



**Mochama & another v Machwara (Suing as the Legal Representative of the Estate of Dorothy Monyangi Onguti - Deceased) (Miscellaneous Civil Case E011 of 2025) [2025] KEHC 13321 (KLR) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13321 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
MISCELLANEOUS CIVIL CASE E011 OF 2025  
WA OKWANY, J  
SEPTEMBER 18, 2025**

**BETWEEN**

**DENNIS MOKAYA MOCHAMA ..... 1<sup>ST</sup> APPLICANT**

**MOGO AUTO COMPANY LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**GEOFFREY MAYOGI MACHWARA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DOROTHY MONYANGI ONGUTI - DECEASED) ..... RESPONDENT**

**RULING**

1. This ruling concerns the Application dated 14th May 2025 in which the Applicants seek, inter alia, stay of execution of the decree in Nyamira CMCC No. E067 of 2023 and leave to appeal out of time against the judgment delivered in the said case.
2. The Application is brought under Sections 1A, 3A, and 79G of the *Civil Procedure Act*, Order 42 Rule 6(1)(2)(6) and Order 51 of the Civil Procedure Rules, together with Section 5(b) of the Insurance (Motor Vehicle Third Party Risks) Act and Article 159 of *the Constitution* of Kenya.
3. The Application is supported by the affidavit of Mr. Robert Ouma Njoga, Advocate, who attributes the delay in filing the appeal to the resignation of a law clerk, restructuring within Occidental Insurance Company Ltd, and inadvertence/oversight on the part of counsel.
4. The Respondent opposed the Application through a Replying Affidavit dated 28th May 2025, contending that: The Applicants have not demonstrated that they will suffer substantial loss not compensable by damages; The delay of over three months is inordinate and unsatisfactorily explained; and The security offered is vague, insufficient, and ought to be for the full decretal sum.



5. The Application was canvassed by way of written submissions, which I have carefully considered.

### **Issues for Determination**

6. The main issues arising are as follows: -

- (i) Whether the Applicants should be granted leave to file an appeal out of time; and
- (ii) Whether the prayer for stay of execution pending appeal is merited.

### **Leave to Appeal Out of Time**

7. Section 79G of the *Civil Procedure Act* provides:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days... Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.

8. In *Nicholas Kiptoo Korir arap Salat vs. IEBC & 7 Others* [2014] eKLR it was held that: -

“Extension of time is not a right of any party. It is an equitable remedy... A party who seeks extension bears the burden of laying a basis... The delay should be explained to the satisfaction of the court... The application must be brought without undue delay.”

9. In *Thuita Mwangi vs. Kenya Airways Ltd* [2003] eKLR the Court of Appeal set out the relevant parameters:

“i) The period of delay; ii) The reason for the delay; iii) The arguability of the appeal; iv) The degree of prejudice to the Respondent; v) The importance of compliance with time limits; and vi) The effect on administration of justice or public interest.”

10. In *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* [1999] 2 EA 231, it was emphasized:

“The court has unfettered discretion, but must consider length of delay, reason for delay, chances of appeal succeeding, and prejudice to the respondent.”

11. In the present case, judgment was delivered on 12th February 2025, while the present Application was filed on 14th May 2025, amounting to a delay of about 3 months.

12. The Applicant attributed the delay to the resignation of counsel’s clerk and restructuring within the instructing insurer. In *Itute Ingu & Another vs. Isumael Mwakavi Mwendwa* [1994] eKLR, the Court of Appeal held:

“...a mistake by counsel, particularly where such a mistake is bona fide, can entitle an applicant to the exercise of the court’s discretion in his favour. But... the Court must, of necessity, examine the nature or quality of the mistake.”

13. Similarly, in *Belinda Murai & Others vs. Amos Wainaina* [1978] eKLR, the Court stated:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It should not necessarily debar a party from relief.”



14. I am satisfied that the delay of 3 months is not inordinate, the reasons advanced are plausible, and the Applicants should not be punished for the errors of counsel. Accordingly, leave to appeal out of time is granted.

### **Stay of Execution Pending Appeal**

15. Order 42 Rule 6(2) of the Civil Procedure Rules provides that:

No order for stay of execution shall be made... 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... has been given by the applicant.

16. In *Butt vs. Rent Restriction Tribunal* [1982] KLR 417, the Court held:

“The power to grant or refuse stay is discretionary... If there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory... The court may impose security as a condition.”

17. In *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, the Court explained:

“...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... The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect... the appeal.”

18. In *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike* [2006] eKLR the Court of Appeal held that:-

“Inability to recover decretal sums from the Respondent constitutes substantial loss.”

19. The decretal sum herein is Kshs. 7,591,346/= plus costs of Kshs. 332,371/=. The Applicants contend that execution will occasion irreparable loss as the Respondent’s means are unknown. The Respondent did not rebut this position by disclosing his financial capacity.

20. Given the principles in *NIC Bank case* (supra), I find that the Applicants have demonstrated risk of substantial loss. The delay has already been excused.

21. On security, the Respondent is entitled to enjoy the fruits of his judgment. A conditional stay is therefore justified.

### **Orders**

22. Accordingly, I make the following orders: -

- i. Stay of Execution pending appeal is hereby granted to the Applicants on the following conditions: -
  - a. The Applicants shall pay to the Respondent half the decretal sum and the full sum of the costs awarded in the trial court being Kshs. 3,795,673 and Kshs. 332,371/= respectively within 30 days from the date of this ruling.



- b. The other half of the decretal sum shall be deposited in a joint-interest earning account, to be held in the names of the parties' advocates, within 45 days from the date of this Ruling.
  - c. The Applicants are hereby granted leave to appeal out of time and are directed to file and serve their Memorandum of Appeal within 30 days from the date of this Ruling.
- ii. That in the event of failure to comply with Orders in a) to c) above, the Respondent shall be at liberty to proceed with execution of the judgment decree issued by the trial court.
23. The costs of this Application shall abide the outcome of the Appeal.
24. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**W. A. OKWANY**

**JUDGE**

