Kigarave v Chepkoech & another (Civil Miscellaneous Application E035 of 2024) [2025] KEHC 13809 (KLR) (29 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13809 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CIVIL MISCELLANEOUS APPLICATION E035 OF 2024

JN KAMAU, J

SEPTEMBER 29, 2025

BETWEEN

HESBON KIGARAVE ..... APPLICANT

AND

CAROLINE CHEPKOECH ..... 1ST RESPONDENT

MILKAH WANGUI NJIRAINI ..... 2ND RESPONDENT

RULING

Introduction

1. In his Notice of Motion application dated 30th September 2024 and filed on 1st October 2024, the Applicant herein sought that this court enlarge time within which he could lodge his intended appeal against the Ruling delivered on 1st August 2024 in Vihiga CMCC No 257 of 2019 Caroline Chepkoech vs Milka Wangui Njiraini and Hesborn Kigarave. He also sought an order for stay of execution of the decree issued in the said case pending the hearing of the intended appeal.

2. Mercy Muyuka, an Advocate of the High Court of Kenya, swore an Affidavit in support of the said application on 26th September 2024 and on behalf of the Applicant.

3. Through the said advocate, the Applicant averred that his insurer Madison General Insurance (K) Ltd was advised of the aforesaid Ruling and being aggrieved by the terms thereof, issued instructions to lodge an appeal.

4. He contended that the delay in lodging the appeal was occasioned by the inadvertent mistake of his Advocates who had misplaced his file which was traced on 27th September 2024 and the instant application promptly prepared for lodging of the same. He urged the court not to visit his Advocates' mistakes upon him. He pointed out that his Advocates were remorseful and tendered their apologies for the delay to file the appeal as they were well aware of the timelines.

5. He stated that he had an arguable appeal and prayed that the application be allowed to enable him prosecute his appeal. He added that the intended appeal was highly meritorious and stood good chances of success as had been demonstrated by his attached Draft Memorandum of Appeal.

6. He pointed out that he had brought the instant application without undue delay and that the Respondents would not be prejudiced in any way that could not be adequately compensated by way of costs if this application was allowed. He averred that he would be greatly prejudiced if this application was not allowed as he would have been denied his right to appeal.

7. The 1st Respondent swore a Replying Affidavit on 22nd October 2024 in opposition to the said application. The same was filed on 25th October 2024. She termed the Applicant's application incompetent, bad in law, an abuse of the court's process and an afterthought made in bad faith.

8. She stated that there was unreasonable delay in the filing of the application herein and that no sufficient reason had been given for the delay. She asserted that the Applicant had not demonstrated evidence of the substantial loss he would suffer if execution was levied.

9. She contended that the Applicant had to establish other factors that would show that the execution would create a state of affairs that would irreparably affect or negate the very essential core of him as the successful party in the appeal, which in this case, he failed to do so. She pointed out that he had not offered any security as condition for stay.

10. She asserted that the application was a ploy to delay her from enjoying the fruits of the Judgment. She was emphatic that it was in the interest of justice that the application be dismissed but that if the court was inclined to grant the orders sought, then the Applicant should be ordered to deposit the entire decretal sum plus costs in an interest earning account in the joint names of the Advocates on record for the parties plus costs.

11. The Applicant's Written Submissions were dated 31st January 2025 and filed on 7th February 2025 while those of the 1st Respondent were dated and filed on 17th January 2025. The 2nd Respondent did not file any response and/or Written Submissions to the present application. The Ruling herein was therefore based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

12. The Applicant invoked Section 79G of the *Civil Procedure Act* and placed reliance on the case of Paul Musili Wambvua (sic) vs Attorney General & 2 Others [2015]eKLR where it was held that in deciding whether or not to grant an extension of time, the court considered length of the delay, the reason for the delay, the chances of the appeal succeeding if the application was granted and the degree of prejudice that would be occasioned to the respondent if the application was granted.

13. He submitted that the Ruling was delivered on 1st August 2024 and he filed the instant application on 30th September 2024 which was about thirty (30) days outside the time limited for filing an appeal. He argued that the mistake of his Advocates was excusable and deserving of this court's indulgence in exercising its discretionary powers to extend time for filing of the appeal.

14. He pointed out that his Draft Memorandum of Appeal raised two (2) pertinent issues, being, the application of law relating to the application of orders vested upon a court to sit on review vis-à-vis appeal and the application of the law relating to third-party proceedings. He was emphatic that he had attained the threshold for this court to allow the extension of time to have the intended appeal filed out of time.

15. He contended that Judgment was delivered in this matter and liability apportioned and that he had dutifully fulfilled his obligation as per the terms of that Judgment and paid the decretal sum together with costs to the 1st Respondent. He argued that that was already a show of good faith and that the 1st Respondent would not be prejudiced in any way if he was allowed to have his day in court and be heard. He added that the result of him not being heard was that he would suffer greater loss by paying the sum of Kshs 154,185/= in addition to the amounts already settled in fulfilment of the Judgment of the Trial Court.

16. He was emphatic that the 1st Respondent had already enjoyed the fruits of her Judgment and was no way prejudiced. He averred that the payment of costs that was made was a clear expression that he was a man of means and as such he was ready to abide by any eventual outcome of the appeal.

17. He further invoked Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 and Sections 1A and 1B of the *Civil Procedure Act* Cap 21 (Laws of Kenya) and submitted that having demonstrated that the appeal raised an arguable case that was worth prosecuting, was sufficient cause to preserve status quo because if execution was allowed to proceed, it would create a state of affairs that would irreparably affect his very nature as the successful party in the intended appeal.

18. He argued that such substantial loss not preserved by an order of stay would render the appeal nugatory and irreparable loss that was not compensable. He asserted that the Respondents had not demonstrated their capacity to refund him the additional amounts if the appeal was successful and execution had proceeded during the pendency of the appeal.

19. He further contended that the objective of the legal provisions on security was to ensure that courts did not assist litigants to delay execution of decrees but that to balance the interest of the parties to the suit. He reiterated that he had demonstrated that he was capable of paying the amounts having fully paid the decretal sum.

20. He pointed out that the Ruling had altered the Judgment which had been fully settled and that if he was to go by the said Ruling, then half the decretal sum had already been paid to the Respondent (sic) plus costs of the suit thus sufficed as security to warrant grant of the stay order for execution. He reiterated that the delay of thirty (30) days was excusable and not inordinate. He urged the court to allow his application as prayed.

21. On her part, the 1st Respondent submitted that the Applicant had not specified the exact loss he would suffer if his application herein was not allowed which meant that a vital limb under Order 42 Rule 6 of the Civil Procedure Rules had not been complied with.

22. In that regard, she relied on the case of Sun Palm Limited & Another vs David Pius Mugambi[2019]eKLR where it was held that it was not sufficient merely to state that the decretal amount was a lot of money and the applicant would suffer if the money was paid but that the applicant was required to show the damages it would suffer if the order for stay was not granted because by granting a stay, status quo would remain as it was before Judgment denying a successful litigant of the fruits of the Judgment.

23. She argued that the decree herein was a money decree and that she could reimburse the same if the appeal was successful and thus releasing the entire decretal sum to her would not render the said appeal nugatory. To buttress her point, she relied on the case of Kenya Shell Limited vs Benjamin Karuga Kibiru & Another [1986]eKLR where it was held that it was not normal in money decrees for the appeal to be rendered nugatory if payment was made.

24. She urged the court to dismiss the Applicant's application for failure to offer security for conditional stay but reiterated that in the event the court found merit in allowing the application, the Applicant should be ordered to deposit the entire decretal sum plus costs in a joint interest earning account in the names of the advocates on record.

25. She pointed out that the delay which was more than two (2) months, was inexcusable and a flimsy one cooked up to justify the delay as no evidence had been tendered to justify that his counsel had lost his file or attempted to apply for a skeleton file to move the court appropriately. She added that the letter from his insurance clearly showed that his counsel emailed it on 6th August 2024 and instructions to proceed were given on 19th August 2024 which correspondences could only have been done and recorded in the file and hence, his excuse that his advocates' file was missing could not stand.

26. She was emphatic that the reason for the delay had not been explained satisfactorily and did not therefore meet the threshold for extension of time to appeal or for granting of stay. She placed reliance on the cases of Gachungu & 3 Others (Civil Application 208 of 2020)[2022] KECA 1411 (KLR) and Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others[2015]eKLR where the common thread was that any delay should be satisfactorily explained. She argued that the Applicant was an indolent and dishonest party and could not come to court more than sixty- two (62) days from the date of the Ruling and seek a stay of execution and enlargement of time. She thus urged the dismissal of the present application with costs to her and the 2nd Respondent (sic).

27. Indeed, in exercising its discretion to allow an application seeking extension to file an appeal out of time, a court had to be satisfied that the omission to file the same within time was excusable. In other words, there had to be a plausible explanation for the delay in filing the appeal.

28. It was apparent from the court record that the decision the Applicant intended to appeal against was delivered on 1st August 2024. The present application was filed on 30th September 2024. About one (1) month had lapsed since the deadline within which the Applicant could lodge an appeal within the time stipulated in Section 79G of the *Civil Procedure Act*. This was not an inordinately long period as the 1st Respondent had contended.

29. The Applicant did not annex any documentary evidence or supporting affidavit from his advocates to show that his said advocates could not lodge the appeal in good time as they had misplaced their file. This court could therefore not decipher whether he was being truthful or not.

30. Be that as it may, courts have held time and again that the blunders of an advocate should not be visited upon a litigant as blunders would continuously be made as human is to err.

31. Indeed, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of *the Constitution* of Kenya, 2010. Even where a party delays in doing an act, there was always a provision that would give it reprieve to seek justice.

32. Notably, Order 50 Rule 6 of Civil Procedure Rules, 2010 empowers the court to enlarge the time to do a particular act. The said Order 50 Rule 6 of Civil Procedure Rules stipulates as follows:-

> "Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise".

33. Against this backdrop, this court, therefore, perused the draft Memorandum of Appeal that was annexed to the present application. The grounds in the Applicant's draft Memorandum of Appeal showed that he was aggrieved by the Trial Court's decision regarding review of her predecessor's decision in finding that there was an error apparent on the face of the record in the manner liability had been apportioned. He sought that the appellate court determine if the Trial Court erred in law and in fact. These were arguable points of law.

34. It did not, however, consider the merits or otherwise of the grounds of appeal that were set out therein as that was strictly under the purview of the appellate court. All that it was expected to do was to consider if the Applicant herein had demonstrated that he had arguable grounds of appeal.

35. In addition, while considering whether to grant an order for extension to do any act or not, the court was also required to consider if the opposing side would suffer any prejudice if extension of time was granted. This court did not see any prejudice that the 1st and 2nd Respondents would suffer or were likely to suffer if the Applicant herein exercised his constitutional right of appeal. If there was any prejudice, then they did not demonstrate the same.

36. Taking all the factors hereinabove into account, it was the considered view of this court that that it was in the interests of justice (emphasis court) that the Applicant be given an opportunity to have his intended Appeal heard on merit as he would suffer prejudice if he was denied an opportunity to fully present his Appeal to be heard on merit.

37. Indeed, the power to grant orders in the interest of justice and/or for the ends of justice (emphasis court) is well captured in Section 3A of the *Civil Procedure Act* that states that: -

> " Nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice (emphasis court) or to prevent abuse of the process of the court."

38. Turning to the issue of order for stay of execution, this court noted both parties' submissions relating to the conditions that the Applicant was required to meet before the said could be granted. As the 1st Respondent was not technically opposed to an order for stay of execution pending appeal being granted and only argued that the Applicant ought to deposit the decretal sum into an interest earning account in the names of her advocates and those of the Applicant herein, this court did not wish to belabour this point as the 1st Respondent's proposal was reasonable and found it prudent that the Trial Court orders be stayed pending the determination of the Appeal herein for the reason that the Applicant's intended appeal would be rendered nugatory if the 1st Respondent executed to recover the amount in question.

Disposition

39. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Application dated 30th September 2024 and filed on 1st October 2024 was merited and the Prayer No (2), (3) and (4) be and are hereby allowed in the following terms: -

    1. That there shall be a stay of execution of the Decree issued in in Vihiga PMCC No 257 of 2019 Caroline Chepkoech vs Milka Wangui Njiraini & Hesbon Kigarave, pending the hearing and determination of the appeal on condition the Applicant shall deposit the remaining half of

the decretal amount in a joint interest earning account of both counsel herein within forty five (45) days from the date of this Ruling.

2. For the avoidance of doubt, in the event, the Applicant shall default on Paragraph 39(1) hereinabove, the conditional stay of execution herein shall automatically lapse.

3. The Applicant be and is hereby directed to file and serve his Memorandum of Appeal within fourteen (14) days from the date of this Ruling.

4. The Applicant be and is hereby directed to file a Record of Appeal within one hundred and twenty (120) days from the date of this Ruling.

5. It is hereby directed that this matter will be mentioned on 25th November 2025 to confirm compliance and/or for further orders and/or directions.

6. Either party is at liberty to apply.

40. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF SEPTEMBER 2025

J. KAMAU

JUDGE