



REPUBLIC OF KENYA



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**West Kenya Sugar Company Limited v Wanyonyi (Suing for and on Behalf of the Estate of John Mboya Amolo) (Civil Miscellaneous Application E078 of 2025) [2025] KEHC 8444 (KLR) (16 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8444 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL MISCELLANEOUS APPLICATION E078 OF 2025**

**PN GICHOHI, J**

**JUNE 16, 2025**

**BETWEEN**

**WEST KENYA SUGAR COMPANY LIMITED ..... APPLICANT**

**AND**

**WINNIE AYUMA WANYONYI ..... RESPONDENT**

**SUING FOR AND ON BEHALF OF THE ESTATE OF JOHN MBOYA AMOLO**

*(Being an application for extension of time to file a Memorandum of Appeal from the Ruling of Honourable Christine Menya dated and delivered on 24th January 2025 in Nakuru Civil Suit No. 1258 of 2017)*

**RULING**

1. This ruling is in respect of the Applicant's Notice of Motion dated 6<sup>th</sup> March, 2025 and brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 42, Rule 6 and Order 50 Rule of 6 of the Civil Procedure Rules, 2010 and seeking for Orders; -
  1. Spent.
  2. Spent.
  3. Spent.
  4. The Honourable Court be pleased to order the OCS Nakuru Police Station, or as the case may be, to provide escort, security and/or any necessary assistance to the Applicant, their agents and/or servants assist in the release of the Applicants' property and/or motor vehicle attached as per the Proclamation Notice.
  5. Spent.



6. The Honourable Court be pleased to enlarge the time within which the Applicant is to file and serve a Memorandum of Appeal against the ruling delivered on 24<sup>th</sup> January 2025, in Nakuru Civil Suit No. 1258 of 2017 Winnie Ayuma Wanyonyi vs West Kenya Sugar Company Limited and Anne W. Kabiru.
  7. There be a stay of execution of the ruling and orders issued on 24<sup>th</sup> January 2025, pending the hearing and determination of the intended appeal.
  8. The Honourable Court be pleased to grant such further or other Orders as it may deem just and expedient in the circumstances of this case.
  9. The costs of this application do abide the outcome of the intended appeal against the ruling and orders of the Chief Magistrate Court at Nakuru (Honourable Christine Menya) dated and delivered on 24<sup>th</sup> January 2025 in Nakuru Civil Suit No. 1258 of 2017 Winnie Ayuma Wanyonyi vs West Kenya Sugar Company Limited and Anne W. Kabiru.
2. The application is based on the grounds on the face of the motion and supported by the affidavit of Eunice Adhiambo Owuor, the Manager, Legal and Insurance Services of the applicant Sworn on even date.
  3. The Applicant stated that on 24<sup>th</sup> January, 2025, the Hon. Christine Menya delivered her ruling in Nakuru Civil Suit No. 1258 of 2017, dismissing the Applicant's application dated 23<sup>rd</sup> July, 2024, without considering its merits.
  4. It is averred that this dismissal exposed the Applicant to execution and indeed the Respondent sent Direct "O" Auctioneers, to attach the Applicant's property pursuant to a Proclamation Notice dated 15<sup>th</sup> July, 2024, and a Warrant of Sale dated 31<sup>st</sup> January, 2025.
  5. It is the Applicant's case, that the delay in filing the intended appeal was due to the advocate handling the matter being in and out of the hospital for most of February 2025, preventing them from taking necessary steps within the prescribed time. As such, the failure to file the appeal on time was not deliberate but was caused by circumstances beyond the advocate's control.
  6. She added that the delay in filing the intended appeal, though regrettable, is not inordinate. Further that mistake made by counsel was unintentional and should not be held against the Applicant, who is aggrieved and wishes to appeal the ruling.
  7. The deponent stated that they have demonstrated preparedness and desire to prosecute the intended appeal, as their advocates have requested certified copies of the proceedings and the impugned ruling from the court. Further that the intended appeal is arguable with reasonable chances of success, as evidenced by the draft Memorandum of Appeal annexed to the Supporting Affidavit.
  8. She stated that unless the Orders for extension of time and stay are granted, the Appeal will be nugatory. Conversely, that the Respondent will suffer no prejudice if the application is allowed, as they will have a fair opportunity to defend the intended appeal.
  9. It is stated that it is in the interest of fairness and the administration of justice that the Notice of Motion be heard urgently and the sought orders granted at the earliest opportunity.
  10. The Respondent opposed this application by the Replying Affidavit sworn on 18<sup>th</sup> March, 2025. The Respondent asserted that the application constitutes an abuse of court process, is based on factual misrepresentation and is misconceived, incompetent and lacks merit, warranting its dismissal with costs.



11. She highlighted that in 2017, she initiated the original suit being Nakuru CMCC No. 1258 of 2017 seeking compensation for her husband's death in a road traffic accident that occurred on 26<sup>th</sup> November, 2016. She emphasised the significant suffering endured by her children and herself since his demise.
12. She contended that the firm of O & M Law Advocates LLP has not formally applied to come on record for the Applicant in the said suit after judgment, as required by Order 9 of the Civil Procedure Rules, thus rendering the instant Application incompetent from its inception.
13. She argued that the Applicant appears to be unaware of the facts and proceedings in this matter, making their application misconceived. She clarified that the impugned ruling issued on 24<sup>th</sup> January, 2025, dismissed the Applicant's application to set aside judgment in the trial court and therefore, a stay of execution cannot be granted in respect of a negative order, which the Applicant is now seeking.
14. Further, she stated that Judgment in the original matter was delivered on 6<sup>th</sup> October, 2023 and that the Applicant's application filed on 23<sup>rd</sup> July, 2024 before the lower court seeking to have it set aside, was subsequently dismissed on 24<sup>th</sup> January, 2025.
15. She pointed out that the ruling of 24<sup>th</sup> January, 2025, was delivered in the presence of the Applicant's counsel, and the court granted the Applicant 14 days to lodge an appeal. That despite this opportunity, the Applicant remained indolent and only reappeared on 6<sup>th</sup> March, 2025, by which time execution had already commenced.
16. The Respondent refuted the Applicant's claim of counsel falling ill on 9<sup>th</sup> February, 2025, asserting that this excuse is irrelevant and immaterial because the 14-day appeal period had already lapsed on 7<sup>th</sup> February, 2025, while Counsel was presumably still on duty.
17. It was the Respondent's position that the Applicant has failed to offer any reasonable explanation for their failure to file an appeal within the prescribed period and the delay is not only unexplained but also inordinate, especially given that execution had already proceeded.
18. While emphasising the principles of equity that the Court does not entertain applications made in vain and that equity aids the vigilant and not the indolent, she contended that the Applicant's lethargic and careless approach should not be rewarded with a favourable Court Order. Furthermore, the Respondent viewed this application as an afterthought and argued that allowing it would result in a grave miscarriage of justice, and unjustly depriving her of the fruits of her judgment due to the Applicant's own laxity.
19. The Respondent reiterated that this Court does not issue orders in vain and that the Applicant's attempt to undo the progress of this matter and waste judicial resources should not be countenanced.
20. Consequently, the Respondent prayed for the dismissal of the application with costs.
21. In a rejoinder, the Applicant reiterated their application and in addition stated that they were not served with any previous mentions or hearing dates for the Nakuru CMCC No. 1258 of 2017 until they received a Proclamation Notice dated 15<sup>th</sup> July, 2024.
22. She contended that Order 9 Rule 9 of the Civil Procedure Rules, which requires leave to come on record post-judgment, only applies if there were previous advocates on record for a party in the trial suit. The Applicant confirms filing a Notice of Appointment of Advocates on 23<sup>rd</sup> July, 2024, and subsequently an application of even date seeking to set aside the ex-parte judgment, but that application was dismissed.



23. The Applicant reiterated that their advocate's health condition, as evidenced by a sick off sheet, prevented the timely filing of the Appeal against impugned ruling, necessitating the current application.
24. In response to the Respondent's claim regarding the lapse of the 14-day appeal period, the Applicant cites Section 75G of the *Civil Procedure Act*, 2010, which allows 30 days for appeals from subordinate courts to the High Court. Therefore, the Applicant argued the delay in filing the appeal was only for a few days and has been well-explained.
25. The Applicant maintained that the intended appeal has triable grounds, specifically noting that the suit motor vehicle did not belong to the Applicant at the time of the accident, giving the appeal high chances of success.
26. She vouched for the integrity of their counsel, stating that the advocate would not be dishonest about being indisposed and that any mistakes by counsel should not be visited upon the innocent litigant.
27. The deponent concluded that granting the prayers sought in this application is in the best interest of justice and equity.

### **Applicant's Submissions**

28. The Applicant submitted on three issues; that is, whether the time should be extended/enlarged to allow the Applicant to file the appeal out of time, whether this Court should issue a stay of execution of the ruling and orders issued on 24<sup>th</sup> January, 2025, pending the hearing and determination of the intended appeal and whether the costs of this instant Application should abide the outcome of the Appeal.
29. On the first issue, the Applicant cited Order 50 Rule 6 of the Civil Procedure Rules, 2010, which grants the Court power to enlarge time and Section 79G of the *Civil Procedure Act* Cap 21, which allows appeals to be admitted out of time if there's good and sufficient cause
30. On factors for consideration before such Orders are granted, reliance was placed on the Court of Appeal case *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR, that listed the four factors to be considered.
31. In respect to length of delay, the Applicant submitted that the ruling of the trial Court was delivered on 24<sup>th</sup> January, 2025, and the application was filed on 6<sup>th</sup> March, 2025, resulting in an approximate 10-day delay in filing the intended appeal, which the Applicant argues is not inordinate.
32. On reason for delay, it was submitted that delay was due to the Applicant's advocate being indisposed and in and out of the hospital for over two weeks in February 2025. The Applicant argued that mistakes of counsel should not prejudice the innocent litigant. They cited the Court of Appeal case in *Itute Ingu & another v Isumael Mwakavi Mwendwa* [1994] eKLR to support that a bona fide mistake by counsel can warrant the court's discretion. They further submitted that the mistake was unconceived, unpredicted and inevitable.
33. With regard to chances of success of the intended Appeal, the Applicant submitted that the intended appeal has reasonable chances of success, as demonstrated by the annexed draft Memorandum of Appeal.
34. On the degree of prejudice to the Respondent, it was argued that the Respondent will suffer no prejudice if the application is allowed as they will have a fair chance to defend the appeal. They stated that any prejudice can be compensated by an award of thrown away costs.



35. On the stay of execution, the Applicant referred to Order 42 Rule 6 of the Civil Procedure Rules, 2010, which outlines conditions for a stay of execution, including substantial loss to the applicant and timely application, and the provision of security.
36. The Applicant maintained that they have an arguable appeal as shown in the annexed draft Memorandum of Appeal. Reliance was placed on the case of *Nairobi City Council v Tom Ojienda & Associates* [2022] KECA 1326 (KLR) where the court found an arguable appeal is one that ought to be argued fully.
37. It was submitted that if stay is not granted, the Respondent will execute, rendering the appeal nugatory and an academic exercise. Reliance was placed on the case of *Nairobi City Council v Tom Ojienda & Associates* (supra), where the Court granted a stay to maintain the status quo and prevent the appeal from becoming an academic exercise.
38. The Applicant asserted that the Respondent has not demonstrated any prejudice they will suffer if a stay is granted and urged this Court to grant the orders sought.
39. Regarding costs, the applicant submitted that it is trite law that costs follow the event and requested the court to adopt the decision in *Nairobi City Council v Tom Ojienda & Associates* (supra) for costs to abide the outcome of the appeal.

### **Respondent's Submissions**

40. The submissions are on four issues, that is; whether the delay on the part of the Applicant is excusable, whether the Applicant has demonstrated an arguable appeal, what prejudice shall be occasioned to the Respondent and who should meet the costs of this application.
41. On delay, the Respondent argued that the 14-days leave to appeal lapsed on 7<sup>th</sup> February, 2025, while the application was filed on 10<sup>th</sup> March, 2025, making the 31-days delay excessive.
42. The Respondent pointed out inconsistencies in the Applicant's reason for delay, noting that a firm of advocates on record is not comprised of a single advocate, and further that from the medical documentation, counsel fell ill after the leave period expired. Further that the sick leave ended on 22<sup>nd</sup> February, 2025, with no explanation for the subsequent delay until 10<sup>th</sup> March, 2025.
43. The Respondent concluded that the delay is inordinately excessive and the reason is implausible, disentitling the Applicant from enlargement of time. In this reliance was placed on the case of *Gachuhi Muthanji -V- Mary Njuguna* [2014] eKLR:- that held that;-  

“Delay, even if it is for one day, must be explained; otherwise the court would be acting arbitrarily... I may add that the explanation for the delay must be plausible and satisfactory.”
44. On whether the Appeal is arguable, the Respondent contended that the grounds in the Applicant's draft Memorandum of Appeal are not arguable, especially considering the trial court deemed the earlier application moot due to ongoing execution.
45. Further, the Respondent argued that the firm of O & M Law Advocates LLP was not properly on record, as Order 9 Rule 9 of the Civil Procedure Rules requires leave to come on record after judgment. Hence, failure to obtain this leave renders the application null and void.
46. With regard to prejudice, the Respondent submitted that the suit was filed in 2017, and judgment issued for Kshs. 3,044,466/= (excluding accrued interest) was delivered on 6<sup>th</sup> October, 2023 and therefore, they have been kept from the fruits of judgment for too long.



47. Arguing that justice delayed is justice denied and that it would be unfair to keep a vigilant litigant waiting indefinitely for an indolent one the Respondent cited the case of Richard Nchapai Leiyangu -Vs- IEBC & 2 others Civil Application No. 299 of 2013 where the Court held; -

“discretion is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice”

48. The Respondent asserted that the Applicant will not suffer prejudice if the application is dismissed, as they have a remedy against the purported purchaser if the alleged sale took place.

49. On costs, the Respondent submitted that costs should follow the event and given the determination of issues in her favour, she is entitled to the costs of the application. For that argument, reliance was placed on the case of Republic -vs- Rosemary Wairimu Munene, Ex-Parte Applicant -Vs- Ihururu Dairy Farmers Co-operative Society Ltd R No. 6 of 2014, where the Court held that;-

“The basic rule on attribution of costs is that costs follow the event... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

#### **Analysis and Determination.**

50. Based on the issues raised in the application herein, the response thereto and submissions by both parties, the issues for determination are:-

1. Whether the Applicant’s Advocate is properly on Record.
2. Whether the time should be extended/enlarged to allow the Applicant to file the appeal out of time.
3. Whether this Court should issue a stay of execution of the ruling and orders issued on 24<sup>th</sup> January, 2025, pending the hearing and determination of the intended appeal.
4. Who should meet the costs of this application.

51. On the first issue, Order 9 Rule 9 of the Civil Procedure Rules provide that ;-

“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.”

52. It is therefore clear from the above provision that an advocate is only required to seek leave to come on record if another advocate was on record. In this case, the Applicant did not participate in the lower court proceedings as such, there was no Advocate on record and in effect, the Applicant’s Advocate did not need to seek leave before acting.

53. On the second issue, Section 79G of the Act provides that: -

“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.”

54. Further, it is settled law that the Court has discretion to grant application for extension of time under Section 79G of the *Civil Procedure Act* if the Applicant satisfies the court that he had good and sufficient cause for not filing the appeal on time.
55. Regarding extension of time, the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR had this to say: -

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus: “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”.

56. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2014] eKLR held: -

“...It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant. This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:

1. 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.
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.
5. Whether there will be any prejudice suffered by the respondents if the extension is granted.
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”



57. In this case, the impugned Ruling which is the subject of this application was delivered on 24<sup>th</sup> January, 2025. A stay of execution of 14 days granted by the trial Court expired on 7<sup>th</sup> February, 2025. This application was filed on 6<sup>th</sup> March, 2025. The law provides for 30 days period to a party that seeks to appeal against any decision from the subordinate court to the High Court and therefore, the time herein lapsed on 23<sup>rd</sup> February, 2025, hence the delay herein is about 11 days.
58. The reason given for delay is that Ms. Catherine Nyandia Kahiu Advocate, has been unwell and thus was unable to file the Appeal within the requisite period. A perusal of the Medical note by Avenue Hospital shows that Ms. Catherine Kahiu Advocate's sick off was from 9<sup>th</sup> February, 2025 to 21<sup>st</sup> February, 2025. In the circumstance, and considering that the delay was only for 11 days, sufficient cause for delay has been shown.
59. As regard substantial loss, the Applicants argued that they are apprehensive that execution will ensue if stay Orders are not granted and further, their Appeal will be rendered nugatory. The Respondent on the other hand argued that the ruling issued on 24<sup>th</sup> January, 2025 dismissed the Applicant's application to set aside judgment in the trial court and therefore, that a stay of execution cannot be granted in respect of a negative order, which the Applicant is now seeking.
60. No doubt, the impugned ruling of 24<sup>th</sup> January, 2025 dismissed the Applicant's application to set aside judgment and for a stay of execution. This decision was based on the finding that the subject matter of the case (the suit property) had already been sold. The court determined that the matter was therefore moot, meaning there was no longer a practical controversy and any ruling would be purely academic.
61. The above decision is a negative Order and faced with a similar Application in the case of *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] KECA 15 (KLR) the Court of Appeal stated thus:-

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”

62. Further still, in the case of *Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah* [2008] eKLR, and while dealing with a similar application for stay of a negative order, the Court of Appeal held:-

“The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December 2006. The order of 18<sup>th</sup> December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only. The same reasoning was applied in the case of *Raymond M. Omboga vs Austine Pyan Maranga* (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application.



This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....In this case, the trial court did not order parties to undertake any action or refrain from doing anything except awarding costs which have not been ascertained.

63. In the circumstances the intended Appeal will not be rendered nugatory if stay of execution Orders are not granted. The prayer for stay of execution is denied.
64. This Court has looked at the Draft Memorandum of Appeal. The Applicant has challenged the default judgment by the trial court dated 19<sup>th</sup> June 2024 but in this application dated 6<sup>th</sup> March, 2025, he has not sought for leave to appeal against that judgment out of time.
65. Accordingly, this Court makes the following orders:-
  1. Leave be and is hereby granted to the Applicant to file their Appeal out of time against the ruling dated 24<sup>th</sup> January 2025 on condition that the Memorandum of Appeal and the Record of Appeal are filed and served within 30 days from the date of this Ruling.
  2. Costs of this application to abide the outcome of the Appeal.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 16<sup>TH</sup> DAY OF JUNE, 2025.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:

Ms. Kahiu for Applicant

Mr. Mutai for Respondent- Absent

Ruto, Court Assistant

