection is dismissed. I direct that, the notice of motion application be canvassed.

**DATED, DELIVERED AND SIGNED THIS 11<sup>TH</sup> DAY OF JUNE 2025.**

**GRACE. L NZIOKA**

**JUDGE**

In the presence of:

Mr. Muhoro for the applicant

N/A for the respondent

Ms. Hannah: court assistant

