



Khetia Drapers Limited v Kiunga & 2 others (Miscellaneous Civil Application E038, E041 & E043 of 2025 (Consolidated)) [2025] KEHC 8613 (KLR) (19 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CIVIL APPLICATION E038, E041 & E043 OF 2025 (CONSOLIDATED)**

EM MURIITHI, J

JUNE 19, 2025

BETWEEN

KHETIA DRAPERS LIMITED APPLICANT

AND

BENSON NJUKI KIUNGA RESPONDENT

AS CONSOLIDATED WITH

MISCELLANEOUS CIVIL APPLICATION E041 OF 2025

BETWEEN

KHETIA DRAPERS LIMITED APPLICANT

AND

DAMARIS GATURI NJUKI RESPONDENT

AS CONSOLIDATED WITH

MISCELLANEOUS CIVIL APPLICATION E043 OF 2025

BETWEEN

KHETIA DRAPERS LIMITED APPLICANT

AND

TRIZAH WAWIRA NJUKI RESPONDENT



RULING

1. The is a ruling on three applications dated 21/5/2025; 27/5/2025 and 27/5/2025, for stay of execution of the judgments of the trial court delivered on 8/4/2025 in Wanguru MCCC Nos.E007/2022; E009/2022 and E010 of 2022, which awarded various amounts of compensation for personal injuries in motor traffic accident for the plaintiffs - husband, wife and child - together with interest and costs, respectively of Ksh.1,212,100/-; Ksh.605,300/- and Ksh.155,300/- seeking the following orders:
 1. Spent.
 2. Spent.
 3. That this Honourable Court be pleased to grant a temporary stay of execution of the judgment and Decree delivered on Wanguru law Courts on 8th April 2025 CMCC E007 [E009 and E010] of 2022 pending the hearing and determination of the Applicant's prospective appeal in this matter.
 4. That this Honourable Court be pleased to enlarge time within which the Applicant may file an Appeal against the Judgment delivered on 8th April 2025 and consequently grant leave to the Applicant to file its Appeal in terms of the annexed Memorandum of Appeal marked "A".
 5. That costs of this application be in the Cause.
2. The applications were based on grounds in the application and supported by Supporting Affidavits sworn by Beatrice Muriithi, legal officer of Jubilee Insurance Co. (K) Limited, the appellant's insurer setting out the facts relied on.
3. The applications were opposed by Replying Affidavits filed in each case in the same terms, principally, objecting that the applications were an afterthought filed only after the Counsel for the Respondents had written a reminder demand for payment following the sending, at the Appellant's request of tabulated costs and bank account details for purposes of payment, as set out in paragraphs 5-10 of the three Replying Affidavits in the same terms as follows:
 5. That I'm informed that the judgment delivered on 8/4/2025 was in my favour and that instead of the applicant herein satisfying the judgment has made the present application seeking stay of execution of the judgment and leave to file appeal out of time.
 6. That the judgment from Wanguru CMCC No. E010of 2022 was delivered on 8th April. 2025. in the presence of advocates of both Parties. The applicant's counsel also prayed for 30 days stay of execution upon the delivery of the judgment. Consequently, the court promptly availed the copy of the judgment in the CTS for parties' access.
 7. That further. the applicant's counsel sent a correspondence to my advocates requesting for tabulated costs and bank account details well in advance confirming the Applicant's Insurer desire to settle the amount. (Annexed and Marked "DCN I" is a copy of Applicant's counsel email extract dated 10" April 2025 requesting for bank detail to pay the claim). This shows that they had no intent to appeal and this application isan afterthought after awaking from their slumber.



8. That in response to the above-mentioned correspondence. my advocates sent the tabulated costs and bank details as requested on 12th April, 2025. (Annexed and Marked "DCN-2" isa copy of my counsel's email extract.
 9. That the applicant was indolent and ignorant of the timelines and does not deserve audience. My advocate sent another correspondence to the applicant's counsel on 12th May, 2025 reminding them on payments but they ignored the same. (Annexed and Marked "DGN-3" is a copy of my counsel's email extract.
 10. That this application is fashioned to delay the execution and deny the respondent enjoyment of the fruits of his judgment. considering that his suit was instituted 3 years ago.”
4. By Order 42 Rule 1 of the Civil Procedure Rules an appeal to the High Court shall be way of a Memorandum of Appeal filed as follows:
1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
 2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”
5. The Memorandum of Appeal was filed within time in accordance with Section 79G of the [Civil Procedure Act](#) provides that:
- “79G. Time for filing appeals from subordinate courts
- 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 appelland of a copy of the decree or order:
- Provided that an appeal may be admitted out of time if the appelland satisfies the court that he had good and sufficient cause for not filing the appeal in time.
- [\[Act No. 10 of 1969, Sch.\]](#)”
- Whether application for extension of time to file appeal should be granted
6. The application for leave appeal out of time filed on 27/5/2025 just outside the three weeks the 30-day period allowed for filing of the memorandum of Appeal under section 79G of the [Civil Procedure Act](#), without unreasonable delay. The delay is explained on account of “inadvertence in the Applicant Insurer’s Messrs Jubilee Insurance Co. (K) as they took time to consider whether to appeal or settle the judgment altogether”, which explanation is not wholly unreasonable, and the Court considers it “good and sufficient cause for not filing the appeal in time” within the meaning of section 79G proviso. Indeed, the Respondents’ Replying Affidavits indicates at paragraph 7 thereof that the reason given by the appelland is on a balance of probabilities true because they had asked for tabulation of costs and bank details with a view to settlement.
7. The Court has power under Order 50 Rule 6 of the Civil Procedure Rules to extend time, even if the application is made outside the time allowed for the doing of the particular act, as follows:

“

“6. Power to enlarge time [Order 50, rule 6]



Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

Whether appeal is arguable

8. As part of test of sufficient cause to justify stay of execution under Order 42 Rule 6 (1) of the Civil procedure Rules, the Court has interrogated the case for existence of an arguable case. The draft Memorandum of Appeal attached to the applications raise grounds challenging both against the finding on liability and quantum of the awards of damages, which cannot be said to be frivolous and the court considers that an arguable case is established on both. An arguable case was defined in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR, as follows
- vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
 - viii. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

Whether stay of execution should be granted

9. The Court’s power to grant an order for stay of execution is provided for under Order 42 rule 6 (1) and (2) of the Civil Procedure Rules as follows:
- 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - 2. No order for stay of execution shall be made under sub rule (1) unless—
 - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
10. The amounts in the decretal sums are not insignificant and the applicant will suffer substantial loss if required to pay the full decretal sums in the appeals before the appeals are determined and it eventually succeeds in the appeals, and the appeal will have been rendered nugatory. In the *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* (supra) Court of Appeal stated that:
- ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.



- x. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

The present appeal will be rendered nugatory, in the sense of Stanley Kang’ethe Kinyanjui case, if the appellants are unable to recover the decretal sums from the respondents, if paid in full.

11. In terms of Order 42 Rule 6 (2) (a) of the Civil Procedure Rules, there was, like in the application for extension of time, no unreasonable and unexplained delay in filing application for stay of execution pending appeal.
12. The Court, however, considers that in balancing the interests of the appellants judgment-debtors and the decree-holder respondents, an order for the payment of a sum equivalent to ¼ of the decretal sum in each case, as shown on the respective Decrees of the Court, and the deposit into court or a joint interest earning account in the names of Counsel as security, to meet the justice of the case.

Orders

13. Accordingly, the Court finds merit in the applications for leave to file appeal out of time and stay of execution in the respective files and the same are granted as prayed, subject to the conditions as to security and filing of the Record of Appeal in each case, as set out hereinbelow.
14. The appellants shall pay to the Respondents the sum equivalent of one quarter of the decretal sum including costs as at the date of filing the application and deposit the balance of the decretal sums into an interest earning account in the names of Counsel for the parties within thirty (30) days or into Court if a joint account is not opened in the said period.
15. The Memorandum of Appeal and the Record of Appeal in each case shall be filed within fourteen (14) and thirty (30) days, respectively.
16. In default of any of the above conditions the stay herein granted shall lapse and be of no effect, and the respondent shall be at liberty to execute the decree.
17. Directions as to hearing on 30/7/2025.
18. The costs of the application shall be costs in the appeal.

Orders accordingly.

DATED AND DELIVERED THIS 19TH DAY OF JUNE 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Diru for the Applicant.

Mr. Momanyi the Respondents.

