



REPUBLIC OF KENYA



KENYA LAW
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**Wangechi & 2 others v Gakuru & another (Miscellaneous Civil Application
E021 of 2025) [2025] KEHC 8675 (KLR) (16 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8675 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CIVIL APPLICATION E021 OF 2025**

LN MUTENDE, J

JUNE 16, 2025

BETWEEN

**DAVID MUHIA WANGECHI & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2
OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS APPLICANT**

AND

**JOHN MWANGI GAKURU & ANOTHER & ANOTHER & ANOTHER &
ANOTHER & ANOTHER & ANOTHER & ANOTHER RESPONDENT**

RULING

1. Through a Notice of Motion dated 19th May, 2023, the Applicant seeks 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. E028 of 2021 by Hon. Nyang'ara Osoro (Senior Resident Magistrate).
 3. This Honourable Court be pleased to grant a temporary order of stay of execution of the judgment and/or the decree delivered on 9th December, 2024 and all consequential orders arising therefrom pending the hearing and determination of this application inter-parties.
 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 9th December, 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 Applicants to deposit half the decretal sum in a joint interest earning account in the names of counsels for both parties and the other half to be deposited in court as security pending hearing and determination of the intended appeal herein.



6. This Honourable Court be pleased to issue any 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;
- a. The judgment in Nyahururu CMCC E028 of 2021 was delivered vide a judgment dated 9th December, 2024 in favour of the Plaintiffs/Respondents as against the Defendants/Applicants in the following terms; liability 100% against the Defendants, loss of dependency Kshs.1,980,000/-, loss of expectation of life Kshs.100,000/-, general damages for pain and suffering Kshs.50,000/-, special damages Kshs.1,500/- plus costs of the suit and interest.
 - b. That on 11th April, 2024 when the matter was coming up for judgment the same was not ready and court directed that it will be delivered on notice.
 - c. That the Applicants' counsels were not served with any judgment notice either from court or Respondents' counsel and were not aware that the judgment was to be delivered on 9th December, 2024. Consequently, they did not log into virtual court to take the judgment terms.
 - d. That for that reason the judgment herein was delivered in the absence of the Applicants' counsel hence there was no stay of execution granted and now the Applicants stand a risk of execution any time.
 - e. That the Applicants only came to know that judgment had been delivered in this matter when they were served with the warrants of attachment and proclamation notice.
 - f. That once obtained the copy of the judgment was emailed to the instructing clients for further instructions.
 - g. That the delay in filing the appeal was inadvertent and excusable due to delay in receiving instructions from the instructing clients.
 - h. That the appeal has good chances of success.
 - i. The Applicants herein are apprehensive that they will suffer substantial loss since the Respondents has already commenced execution proceedings against them per the warrants of attachment issued on 19th February, 2025 in this suit by attaching the Applicants' motor vehicle Reg. No. KBV 603T Toyota Hiace and all household goods through Kingstar Auctioneers.
 - j. That the said warrants of attachment and proclamation notice have already expired and the Applicants are apprehensive that their attached properties will be sold by way of auction any time as per the warrants of attachment dated 19th February, 2025 and proclamation of attachment dated 21st March, 2025.
 - k. The Applicants stand to suffer substantial loss and damage if orders sought herein are not granted and further that the intended appeal will be rendered nugatory if stay is not granted.
 - l. That the application is made timely and the Plaintiff/ Respondent will not be prejudiced in any way if the orders sought herein are granted as prayed.
 - m. That it is in the interest of justice that the execution of the judgment and/or decree delivered on or about 9th December, 2024 herein be stayed to pave way for the Applicants to exercise their right of appeal once leave to appeal out of time is granted.



- n. That there will be no irreparable damage that will be occasioned to the Respondent herein if the orders sought herein are granted.
 - o. The Applicants are willing and ready to deposit half the decretal sum in a joint interest earning account in the names of counsels for both parties and the other half to be deposited in court as security 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.
3. The application is unopposed.
 4. I have considered the application, supporting affidavits and annexures thereto.
 5. On the question of leave to appeal out of time, Section 79G of the [Civil Procedure Act](#) provides thus;

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.
 6. The judgment was delivered on 15th December, 2024. The instant application was filed on 21st May, 2025. The appeal ought to have been filed in 30 days from the date of the decree. An approximate period of five (5) months lapsed before action being taken.
 7. An explanation has been rendered of the judgment having been delivered in the absence of the Applicants' counsel hence no stay of execution sought. The copy of the judgment clearly indicates that at the time only the Court Assistant, Gilbert was present. There is no rebuttal to the allegation.
 8. This court is seized of the discretion to grant the order sought but the court must consider principles set out for extension of time. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1991] 2EA 231 the Court of Appeal held as follows;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted”
 9. In addition, the court would also consider whether it is just and fair to all parties to allow the application. The Respondents having failed to reply there is nothing to suggest that they will be prejudiced. Hence the prayer to appeal out of time being meritorious.
 10. On the issue of stay of execution, the same is provided by Order 42 Rule 6(1) (2) of the [Civil Procedure Rules](#) which enact that;
 11. In that regard, the court must be satisfied that; substantial loss may result; the application was made without due delay and the Applicant must be willing to provide security for due performance of the decree.



12. I have afore addressed the question of due delay. On the issue if substantial loss. In *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another* [1986] eKLR the court stated that;

“...substantial loss, and such loss cannot be inferred in this case.

But this court must look at the matter from the point of view of rule 5(2) of Court of Appeal Rules, and here the test would be whether the appeal would be rendered nugatory, unless payment of the decretal sum were stayed. It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory.”

13. The loss alluded to is that the appeal shall be rendered nugatory denying the Applicants the right to appeal and the ability of the Respondents to refund the money is unknown. Without the Respondents response to the allegation their financial ability is unknown.

14. Security for due performance has been offered. The Applicants seeks to deposit half the decretal sum in the joint interest earning account in the names of both counsel for the parties and the other half to be deposited in court. However, following non-appearance of the Respondents’ counsel no sentiments have been received by the court in this regard.

15. For reasons given, I grant orders thus;

1. The Applicants are granted leave to file the appeal out of time within 10 days hereof.
2. There be stay of execution of the judgment and decree in Nyahururu CMCC E208 of 2021 pending hearing and determination of the intended appeal on condition that the Applicants’ deposit Kshs.2,131,500/- in court as security for the due performance within 14 days of today.
3. In default, the orders granted shall stand vacated.
4. Costs of the application shall be in the cause.

16. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF JUNE, 2025.

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L.N. MUTENDE

JUDGE

