



**Boniface v Kilorit (Commercial Case E004 of 2024)  
[2025] KEHC 9386 (KLR) (1 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9386 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
COMMERCIAL CASE E004 OF 2024**

**TM MATHEKA, J**

**JUNE 1, 2025**

**BETWEEN**

**BONIFACE ..... APPLICANT**

**AND**

**JAMES KIRISIA KILORIT ..... RESPONDENT**

**RULING**

1. The application before me is the Notice of Motion dated 15th of October 2024
2. It is brought under order 51 rule 1,2 rule 6 (sic) of the Civil Procedure Rules Section 1A,3A, 43 (1) 75 and 79G of the Civil Procedure Act.
3. It seeks prayers that pending the hearing and determination of this appeal there be stay of execution of the judgment and decree issued by Makindu Resident Magistrate in civil case No. 97 of 2020. The applicant also seeks leave to appeal out of time against the judgment delivered on July 26, 2024 in SCCCOMM No. E050 of 2024, and that the memorandum of Appeal be deemed filed and served upon payment of requisite fees.
4. The grounds are on the face of the application and the supporting affidavit sworn by Boniface Muema Kathei ;which include; that he will suffer substantial loss unless the order of stay is made and that the former advocate on record was instructed to file the appeal but did not do so due to ill health condition and that the application has been made without delay and he is willing to provide security for due performance of the decree appealed against and that the appeal raises substantial matters of law which this court needs to comprehensively and conclusively address . Further that he had instructed the firm of Kasyoka and company Advocates after judgment was delivered on 26th of July 2024 to file the appeal.



5. That by 9th of October 2024 he found that no appeal had been filed and was served with a notice to show cause and that is when he instructed present counsel. That on 9th of October 2024 he confirmed that his counsel was unwell.
6. The application is opposed through the replying affidavit of James Kirisia Kilorit. The grounds are that the applicant fully participated in the litigation process from the time the claim was instituted on the 27th of May 2024 to the time the judgment was delivered on the 26th of July 2024. That when the matter came for notice to show cause why the applicant should not be committed to civil jail the applicants together filed an application under certificate of urgency saying that they were ready and willing to liquidate their portion by way of monthly instalments of Ksh shillings 10,000 each until payment in full, that the applicants had not demonstrated the substantial prejudice they would suffer; that the intended appeal has zero chances of success since there is overwhelming evidence in support of the judgment; but that should the court find it reasonable to stay the execution and allow the failing of the appeal out of time then the applicant be ordered to pay the sum of Ksh 386,000 being half of the decretal sum and to deposit the balance in court as security for the performance of the decree.
7. Parties filed written submissions
8. For the applicant it is argued that though there was delay it was reasonable caused by counsel's illness and he cited *Belinda Murai* [1978] eKLR.
9. It is argued that the applicant took all the necessary steps and diligently followed up on the matter upon realizing the fault on the former advocates. He relies on *Evans Kiptoo v Reinhard Omwonyo Omwoyo* [2021] eKLR which cited the reasoning in *Gerald M'limbine vs Joseph Kangangi* [2008] eKLR on the effect of the proviso to section 79G of the *Civil Procedure Act* as to when an appeal ought to be filed.
10. It was submitted that the decision as to whether to grant leave to file an appeal out of time or admit the memorandum of appeal out of time is an exercise of discretion and that guidance was to be found in the Court of Appeal in *Thuita Mwangi Vs Kenya Airways Ltd* [2003] eKLR requiring the courts to consider among other things the period and reason of the delay, whether there is an arguable appeal, whether the respondent will suffer prejudice, the importance of time limits to the particular litigation or issue, and whether it is an issue in the public interest.
11. On the issue of stay of execution, the applicant relies on order 42 rule 6 (1) of the *Civil Procedure Rules* and the conditions set out there under rule 6 (2). He urged the court to exercise its discretion in his favour and he was ready to deposit security.
12. For the respondent it is argued that the delay was unreasonable and was not explained. That the applicant failed to establish the facts he was relying on; i.e. that he issued instructions to counsel, that counsel was sick, that it was on that basis that the appeal was not filed. The court was referred to *Alice Wanjiru Rubiu Vs Messiah Assembly Of Yahweh* [2021] eKLR on the proposition that he who alleged must prove and the provisions of sections 107 and 108 of the *Evidence Act*
13. It is also argued that the intended appeal has no merit on the basis that the applicant had made an offer to settle the decretal sum by way of instalments.
14. That the applicant has not demonstrated the substantial loss he will suffer.
15. The respondent submits that should the court find a favour that half their decretal sum be paid to him and the other half be deposited in a joint interest earning account. He relies on *Joseph Kimeli Sitonik & 12 others Vs Grogoken Limited & 2 others* [2020] eKLR, *Songor & another V Sang* [2023] KEHC 24233(KLR)



16. I have carefully considered the application, the arrival affidavits and submissions
17. The issue is whether the application for extension of time is merited.
18. The applicant relies on a fact which he has not proved at all. He alleges giving instructions to his advocate only for his advocate to fall ill and become admitted in hospital. He has laid nothing before the court to support this allegation to warrant the exercise of this court's discretion in his favour. It would have been the easiest thing for him to do for his counsel to swear an affidavit to that effect or the counsel's office to support his application. The court is of course alive to the fact that no one calls for illness upon himself or herself but where the illness of another is alleged to be the reason for the failure to comply with a requirement of the law or procedure then the applicant or the person relying on that particular fact has the obligation to place before the court the evidence to support that allegation. the applicant has not done that.
19. It is noteworthy that when the execution proceedings began the applicant proceeded to offer to settle the claim. That part of the respondent's affidavit and submissions have not been denied or explained by the applicant. If he was aggrieved with the judgment why would he offer to settle the claim? whatever caused the change of mind has not been demonstrated, then what would the applicant be appealing against if indeed he had offered to settle the claim?
20. From the totality of what is placed before me I am of the view that the delay has not been explained. The words of the court in *Reuben M. Muli T/a Konza Merchants V Kesbra Visbra T/a Alpesh Enterprises* [2007] KECA 22 (KLR) speak to this matter:

The affidavit sworn by Francis Manthi Masika in support of the application says absolutely nothing about that period. It concentrates instead on the period before receipt of the copies of proceedings and the ruling which, for reasons stated above, I found excusable. Indeed, Mr. Masika conceded at the hearing of the application that there was nothing in the affidavit covering the period in issue. It follows therefore that there is no basis for making any finding that the delay was excusable. On the contrary, in the absence of any explanation, I find it inordinate. As this Court stated in *First American Bank of Kenya Ltd & Anor vs Grandways Venture Ltd*, Civil Application No. NAI 173/99 (UR).

“We always understood the rule to be that once a party was in default (as the applicants here admittedly were) it was for them to place the necessary and relevant material before the Court to satisfy the Court that despite their default the discretion should nevertheless be exercised in their favour. This burden unfortunately the applicants have not discharged.”

I would say the same about the applicant in this matter.

21. The delay for filing the appeal is not explained. The reason given is not established and in addition the applicant offered to settle the matter.
22. In the circumstances the issue of state does not arise.
23. The application is not merited and is dismissed with costs to the respondents.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 30TH MAY 2025**

**MUMBUA T MATHEKA JUDGE**

**SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA**



**THE JUDICIARY OF KENYA.**

**MAKUENI HIGH COURT**

**HIGH COURT DIV**

**DATE: 2025-06-01 17:54:58**

