



**Ojuko & another v Kimani (Civil Miscellaneous E019 of 2025)  
[2025] KEHC 10428 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10428 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL MISCELLANEOUS E019 OF 2025**

**JK SERGON, J  
JULY 17, 2025**

**BETWEEN**

**DAVID OSWAGO OJUKO ..... 1<sup>ST</sup> APPLICANT**

**WESTERN EXPRESS COACH LTD ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MOSES GITAU KIMANI ..... RESPONDENT**

**RULING**

1. The application coming up for determination is the Notice of Motion dated 10th March, 2025 seeking the following orders;
  - (i) Spent
  - (ii) Spent
  - (iii) THAT there be a Stay of Execution of judgement in Kericho CMCC number 422 of 2018 pending the hearing and final determination of this Application and intended appeal.
  - (iv) THAT The Applicant herein be granted leave to appeal out of time against the whole judgment of Honourable F.M. Nyakundi (PM) delivered on the 20th day of September 2024 in Kericho Chief Magistrate's Civil Suit No. 422 of 2018.
  - (v) THAT there be a Stay of taxation of costs in Kericho CMCC number 422 of 2018 pending the hearing and final determination of this Application and intended appeal.
  - (vi) THAT the draft Memorandum of Appeal annexed to the application be deemed as duly filed and served upon payment of the requisite fees.



- (vii) THAT upon grant of prayers No. (iii) and (iv) above, this Honourable Court be pleased to order that the judgment sum be deposited into a joint interest earning account in the names of both counsel, to stand as security.
- (viii) THAT costs of this application be in the cause.
2. The application is based on grounds set out on the face of the motion and the facts deponed in the supporting affidavit sworn by David Oswago Ojuko, the 1st applicant herein and the insured of motor vehicle registration no. KCH 176N which forms the subject matter of the Application herein.
  3. He avers that directline insurance instructed the firm of Kimondo Gachoka & Company Advocates and now the firm of Kairu MCCourt & Company Advocates to enter appearance and defend him in Kericho CMCC No. 422 of 2018, which they did.
  4. He avers that judgment in Kericho CMCC No. 422 of 2018 was delivered on the 20th day of September 2024 whereby they were condemned to pay Kshs. 604.650/- plus costs and interest.
  5. He avers that he had travelled outside the country to seek medical treatment and as such his advocates on record were not at a position to reach him through his contacts left in their office to have him updated on the contents of the judgment.
  6. He avers that being dissatisfied with the judgment, he and the co-applicant are desirous of challenging the decision of the trial court however the time within which to file an appeal has lapsed, he attached a copy of the draft memorandum of appeal.
  7. He avers that the delay in filing the appeal was not deliberate and that the intended appeal raises triable issues and has high chances of success. He avers that they are willing to furnish security by depositing the entire judgment sum into a joint interest earning account.
  8. He avers that they are likely to suffer substantial loss and damage if orders sought herein are not granted and further that the intended appeal will be rendered nugatory and further that the Respondent will not be prejudiced in any way if the orders sought herein are granted.
  9. He avers that it is in the interest of justice that stay of taxation of costs and execution of judgment in Kericho CMCC number 422 of 2018, and leave to file an appeal out of time be granted pending the hearing and determination of the application and the intended appeal and that in any event the application has been done without any unreasonable delay.
  10. He avers that unless this application is heard and stay of taxation of costs and execution of judgment in Kericho CMCC NO. 422 of 2018 granted this Application together with the intended appeal will be rendered nugatory and greatly prejudicing the Applicants.
  11. At the time of writing this ruling the Respondent had not yet uploaded a replying affidavit on the Case Tracking System.
  12. Having considered the instant application, this court finds that the issue (s) for determination are whether to enlarge the time to file the intended appeal out of time and grant stay execution against the judgment and decree in Kericho Chief Magistrate's Civil Suit No. 422 of 2018 and grant stay of assessment of costs in Kericho CMCC number 422 of 2018, pending the hearing and determination of the intended appeal.
  13. On the issue as to whether to enlarge time to lodge the appeal out of time, the operative section of the law is section 79G of the *Civil Procedure 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.” In the case of Paul Musili Wambua v Attorney General & 2 others [2015] eKLR, the Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated as follows: “...it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; 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.” Regarding the length of delay, it is evident from the pleadings on record herein that the judgement that the applicant is seeking to appeal against was delivered on 20th September, 2024. The instant application was filed on 10th March, 2025, occasioning a delay of about six months. The applicant submitted that the delay in lodging the appeal was because he had travelled outside the country to seek medical treatment and as such his advocates on record were not able to reach him through his contacts left in their office to have him updated on the contents of the judgment and for further instructions. The applicants were adamant that the delay in filing the appeal was not deliberate and that the intended appeal raises triable issues and has high chances of success. In the circumstances, I am inclined to allow the applicant leave to file the intended appeal noting that the delay is not inordinate and the applicants have offered a plausible explanation for the delay in filing the appeal.

14. On the issue as to whether to grant a stay of execution, the judgment was delivered on 20th September, 2024 while the present application was filed on 10th March, 2025, five months after the lapse of the 30 days stay of execution granted by the trial court. An application for stay invokes the discretionary powers of this court under Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010 that empowers the court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Order 42, Rule 6 (2) which states as follows: “No order for stay of execution shall be made under sub rule (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.” This court notes that the instant application was not filed timeously, this notwithstanding, the applicants asserted that they are likely to suffer substantial loss and damage if orders sought are not granted and that the intended appeal will be rendered nugatory. They were adamant that the Respondent will not be prejudiced in any way if the orders sought in the application are granted. This court notes that the applicants are willing to furnish security by depositing the entire judgment sum into a joint interest earning account. Having considered the averments by the applicants on the issue of stay and the circumstances of this case, it is the finding of this court that the applicants are entitled to a stay of execution as they ventilate the intended appeal.
15. On the issue as to whether to grant a stay of the assessment of party to party costs in the proceedings before the lower court in Kericho CMCC number 422 of 2018 which are due for assessment, it is the view of this court that a stay of the assessment proceedings will be a travesty of justice because costs were awarded by the trial court to the successful party in the suit being the plaintiff/respondent and no appeal, reference or review has been filed against the award of the party to party costs by the applicants herein.



16. I find that the applicants are entitled to pursue the appeal. I hereby partially allow the notice of motion dated 10th March 2025 in the following terms:-

- (i) Leave is granted to the applicants to file appeal out of time against the judgment delivered in Kericho CMCC number 422 of 2018 within 10 days from the date hereof.
- (ii) There be a stay of execution of the judgment/decreed in Kericho CMCC number 422 of 2018 pending the hearing and determination of the intended appeal.
- (iv) The applicants as a condition for the grant of the order for stay to deposit the entire decretal sum of Kshs. 604, 650/= in an interest earning account in the names of both advocates appearing in this matter within forty five (45) days hereof. In default the order of stay shall automatically lapse.
- (v) Costs to abide in the outcome of the appeal.

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 17TH DAY  
OF JULY, 2025.**

.....  
**J. K. SERGON**

**JUDGE**

In the presence of

C/Assistant – Rutoh

Miss Ongwacho for Applicant

