



REPUBLIC OF KENYA



KENYA LAW
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**Wangechi v Makumi (Miscellaneous Civil Application
E022 of 2025) [2025] KEHC 8548 (KLR) (16 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CIVIL APPLICATION E022 OF 2025**

LN MUTENDE, J

JUNE 16, 2025

BETWEEN

DAVID MUHIA WANGECHI & 2 OTHERS APPLICANT

AND

DAVID MAKUMI RESPONDENT

RULING

1. The Applicant approached this court through an application dated 19th May, 2023, 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. E167 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 the 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 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 stated application is premised on grounds that;
 - a. The judgment in Nyahururu CMCC E0167 of 2021 was delivered vide a judgment dated 9th December, 2024 in favour of the Plaintiff/Respondent as against the Defendant/ Applicants in the following terms; liability 100% against the Defendants, general damages for pain and suffering Kshs.350,000/-, special damages Kshs.3,550/- 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' counsel 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 the copy of the judgment was obtained, it 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 instructing clients.
 - h. That the time allowed to file an appeal has run out.
 - i. That the appeal has good chances of success.
 - j. The Applicants herein are apprehensive that they will suffer substantial loss since the Respondent has already commenced execution proceedings against them per the warrants of attachment issued on 19th February, 2025 by attaching the Applicants' motor vehicle Reg. No. KBV 603T Toyota Hiace and all household goods through Kingstar Auctioneers.
 - k. 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.
 - l. That 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.
 - m. 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.
 - n. 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.
 - 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 unchallenged.
4. I have duly considered the application, supporting affidavits and annexures thereto.
5. The initial issue to be considered is the question of leave to appeal out of time. 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.

6. The judgment concerning the matter in question was delivered on 9th December, 2024 and the instant application was filed on 21st May, 2025 same. An appeal in a civil matter is supposed to be filed in 30 days' time from the date of the decree. An approximate duration of five (5) months passed prior to action being taken.
7. The explanation given for the delay is that the judgment was not ready on the date fixed for delivery and counsel was not served with the notice from either the court or the Respondent's counsel in the result, no stay of execution was made. And the Applicants came to know of the existence of the judgment when warrants of attachment and proclamation notice were issued.
8. A copy of judgment annexed to the application clearly show that only the Court Assistance Gilbert was present. This argument is therefore not challenged.
9. This court has discretion to consider and grant the order sought guided by principles for granting 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.”

10. Additionally, the court would also consider whether it is just and fair to all parties to allow the application. The Respondent having not replied the allegations put forth there is nothing to suggest that the Respondent will be prejudiced hence the prayer to appeal out of time has merit.
11. On the subject matter of stay of execution, the principles governing the same are provided by Order 42 Rule 6(1) (2) of the Civil Procedure Rules which enacts that;
 - (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.
12. 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.
13. 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.”
14. The loss stated is the right of appeal being curtailed and the ability of the Respondent to refund the decretal amount if the appeal succeeds being unknown.
15. Security for due performance is offered. The Applicants propose to deposit half the decretal sum in a joint interest earning account in the name of bot counsels for the parties and the other half to be deposited in court as security pending hearing and determination of the intended appeal. However, due to non-appearance of the Respondents no sentiments have been received by the court in that regard.
16. In the premises, I grant orders as follows;
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 E167 of 2021* pending hearing and determination of the intended appeal on condition that the Applicants’ deposit Kshs.353,550/- in court as security for the due performance within 14 days of today, June 16, 2025.
 3. In default, the orders granted shall stand vacated.
 4. Costs of the application shall be in the cause.

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

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L.N. MUTENDE
JUDGE

