



**Gachoya v Muthui (Miscellaneous Civil Application E043 of 2024)  
[2025] KEHC 13557 (KLR) (30 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13557 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
MISCELLANEOUS CIVIL APPLICATION E043 OF 2024  
LN MUTENDE, J  
SEPTEMBER 30, 2025**

**BETWEEN**

**SIMON KARIUKI GACHOYA ..... APPLICANT**

**AND**

**MARGARET WAIHUNI MUTHUI ..... RESPONDENT**

**RULING**

1. The Applicant approached this court through an application dated 14<sup>th</sup> November, 2024, seeking orders that;
  1. Spent
  2. This Honourable Court be pleased to grant leave to the Applicants to appeal out of time in respect to the judgment /decree delivered in the Chief Magistrate Court in Nyahururu CMCC No. 026 of 2020 by Hon. C.M. Muhoro (Senior Resident Magistrate)
  3. Spent.
  4. This Court be pleased to grant the Applicant stay of execution in respect to judgment /decree delivered in Nyahururu CMCC No. 026 of 2020 by Hon. C.M. Muhoro (Senior Resident Magistrate) on 07/10/2020 pending the hearing and determination of the intended appeal herein and all consequential orders arising therefrom.
  5. This Honourable court be pleased to issue an order for provision of a Bank guarantee of the entire decretal sum awarded by the trial court of Ksh. 1,370,825 plus costs and interests only as security pending hearing and determination of the intended appeal.
  6. This Honourable Court be pleased to issue any other Order as it may deem just, appropriate and expedient in the interest of justice.



7. Costs of this application be provided for.
2. The application is premised on grounds that;
  - a. Judgment in Nyahururu CMCC 26 OF 2020 was delivered vide a judgment dated 07/10/2024 in favour of the Plaintiff/Respondent as against the Defendant/Applicant in the following terms; Liability at 100% against the Applicant, General damages of Ksh.1,000,000/-, Future Medical expenses Ksh.250,000/- and special damages of Ksh. 120,825 plus costs of the suit & interest at court rates together without stay of execution.
  - b. That the delay in filing of the appeal was inadvertent and excusable due to delay in receiving instructions from our instructing clients; time to file the appeal has run out; the appeal has good chances of success; the Applicant is apprehensive that the Respondent will commence execution proceedings against them to their detriment; the Applicant stands to suffer substantial loss and damage if orders sought herein are not granted which will render the intended appeal nugatory
  - c. That the Respondent will not suffer prejudice if orders sought are granted as prayed and it is in the interest of justice that the application be allowed so as to pave way for the Applicant to exercise his right of appeal.
3. The application is supported by an affidavit deposed by Doreen Nasimiyu, an advocate in conduct of the matter who basically reiterates what is stated in the grounds of the application.
4. In response, the Respondent filed a replying affidavit where she deposes that the Applicant has not demonstrated the reasons as to why he did not lodge the appeal within the time allowed despite having been aware of the judgment having been delivered. That the court should not grant stay of execution as she is entitled to the fruits of the judgment.
5. That if filed and successful, the appeal shall not be rendered nugatory, and she is capable of refunding the decretal sum But, if granted, may the court direct that the principle sum of Ksh. 1,370,000/- together with the assessed costs of Ksh.221,000/- be deposited either in court or in a joint account of both advocates for the Applicant and Respondent. However, she prayed for dismissal of the application.
6. I have duly considered the application, supporting affidavits and annexures thereto.
7. The initial issue I should consider is the question of leave to appeal out of time. Section 79G of the [Civil Procedure Act](#) provides as follows;

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.
8. The judgment in the matter was delivered on 7<sup>th</sup> October, 2024 and the instant application dated 7<sup>th</sup> November,2024 was filed on 8<sup>th</sup> November, 2024. The aggrieved party was advised on the right to appeal. An appeal in a civil matter is supposed to be filed in 30 days' time from the date of the decree. It is not indicated when the decree was drawn. What is however clear is an approximate duration of (4) months having elapsed prior to the court being moved.



9. The explanation given for the delay in making the instant application is that there was delay in receiving instructions by the instructing client. The question is whether circumstances prevailing would make it acceptable as a good reason. Considering that the delay was following circumstances beyond the control of the legal representatives, the Applicant should be granted the opportunity to exercise his right of appeal which makes the reason plausible.
10. This court has discretion to consider and grant the order sought guided by principles for granting extension of time. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1991] 2EA 231 the Court of Appeal held as follows;
 

“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.”
11. Additionally, this court should also consider whether it is prejudicial to the Respondent to allow the application.
12. On the subject matter of stay of execution, the principles governing the same are provided by Order 42 Rule 6(1) (2) of the Civil Procedure Rules which enacts that;
  1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
  2. 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.
13. In that regard, the court must be satisfied that substantial loss may result; the application was made without due delay and the Applicant must be willing to provide security for due performance of the decree.
14. I have afore addressed the question of due delay. On the issue if substantial loss. In *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another* [1986] eKLR the court stated that;
 

“...substantial loss, and such loss cannot be inferred in this case.

But this court must look at the matter from the point of view of rule 5(2) of Court of Appeal Rules, and here the test would be whether the appeal would be rendered nugatory, unless payment of the decretal sum were stayed. It is not normal in money decrees for the appeal



to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory.”

15. In *James Wangalwa & Another v Agnes Naliaka Chesoto* [2012] eKLR the court stated thus;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

16. The loss stated is the arguable appeal being rendered nugatory to the detriment of the Appellant. However, the contention of the Respondent is that she sustained injuries while travelling as a passenger in the Applicant’s motor-vehicle which confirms liability hence the issue should be on quantum. Therefore, it will be prejudicial to him if orders sought are granted as he will be denied the fruits of judgment. That the Respondent is capable of refunding the decretal amount if the same is paid and the appeal succeeds.

17. In the circumstances the evidential burden shifts to the Respondent to demonstrate that she has sufficient means with the capacity to refund the amount if the appeal succeeds. This was succinctly stated in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR where the Court of Appeal stated that:

“Once an Applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge”

18. In the instant matter, apart from allegation, the Respondent has not demonstrated the ability to repay the decretal sum incase the appeal succeeds. The appeal is against both liability and quantum. In event that the appeal succeeds, there may be the risk of nonpayment resulting into loss of the decretal amount.

19. On the question whether the appeal is arguable, it is apparent that the intended appeal raises legal issues therefore it will be just and in the interest of justice for it to be heard for the court to determine its merit.

20. Security for due performance is offered. The Applicant states that he is willing to issue security in the form of Bank Guarantee from a well-known and full functioning bank, a proposal which is not amenable to the Respondent.



21. In the premises, I grant orders as follows;

1. The Applicant is granted leave to file the appeal out of time within 21 days hereof.
2. There be stay of execution of the judgment and decree in Nyahururu CMCC No. E026 of 2020 pending filing, hearing and determination of the intended appeal on condition that the Applicant deposits half the decretal amount in court as security for the due performance within 21 days of today, September 30<sup>th</sup> 2025.
3. In default, the orders granted shall stand vacated.
4. The record of appeal be filed within 60 days' of today.
5. Costs of the application shall in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF SEPTEMBER, 2025.**

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**L.N. MUTENDE**

**JUDGE**

