



Njagi & another v Tarkok & another (Suing as the Personal and Legal Admin of the Estate of David Tuitoek Kimeli) (Civil Appeal E005 of 2025) [2025] KEHC 8263 (KLR) (11 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8263 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL E005 OF 2025
LN MUTENDE, J
JUNE 11, 2025**

BETWEEN

JANEV WAMBUI NJAGI 1ST APPLICANT

JOHN MUCHUI MWIRURI 2ND APPLICANT

AND

MAXIN TARKOK & DAVID KIPKEMOI CHIRCHIR (SUING AS THE PERSONAL AND LEGAL ADMIN OF THE ESTATE OF DAVID TUITOEEK KIMELI) RESPONDENT

RULING

1. The Applicants approached this court through a Notice of Motion dated 4th March, 2025, seeking orders thus;
 1. Spent.
 2. This honourable court be pleased to grant the Applicants leave to appeal out of time in respect to the judgment/decree delivered in Nyahururu CMCC No. 179B of 2020 by Hon E.H. Keago.
 3. Spent.
 4. This honourable court be pleased to grant an order of stay of execution of the judgment and/or the decree delivered on or about 2nd September, 2024 and all consequential orders arising therefrom pending the hearing and determination of the intended appeal herein.
 5. This honourable court be pleased to issue an order allowing the Applicants to deposit the entire decretal sum in a joint interest earning account only as security pending hearing and determination of the intended appeal herein.



6. This honourable court be pleased to issue any other order as it may deem just, appropriate and expedient in the interest of justice.
7. Costs of this application be provided for.
2. The application is premised on grounds that the defence case upon being closed, judgment was reserved for delivery on 2nd September, 2024, and was delivered where the Applicants were held 70:30% liable, pain and suffering Kshs.30,000/-, loss of expectation of life Kshs.100,000/- loss of dependency Kshs.3,120,000/-, special damages of Kshs.30,550/- entered plus costs and interest subject to liability, total Kshs.2,294,900/-. And being dissatisfied, the Applicants lodged an appeal on 4th March, 2025.
3. That the delay in filing the appeal was inadvertent and excusable due to delay in receiving instructions from their instructing clients. The time allowed to file an appeal has run out and that the appeal has good chances of success.
4. The Applicants are apprehensive that the Respondents will commence execution proceedings against them to their detriment and thus the Applicants stand to suffer substantial loss and damage if the orders sought herein are not granted and further that the intended appeal will be rendered nugatory if stay is not granted.
5. That there will be no irreparable damage that will be occasioned to the Respondents herein if the orders sought herein are granted as the Applicants are willing and ready to deposit the entire decretal sum in a joint interest earning account pending the hearing and determination of the intended appeal; as a condition for allowing this application for leave to appeal out of time and stay of execution pending appeal. That this honourable court has powers to grant the orders sought herein in the interest of justice and fairness.
6. In response it is submitted by the Respondents that the Applicants' counsel having come on record after the suit was defended through the firm of Kimondo & Gachoka Advocates, there was no compliance with Order 9 Rule 9 of the Civil Procedure Rules.
7. That the application is silent on how the Applicants stand to suffer substantial loss; there was excessive delay in bringing the application which was an afterthought and that the Applicants are trying to wiggle out of a consent that was entered into by parties.
8. I have considered rival arguments.
9. The Respondents contend that the application is not properly before court. Order 9 Rule 9 of the Civil Procedure Rules provides thus;

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

 - a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
10. The alluded to procedure of the rules governs the process when a party decides to change advocates after judgment is entered, calling for proper authorization and safe guarding interests of counsel who was on record. This also maintains the integrity of the judicial process.



11. However, what is before court is an application for leave to appeal out of time. The Applicants were previously represented by the firm of Kimondo Gachoka & Co. Advocates in the lower court. Currently he is represented by Kairu M'court Advocates. These are new proceedings which makes that provision of law inapplicable.
12. On the issue whether the appeal is merited, 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 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:

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.
13. It behooved the Applicants to demonstrate existence of a good case to warrant grant of leave to appeal out of time. This court is seized of discretion to grant extension of time. I do appreciate the importance of timelines set but also take into consideration interests of justice. (Also see *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931).
14. The application rendered for the delay is pegged on internal changes whereby the officer who received the terms of the judgment left employment of the instructing client without further instructions hence the delay being occasioned by the omission.
15. The trial court delivered the judgment on 2nd September, 2024 and the Miscellaneous Application was filed on 11th March, 2025. There was a delay of four (4) months. In as much as the court may frown against such a conduct, the interest of justice would call for grant of extension of time sought.
16. On the issue of stay of execution, Order 42 Rule 6(1) (2) of the Civil Procedure Rules provides thus;

(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 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 by the applicant.
17. The Applicants are obligated to demonstrate existence of conditions requiring grant of the order sought.



18. In *Butt v Rent Restriction Tribunal* [1982] KLR it was held that;

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

19. It is therefore upon the Applicants to show that they stand to suffer substantial loss if execution proceeds. In *James Wangalwa & Another v Agnes Naliaka Chesoto* [2012] eKLR the court stated thus;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

20. It is argued that the application has a meritorious and arguable appeal which has high chances of success and they are apprehensive that the appeal will be rendered nugatory if execution is levied. And, if the execution proceeds considering the substantial amount awarded they may be prejudiced if the appeal is successful.



21. It is a fact that the Respondents have not suggested that they may be individuals with the ability to refund the sum awarded in event of the appeal being successful. In *Amal Hauliers Limited v Abdulnasir Abubakar Hassan* [2017] eKLR it was stated that;

“The Respondent has not disclosed any source of income that he would use to refund the Applicant the decretal amount should the appeal succeed. Indeed, the Respondent’s averment that he is in dire need of money to continue with treatment for the serious injuries received in the accident can only confirm that he will not be able to refund the decretal sum were the Applicant’s appeal to succeed. The Applicant has thus established that it will suffer substantial loss if the intended execution is not stayed.”

22. The sum awarded is considerable, such that if the appeal is successful irreparable harm may be suffered.

23. On the question of security being furnished for eventual performance of the decree, the Applicants have offered to furnish the court with a bank guarantee pending hearing and determination of the appeal as submitted. But, on the body of the application the prayer is for the Applicants to deposit the entire decretal sum in a joint interest earning account only as security. The Respondents however were silent on the proposal.

24. The Applicants having met conditions for grant of stay of execution, I order thus;

1. The Applicants are granted leave to appeal out of time within 14 days.
2. Stay of execution is granted pending hearing and determination of the intended appeal on condition that;
 - i. the entire decretal sum shall be deposited in court within 10 days of today
 - ii. The Applicants/Appellants to file and serve the record of appeal within 30 days upon filing the appeal – costs to the Respondents to be agreed upon.
 - iii. Mention for further orders on 8th July, 2025.
 - iv. Failure to comply with the conditions set, the stay orders to be vacated.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF JUNE, 2025.

L.N. MUTENDE

JUDGE

