



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
MISC. CIVIL APPLICATION NO E066 OF 2025

JASON NYAGWARA ONSONGO1ST INTENDED APPELLANT/APPLICANT
DANIEL MURIUKI NDERITU.....2ND INTENDED APPELLANT/APPLICANT
VERSUS
FESTUS NJUKI GATERI..... RESPONDENT

RULING

[1] The applicants seek to appeal from the decision of the Gichugu Chief Magistrate’s Court delivered on 25th June 2025 in Gichugu CMCC No. E020 of 2024 – ***Festus Juki Gateri v. Jason Nyangwara Onsongo & Another*** which awarded general damages, special damages and future medical expenses in the sum of Ksh.1,010,550 plus costs of the suit and interest to the Respondent plaintiff in a personal injury claim.

[2] By Notice of Motion dated 31/7/2025, the applicants seek specific reliefs that:

1. ... (*spent*)
2. ... (*spent*)
3. *The Intended Appellants be granted leave to appeal out of time against part of the judgment of the Chbief magistrate’s Court in Gichugu CMCC NO. E020 of 2024 – Festus Njuki Gateri versus Jason Nyangwara Onsongo & Another delivered on 25th June 2025 without notice to the respondent.*
4. *There be a stay of execution of any decree emanating from he judgment delivered on 25th June 2025 in Gichugu CMCC NO. E020 of 2024 – Festus Njuki Gateri versus Jason Nyangwara Onsongo & Another pending the hearing and determination of the Intended Appeal*

5. *The memorandum of Appeal Annexed hereto be deemed as duly filed and served.*
6. *Costs of the Application be in the Cause.*

- [3] The delay in filing the appeal is explained at paragraph 3 of the supporting Affidavit in terms that ***“by the time my advocates M/S Kiruki & Kayika Advocates, could obtain sufficient instructions from my insurer, M/S Madison General Insurance Kemya Limited, the time allowed to file an appeal had run out.”***
- [4] The Respondent principally opposed the application (see paragraph 6 of the Replying Affidavit) that *“the explanation given that the Applicant’s Counsel was awaiting instructions from the Applicant’s insurance is vague, unsupported by evidence, and cannot be a ground for extension of time[and] the applicants have not annexed any correspondence or proof to show efforts made to obtain such instructions or when the same were given.”*
- [5] Counsel for the parties filed submissions citing statute and caselaw authorities including sections 79 (G) and 95 of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules; *Thuita Mwangi v. Kemya Airways Ltd.* (2003) eKLR, *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another* (2018) eKLR, *National Industrial Credit Bank Ltd. v Aquinas Francis Wasike & Another* (2006) eKLR, *James Njenga & Another v. Samuel Ngetich* (2018) eKLR, *Butt v. Rent Restriction Tribunal* (1979) eKLR, *RWW v. EKW* (2019) eKLR, *Tropical Commodities Suppliers Ltd. v. International Credit Bank Ltd.* (2004) EA 331, *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* (1986) KLR 410, *Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others* (2014) eKLR, *Bi-Mach Engineers Limited v. James Kahoro Mwangi* (2011) eKLR and *Andrew Kiplagat Chemaringo v. Paul Kipkorir Kibet* (2018) eKLR.
- [6] The Court has considered the joint application for extension of time to lodge appeal and for stay of execution pending appeal on the well-known principles of the delay and explanation for the delay; arguability of the intended appeal and the degree of prejudice to the respondent and the presence of substantial loss or possibility of the appeal being rendered nugatory and the necessary requirement for security.
- [7] Granted that the length is not the determinant consideration, the delay in filing the appeal in this case was just six (6) days after the expiry of the 30-day period allowed for appeal under section 79 G of the Civil Procedure Act. It is not inordinate and the explanation that the delay was occasioned by a delay in receipt of instructions to

lodge the appeal against the judgment is not unreasonable. Despite want of documentary evidence of counsel calling for instructions on whether to appeal the judgment, it cannot be said to be an implausible, unlikely occurrence in ordinary course of things in the litigation of personal injury claims where the insured defendants are usually represented before the Court by Counsel appointed by their insurance companies. The applicants' Counsel could not have acted without instructions from the instructing Insurance Company. The prejudice on the Respondent may be remedied by an award of costs.

- [8] On arguability of the appeal, the Court finds that the challenge, as shown in the Draft Memorandum of Appeal, against the award of general damages as inordinately high and award of “*future medical expenses which were not sufficiently specifically proven*” are grounds of appellate review in terms of **Butt v Khan [1978] KECA 24 (KLR)**, that

“An appellate court will not disturb an award of damages **unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles,** or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

And the Court is guided by authorities that an arguable appeal need not be one that eventually succeeds at the hearing.

- [9] As to likely prejudice to the parties, the Court accepts that the grant of leave to appeal and the stay of execution will prejudice the Respondent who will be kept away from the fruits of his judgment a little longer. The appellant too would be prejudiced if his otherwise meritorious appeal were shut out on account of a six-day delay in filing.
- [10] As regards the possibility of the appeal being rendered nugatory or the applicants suffering substantial loss, the Court would accept that presence of substantial loss if stay of execution is declined and the appellants' appeal succeeds but they are unable to recover the decretal sum paid upon execution in whole to the Respondent whose ability to refund has not been disclosed.
- [11] Consequently, in balancing the rights of the right of appeal of the intended appellant and to ensure that they do not suffer substantial loss or that such appeal is not rendered nugatory, against the respondent's right to enjoyment of the fruits of his judgment, the Court will in granting leave to appeal out of time and stay of execution

of the judgment of the trial court, direct that a portion of the decretal sum assessed at 1/3 thereof shall be paid to the Respondent and the balance be secured by a bank guarantee.

ORDERS

[12] Accordingly, for the reasons set out above, the applicants' application dated 31/7/2025 for leave to appeal out of time and for stay of execution is granted upon terms that:

1. **The Memorandum of Appeal shall be filed with fourteen (14) days, and the Record of Appeal shall be filed within thirty (30) days.**
2. **There shall be an order for stay of execution pending hearing and determination of the appeal.**
3. **The applicants shall pay to the Respondent through his Counsel the sum of Ksh.300,000/- approximating 1/3 of the decretal sum within fourteen (14) days.**
4. **The Applicants shall within fourteen (14) deposit into Court a Bank guarantee for the balance of the decretal sum approximating 2/3 of thereof as security for the payment of such obligation as may eventually be determined on appeal.**
5. **In default, the order for stay of execution shall lapse.**
6. **Costs of the application for extension of time shall be paid by the Applicants to the Respondent in terms of Order 50 Rule 6 of the Civil Procedure Rules.**

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF SEPTEMBER 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Makawa instructed by M/S Kiruki & Kayika Advocates for the Applicant.

Ms. Lumumba instructed by M/S Mwangi Kennedy & Co. Advocates for the Respondent.