



REPUBLIC OF KENYA



**Muturi & another v Khwesa (Civil Miscellaneous E427 of 2024)
[2025] KEHC 11857 (KLR) (Civ) (7 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL MISCELLANEOUS E427 OF 2024

LP KASSAN, J

JULY 7, 2025

BETWEEN

RUTH MUTURI 1ST APPLICANT

JAMES MUTURI THONGO 2ND APPLICANT

AND

DERRICK KHWESA RESPONDENT

RULING

1. Before this court is a Notice of Motion dated 14.05.2024 brought under, Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Order 42 Rules 6, 27 (1) (b) Order 50 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules 2010, and all enabling provisions of the law wherein the Applicant seeks orders to wit:
 - a. Spent
 - b. That this Honourable Court be pleased to extend the time for filing an appeal out of time by granting the Applicants 14 days to file appeal against the judgment and decree of the Hon. G.M. Mokua, Resident Magistrate/Adjudicator dated 19th December 2023 in SCCC No. E4682 of 2023- Derrick Khwesa-vs-Ruth Muturi & James Muturi Thongo.
 - c. Spent
 - d. That there be a stay of execution against the judgment and decree of the Hon. G.M. Mokua, Resident Magistrate/Adjudicator dated 19th December 2023 in SCCC No. E4682 of 2023- Derrick Khwesa-vs-Ruth Muturi & James Muturi Thongo pending the hearing and determination of the intended appeal.



- e. That this Honourable Court be pleased to order the Respondent undergo a second medical examination by Dr. Waithaka.
 - f. That the Applicants be and are hereby granted leave to adduce additional evidence by producing the second medical report.
 - g. That the costs of this application be provided for.
2. The application is based on several grounds. A judgment was delivered by the small claims court on 19th December 2023 against the Applicants. The initial 30-day stay of execution has expired, and the respondent has begun execution proceedings for the decretal sum and costs. The applicants are dissatisfied with the judgment, believing the court erred in finding them liable for an accident without evidence of negligence, and their advocates inadvertently failed to refer the respondent for a second medical examination, a mistake they argue should not penalize them. They contend that it is just for the respondent to undergo this second examination to ascertain the extent of the alleged injuries. The delay in filing the appeal was due to the applicants' insurer only noticing on 25th April 2024 that the respondent had not been re-examined, as well as the judgment being delivered just before the Christmas recess, leading to the advocate going on recess without acting on appeal instructions, which were later reminded upon receiving a 10-day notice from the respondent's advocates. The applicants argue that without the sought orders, the respondent will proceed with execution, rendering their intended appeal futile and defeating justice, and therefore, it is in the interest of justice for the application to be granted. The application is premised on alleged irregularities in service, denial of a fair hearing, and procedural mishaps in the lower court. The Respondent opposes the application, asserting that the Applicant is intent on delaying justice.
 3. The Respondent, states in his replying affidavit that he instructed his advocates to file a civil compensatory suit, which was registered as Millimani SCCC No. E 4682 of 2023, seeking general and special damages against the Applicants. He confirms that the applicants entered an appearance and filed a statement of defense, and while they were given two dates to comply with procedural rules before a hearing, they failed to ensure a medical examination of him. He asserts that the failure to undergo a second medical examination was not his responsibility, as he never requested one, and it was incumbent upon the applicants to provide details for such an examination. Furthermore, he highlights that the applicants' advocates were specifically requested by their insurers to facilitate a second medical examination but failed to do so. Khwesa notes that judgment was entered against the applicants on 19th December 2023, a decree was issued, and he was informed of this judgment on 11th January 2024, followed by a thirty-day stay of execution. He concludes by believing that the current application brought by the applicants is an abuse of the court process.
 4. The application was canvassed by way of written submissions.

Applicant's submissions

5. The Applicants seek an extension of time to file an appeal and a stay of execution concerning a judgment issued on 19th December, 2023, in SCCC No. E4682 of 2023, which they assert was unprocedural and led to an incorrect finding of liability. They contend that the delay in appealing was unavoidable, attributed partly to their advocates' oversight in failing to arrange a second medical examination for the Respondent as instructed by their insurer, and logistical challenges during the festive recess. The Applicants believe their appeal has a high likelihood of success, arguing that the Respondent's injuries were misrepresented (a skeletal tissue injury was wrongly classified as a fracture, leading to inflated damages) and that the finding of negligence was unsupported by evidence. They claim there was insufficient direct evidence linking their actions to the accident, and witness



testimonies did not conclusively establish their specific actions or omissions contributing to liability. The Applicants emphasize their fundamental right to access justice and a fair hearing, stating that the delay was not due to any lack of diligence on their part, and that granting the extension would not unduly prejudice the Respondent, who would still have the opportunity to argue the appeal on its merits.

Respondent's submissions

6. The Respondent opposes the Applicants' request for an extension of time to file an appeal and a stay of execution, contending that the Applicants have failed to demonstrate sufficient and justifiable grounds for their significant delay. They argue that the delay was unreasonable, unjustified, and that the intended appeal lacks arguable points of law or fact. The Respondent asserts that the Applicants' motion constitutes an abuse of the court process, aimed at delaying the enforcement of a valid judgment. They highlight the Applicants' failure to file a Memorandum of Appeal within the statutory period and their advocates' oversight in not arranging a second medical examination for the Respondent as instructed by their insurer, demonstrating a lack of diligence. The Respondent maintains that the initial judgment's findings on liability and damages were well-supported by the evidence presented, including an unchallenged medical report and conclusive witness testimonies, with no misrepresentation of injuries. They argue that the Respondent has already established a compelling basis against granting such leave and emphasize that granting the extension would cause undue prejudice and squander judicial time.

Analysis & Determination

7. I have considered the Application, responses and the submissions filed herein. The main facts relating to the Application herein are not in dispute. These include the existence of the ruling in Nairobi Nairobi SCCC No.E4682 of 2023 delivered on 19.12.2024 in favour of the Respondent.
8. The issues for determination herein are
 - i. Whether the Applicant herein should be granted leave to appeal out of time against the judgment in Nairobi SCCC No. E4682 of 2023?
 - ii. Whether to grant stay of execution in SCCC E4682 of 2023 pending the hearing and determination of the appeal?
 - iii. Who should bear the costs?
9. Section 79G of the *Civil Procedure Act* provides that the appeals from the subordinate court to the High Court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. It provides:

“Every appeal from a subordinate court to high court should be filed within a period of thirty days from the date of the decree or order appealed against, From such period any time the lower court may certify as having been requisite of a copy of the or order. Provided that an appeal may be admitted out of time if the appellants satisfied the court that he had good and sufficient cause for the filing of the appeal in time.”
10. It allows for the extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.



11. The court in exercise of its discretion is supposed to take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted and whether the matter raises issues of public importance. (See Court of Appeal in Edith Gichungu Koine-vs-Stephen Njagi Thoithi (2014) eKLR)
12. In addition, Section 95 of the *Civil Procedure Act* grants to the court the “discretion, from time to time, to enlarge” any time fixed for the doing of any act under the Act. See also, Order 50 Rule 6 of the Civil Procedure Rules. Thus it is incumbent upon the Applicant to satisfy the court that it had good and sufficient cause for not filing the appeal in time, and is deserving of the court’s discretion.
13. The judgment in the primary suit Nairobi SCCC No. E4682 of 2023, was delivered on 19.12.2024. The judgment made an award in favour of the Respondent as against the Applicants herein. The application herein was filed about four (4) months after the 30 days leave to appeal had lapsed. The explanation given is that judgment was delivered on the eve of Christmas recess, the Applicants’ Counsel failed to notify them of the outcome until the notice of entry of judgment was served upon them. In light of this, the delay in bring the application herein although inordinate is with reason.
14. As to whether the Respondent will suffer any prejudice, this has to be weighed against a party’s constitutional right to be heard (See Court of Appeal case Vishva Stone Suppliers Company Limited-vs-RSR Stone (2006) Limited (2020) eKLR.). The Applicant deposed that the Respondent will not suffer any prejudice if the orders of leave are granted. The Applicant has expressed her chances of appeal succeeding. The Respondent’s deposition as to the prejudice he will suffer cannot dislodge the clear prejudice the Applicant stands to suffer.
15. Where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in his/her favour and especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way. The discretion of the court must always be exercised judiciously. The Applicant having expressed her intentions to be heard by this court on appeal, it is my considered view that she ought to be given an opportunity to pursue the appeal.
16. For the above reasons, the Applicant has satisfied the conditions for grant of leave to appeal out of time.
17. The prayer for leave to file an appeal having been allowed, this court will then proceed to determine the issue as to whether there ought to be stay of execution of the judgment of the trial court pending the hearing and determination of the appeal. The principles upon which the above prayer can be allowed are now well settled from the authorities from this court and from the superior courts.
18. Generally, a stay of execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 which provides:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
19. For orders of stay of execution to be granted, the Applicant must satisfy the conditions to wit that substantial loss may result to the Applicant unless the order is made; that the application has been made without undue delay; and that 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 See Amal Hauliers Limited-vs-Abdulnasi Abukar Hassan (2017) eKLR.



20. The court ought to fairly take into account the interests of the Respondent, who has been deprived of the benefits of his judgment, in addition to the Appellant's right to ventilate their case which the court should not be quick to deny. See *Kenya Shell Ltd. v. Kibiru & others* (Supreme); *Attorney General v. Halal Meat Produces Limited*, Civil Application No. Nairobi 270 of 2008; and *Mukuma v. Abuoga* (1988) KLR 645.
21. Where the Applicant is successful, he or she shouldn't be in a position where he or she can't obtain their money back. Additionally, if the Applicant ultimately fails in his intended appeal, the Respondent who has a decision in his favour shouldn't find it difficult or impossible to enforce the decree. This is the guarantee security of costs gives to parties. See *Nduhiu Gitahi & Ano.-vs-Anna Wambui Warugongo* (1988) 2 KLR 100.
22. Taking all relevant factors into consideration, I do order that;
 - a. The Applicant is granted leave to file an appeal out of time and the same must be filed and served within the next 21 days from the date of this ruling.
 - b. The Applicant will deposit the entire decretal sum into an interest earning account in the joint names of the parties' advocates within 30 days from this Ruling date.
 - c. In default of any of these conditions, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
 - d. The issue of second medical report to be ventilated in the substantive appeal.
 - e. The costs of this Application will be in the cause.
23. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF JULY 2025.

LINUS P. KASSAN

JUDGE

Carol - Court Assistant

