Mbuthia & 2 others v Mburu & another (Suing as the Legal Representatives of Torno Tore Olibo) (Civil Miscellaneous E019 of 2025) [2025] KEHC 12212 (KLR) (Civ) (5 June 2025) (Ruling)

Neutral citation: [2025] KEHC 12212 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL MISCELLANEOUS E019 OF 2025

TW CHERERE, J

JUNE 5, 2025

BETWEEN

FREDRICK MWANGI MBUTHIA ..... 1ST APPLICANT

KAMUNJURU WANJIRU NAOMI ..... 2ND APPLICANT

BIVON MASOI ..... 3RD APPLICANT

AND

ISAAC NGUMI MBURU ..... 1ST RESPONDENT

FEDELIS NJERI MBURU ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF TORNO TORE OLIBO

RULING

1. The Applicants have moved this Court by a Notice of Motion dated 05th May 2025, brought under Sections 3, 3A and 79G of the *Civil Procedure Act*, and Order 22 Rule 22, Order 42 Rules 4, 6 and 7, and Order 51 Rules 1 and 3 of the *Civil Procedure Rules*. The Applicants seek:
    1. Leave for the firm of Kairu & McCourt Advocates to come on record for the Applicants;
    2. Leave to file an appeal out of time;
    3. A stay of execution of the judgment delivered on 24th April 2024 in Milimani MCCC No. 4953 of 2022
    4. That costs of the application do abide the outcome of the intended appeal.
2. The application is supported by the affidavit of Jebotibin Boiwo, Advocate for the Applicants, sworn on 05th May 2025, in which it is deponed that judgment was entered in favour of the Respondents

in the sum of KES 2,200,550 and that the Applicants intend to appeal on the issue of quantum. It is further stated that the judgment was only availed on 27th March 2025, and that unless stay is granted, the appeal will be rendered nugatory. The Applicants express willingness to furnish security and assert that the Respondents may be unable to refund the decretal sum if the appeal succeeds.

3. The application is opposed through a replying affidavit sworn by Fidelis Njeri Mburu on behalf of the Respondents. She avers that the Applicants were fully aware of the judgment as early as May 2024, and reference is made to extensive correspondence exchanged between the parties between 05th May 2024 and 25th July 2024, during which the Applicants undertook to settle the judgment. The Respondents accuse the Applicants of untruthfulness and assert that the application is a calculated afterthought.

4. In submissions dated 26th May 2025, the Respondents cite Section 79G of the *Civil Procedure Act* and rely on the Supreme Court decision in *Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, arguing that the Applicants have failed to meet the threshold for extension of time or for the equitable remedy of stay.

5. Having considered the application in light of the affidavits on record, Respondents submissions and cited authority, the court identifies the following issues for determination:

    1. Whether the firm of Kairu & Mc Court Advocates requires leave to come on record

    2. Whether the Applicants have demonstrated good and sufficient cause for failure to file the appeal within the prescribed time;

    3. Whether the Applicants have satisfied the conditions for the grant of a stay of execution pending appeal under Order 42 Rule 6(2).

1. Whether the firm of Kairu & Mc Court Advocates requires leave to come on record

6. Order 9 Rule 9 of the *Civil Procedure Rules* requires leave of court or consent of the previous advocate where there is a change of advocate after judgment has been entered in the same suit or proceedings.

7. This application has been brought in a new and separate proceeding, and does not constitute a continuation of the original suit Milimani MCCC No. 4953 of 2022.

8. Accordingly, the firm of Kairu & Mc Court Advocates need not have sought leave to come on record for the Applicants.

2. Leave to Appeal Out of Time

9. Section 79G of the *Civil Procedure Act* provides as follows:

> " 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 such time as may be certified by the court to have been requisite for the preparation and delivery to the appellant 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."

10. The Supreme Court in *Nicholas Kiptoo Arap Salat v IEBC & 7 Others* (*supra*) authoritatively stated:

> " Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court. The applicant must lay a basis to the

satisfaction of the Court. A plausible and satisfactory explanation for the delay is the key that unlocks the Court's flow of discretionary favour."

11. The Applicants claim that the judgment was only availed to them on 27th March 2025. However, the Respondents contention that the judgment was uploaded onto the Court's CTS portal as early as 02nd May 2024 has not controverted. Additionally, the extensive correspondence exchanged between the parties between 05th May 2024 and 25th July 2024, during which the Applicants undertook to settle the judgment buttresses the fact that the Applicants were aware of the judgment as early as May 2024.

12. In the circumstances, the Court finds the Applicants' assertion that they were unaware of the judgment until March 2025 to be implausible and lacking candour.

13. In the absence of a good or sufficient cause to justify the exercise of discretion under Section 79G of the *Civil Procedure Act*, the application for extension of time is he application for extension of time is devoid of merit and is hereby declined.

3. Stay of Execution Pending Appeal

14. Order 42 Rule 6(2) of the *Civil Procedure Rules* provides:

> "No order for stay of execution shall be made under subrule (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."

15. The application was brought slightly over one year after delivery of the judgment. Such delay is not only inordinate but is also premised on a false narrative regarding the Applicants' knowledge of the judgment. Further, the Applicants have failed to demonstrate how payment of the decretal sum would occasion substantial loss. No evidence has been adduced to show that the Respondents' lack the financial capacity to refund the decretal amount should the appeal succeed.

16. In *Kenya Shell Ltd v Benjamin Karuga Kibiru & another* [1986] KLR 410, the Court of Appeal held:

> "It is not normal in money decrees for the appeal to be rendered nugatory if payment is made. The successful litigant should not be deprived of the fruits of his judgment in the absence of evidence that the respondent would be unable to refund the decretal sum."

17. In this case, the Applicants have made no effort to prove such inability. A mere assertion is not evidence. In any event, the Applicants had a full and fair opportunity to challenge the judgment in time, which they squandered. Their belated recourse to appellate remedies cannot now be used as a shield against execution.

Disposition

18. In the final analysis, the Court finds that the Applicants have failed to demonstrate good and sufficient cause for delay under Section 79G of the *Civil Procedure Act*, or to satisfy the conditions for stay of execution under Order 42 Rule 6(2) of the *Civil Procedure Rules*.

19. The Notice of Motion dated 05thMay 2025 is accordingly dismissed with costs to the Respondents.

20. File closed

DELIVERED AT NAIROBI THIS 05TH DAY OF JUNE 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Applicants - Ms. Boiwo for Kairu & Mc Court Advocates

For Respondents - Mr. Kulecho for Kulecho & Co. Advocates