



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL APPEAL NO. 38 OF 2017**

**PETER GACHERU NJOROGE..... APPELLANT**

**VERSUS**

**BENARD MWANGI ..... RESPONDENT**

**(Legal representative of the Estate of the late JOHN NJENGA KIARIE**

***(An appeal from the judgment and decree of Honourable B. Mararo PM in Nakuru  
CMCC NO. 772 of 2015 delivered on the 22<sup>nd</sup> February, 2017)***

**RULING**

1. By his application dated the 4<sup>th</sup> April 2017 the applicant Peter Gatheru Njoroge sought leave of the court to lodge an appeal from the judgment and decree in **Nakuru CMCC No. 772 of 2015** delivered on the 22<sup>nd</sup> February 2017 out of time and that the Memorandum of Appeal filed herewith with on the 4<sup>th</sup> April 2017 be deemed to be properly on record. Application is brought under **Section 79 and 95 of the Civil Procedure Act**. It is further sought an order of stay of execution of the said Judgment and decree pending hearing and determination of the intended appeal.

2. In support of the application are grounds stated on the face of the said application and upon a supporting affidavit sworn by one Kinyua Penina Wanjiku an advocate and legal officer at Britam General Insurance Company Limited, the insurer of the accident Motor vehicle KAU 320N.

3. The application is opposed by a Replying Affidavit sworn by the Respondent Bernard Mwangi on the 10<sup>th</sup> April 2017.

4. I have considered reasons for the delay in filing the intended appeal within the time lines allowed under the civil procedure Act and Rules and objections raised by the respondents.

The decretal sum awarded by the trial court is Kshs 470,400/-. Issue of liability at 100% against the applicant is contested in the proposed appeal and so is the issue of dependancy under the Fatal Accidents Act, the Respondent being a brother to the deceased.

5. The judgment of the trial court is dated 22<sup>nd</sup> February 2017 and the application was brought on the 4<sup>th</sup> April 2017, twelve days outside the 30 days period allowed for lodging an appeal. The reasons given for the delay are not persuasive but I do not find it too inordinate in the circumstances.

The applicant is willing and ready to deposit sufficient security for the performance of the decree. It is proposed by the respondent that if the orders sought are allowed that 50% the decretal sum be paid

out to the respondent and the balance be deposited in court.

6. I have considered the case **Iisan Enterprises Ltd -vs- Fredrick Muia Peter (2016) e KLR** cited by both parties. Other than stating that the respondent may not be able to repay back the decretal sum should the intended appeal be successful, no proof was tendered in support of the allegation. Likewise the respondent with whom the burden of proof that he would be able to repay the money back failed to discharge that burden.

7. I have considered the intended grounds of appeal. It is not the duty of the court to look at the merits or demerits of the appeal but a casual perusal shows some arguable grounds.

8. There being no serious contestation on the extension of time and leave to lodge the appeal out of time, I am persuaded to allow and grant leave to the applicant to file it out of time.

The already filed Memorandum of appeal dated 30<sup>th</sup> March 2017 is hereby deemed as properly on record.

9. Further, I allow a stay of execution of the decree of the trial court but upon terms that the appellant shall pay 50% of the decretal sum to the respondent within 30 days and the balance (50%) be deposited in court also within the period of 30 days from the date of this ruling.

In default, the order of stay of execution shall lapse.

Costs in the cause.

**Dated, Signed and Delivered this 4<sup>th</sup> day of May 2017**

**J. N. MULWA**

**JUDGE**