



**Ng'ang'a & another v Monyo & another (Civil Appeal E049 of 2025)
[2025] KEHC 13487 (KLR) (Civ) (30 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13487 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E049 OF 2025

AC MRIMA, J

SEPTEMBER 30, 2025

BETWEEN

WILLIAM NG'ANG'A 1ST APPELLANT

JULIA NJERI KINUTHIA 2ND APPELLANT

AND

ZIPPORAH WANJIRU MONYO 1ST RESPONDENT

SAMUEL KARWIMBO MONYO 2ND RESPONDENT

RULING

1. William Ng'ang'a and Julia Njeri Kinuthia, the 1st and 2nd Applicants herein respectively, lodged an application by way of a Notice of Motion dated 25th January 2025. It was supported by two Affidavits deposed to on 15th January 2025 and 17th March 2025 respectively.
2. The application sought the following orders: -
 1.Spent
 2.Spent.
 3. The Applicant be granted leave to have their Appeal herein filed out of time, as well as their Record of Appeal against the Ruling and Order dated 30th September 2024 and the original ex-parte judgment dated 13th October 2023 both in the Chief Magistrates Court at Nairobi on CMCC Case No. 5985 of 2018 issued by Hon. B. M Cheloti PM, under such terms and conditions as this Honourable Court shall be pleased.
 4. Pending the hearing and determination of this Notice of Motion, there be a stay of execution and further execution of the decree, and all subsequent process pursuant to the Ruling and



order dated 30th September 2024 and the original Ex-parte Judgment dated 13th October 2018, issued by Hon. B. M Cheloti PM, and the proceedings in the said Nairobi CMC Civil Case No. 5985 of 2018, be stayed until further Court Orders.

5. Pending the hearing and determination of this Appeal filed by the Applicants herein, there be a stay of execution and further of decree and all subsequent process pursuant to the Ruling and Order dated 13th October 2023 both in the Chief Magistrates Court in CMC Civil Case Not 5985 of 2018 issued by Hon. B. M Cheloti PM, and the proceedings in the said Nairobi CMC Civil Case No. 5985 of 2018, be stayed until the determination of the appeal herein.
6. The costs of this application be to the Applicants
3. As can be discerned from the grounds on the body of the application, the Affidavits in support of the application and the written submissions dated 17th March 2025, the Applicants urged that it was their constitutional right under Article 50(1) of *the Constitution* to appeal against a manifestly unjust decision. They asserted that the failure to file an appeal out of time was because the impugned ruling, rendered on 30th September 2024, which sought to set aside the ex-parte Judgment, was not availed to them and neither was it posted on the subordinate Court Tracking System [CTS] until December 2024, which hampered the expeditious filing by the Applicants.
4. It was their case further that pursuant to Order 50 Rule 4 or the Civil Procedure Rules, the period between 20th December 2024 and early 14th January 2025 was Christmas vacation, a period excluded from any consideration on the delay. They claimed that the delay was further accentuated by the fact that they were compelled to wait for missing pages of the ruling from the subordinate Court, a fact that was outside their control. They stated that they could have breach the law had they filed an incompetent appeal.
5. The Applicants argued that the intended appeal raised triable issues as depicted in the Memorandum of Appeal, and if not allowed they will be exposed to unlawful execution process which will lead to loss of property. It was further their case that they were not served with Summons to Enter Appearance or the process and that they only became aware of the suit at the execution stage which prompted them to file an application to set aside the ex-parte judgment. The Applicants claimed that no prejudice will be suffered if the application was allowed and maintained that the Respondent had, by the illegal actions of the Auctioneers, attached and sold off the 2nd Appellant's passenger service vehicle worth over Kshs. 3,000,000/-. They argued that the decretal amount challenged was Kshs. 5.1 million and it would be unfair to burden them to a condition to deposit more monies yet the ex-parte judgment itself founding the execution is under challenge. It was its case that it would be expedient for this Court to stay execution pursuant to Order 9 Rule 10 of the Civil Procedure Rules.
10. The Applicants also contested service and argued that such lack of service of process vitiated the entire proceedings in the subordinate Court. They prayed that the application be allowed as prayed.
11. The Respondents opposed the application through a Replying Affidavit sworn by the 1st Respondent, Zipporah Wanjiru Monyo, on 11th February 2025 and the written submissions dated 26th March 2025. It was their case that the suit was filed on 28th June 2018 and the Applicants were properly served with the Summons to enter appearance and an affidavit of service filed to that end. They further deposed that the interlocutory judgment of 11th August 2019 was correctly entered when the Applicants failed to enter appearance and/or file any defence despite service. They also argued that the suit was scheduled for formal proof but due to the Covid-19 pandemic, it was rescheduled. That, when Courts eventually resumed operations, the matter was eventually heard.



12. The Respondents also deposed that in March 2023 the Firm of Messrs. Maraa Nyambane & Co. Advocates took up the matter and filed a Notice of Change of Advocates and that the suit was heard on 18th July 2023 where the Respondents presented their witnesses and closed their case. Judgment was delivered on 13th October 2023 and thereafter execution followed where the Auctioneers looked for the Applicants for a whole year to no avail. That the Auctioneer was only lucky to levy partial execution much later through the sale of Motor vehicle registration number KBH 165V.
13. As regards a similar application to set aside the *Exparte* judgment, the Respondents deposed that it was dismissed and the Applicants were granted 30 days stay, a decision which was rendered in the presence of the Applicants' Advocates and that the impugned Ruling was immediately uploaded onto the CTS such that the claim that there was delay and some missing pages could not be true. They further argued that the Applicants did not provide any sufficient cause for not filing the Appeal within time, had not provided any explanation for the delay and as such, the intended appeal was frivolous and meant to delay justice.
14. Further, the Respondents argued that the Applicants had not provided any reason why an order staying execution ought to be granted and that they had not deposited any form of security for satisfaction of the decree.
15. In the end, the Respondents asserted that there were no reasons why the Applicants should be granted the orders sought for in the application in that the legal threshold for the grant orders sought had not been achieved. They prayed that the application be dismissed with costs.
16. It is on the foregoing background that this Court was moved to render itself on the instant application. Suffice to say that the parties filed detailed submissions and referred to several decisions in urging their respective cases. The gist of the arguments has been appreciated and will be ingrained in this decision.
17. From the above rendition, two main issues arise for determination. They are whether the application meets the threshold for enlargement of time and if so, whether the quest for stay of execution is merited.
18. I will begin with the first issue. The power of the High Court to inter alia extend time for a party to lodged an appeal to the Court from a subordinate Court is donated by Sections 65, 79G and 95 of the *Civil Procedure Act*. Courts have also over time developed legal principles guiding the issue of extension of time.
19. The Court of Appeal in *Thuita Mwangi vs. Kenya Airways* [2003] eKLR stated as follows in respect to the matter: -

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 generally the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

20. And, in *Velji Shahmad vs. Shamji Bros. and Papatlal Karman & Co.* [1957] EA 438, the High Court expressed itself as follows: -

In the interests of the public the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgement has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgement which ought, except under very special circumstances, to



be made effectual. And the Legislature intended that appeals from judgements should be brought within the prescribed time and no extension of time should be granted except under very special circumstances.”

21. The guiding law on extension of time was finally settled by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR. The Apex Court derived the following underlying principles which a Court should consider: -
 - i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
22. Having restated the law, this Court will now apply it to the circumstances of this case. Apart from the challenges on whether the ex-parte judgment ought to eventually be set aside or not, [which issue may be dealt with in the main appeal if leave is granted], at hand is the quest to lodge an appeal out of time. As guided, since the order sought is discretionary, the Applicants must account for the delay in issue.
23. The impugned ruling was rendered on 30th September 2025. Therefore, the Applicants had 30 days within which to lodge the appeal. That was up to 30th October 2024. However, the instant application was filed on 15th January 2025. Given that time stops running from 21st December to 13th January as per Section 10 of the *High Court (Organization and Administration) Act*, then the period of delay in this case is around 50 days.
24. The Applicants’ main reason as to why they did not file the appeal in time was that the impugned ruling was neither availed to them nor was it timeously uploaded on the CTS. Having perused the record and noting the challenges ordinarily associated with the CTS, the Applicants’ reason cannot be cited as outrageous. It is reasonable in the circumstances and given the history of the matter, the Applicants ought to be accorded an interim liberty to challenge the impugned ruling.
25. Turning to the issue of stay of execution, the applicable principles are well settled. Order 42, Rule 6 of the Civil Procedure Rules provides that an Applicant must satisfy the following conjunctive requirements for the grant of stay of execution pending appeal; that is to say: -
 - i. The application has been made without unreasonable delay;
 - ii. Substantial loss may result to the Applicant unless the order is made; and



- iii. That the Applicant is willing to furnish such security as the court order for the due performance of such decree.

26. It is not lost that the purpose of stay pending appeal as held in the case of RWW vs. EKW [2019] eKLR, is as follows: -

..... The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs... Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.

27. On a careful consideration of the application against the foregoing, and in view of the fact that the Applicants have been accorded an opportunity to lodge an appeal against the ruling, coupled with the fact that the decree in issue is a monetary one, although the issue of service of the pleadings is at the heart of the appeal, then a stay of execution on minimal terms ought to issue in the unique circumstances of this matter.

28. Deriving from the foregoing discussion, the application is merited and the following final orders do hereby issue: -

- (a) Leave is hereby granted to the Applicants to appeal out of time. The Memorandum of Appeal dated 15th January 2025 is hereby deemed to be properly on record.
- (b) As the appeal is against the ruling dated 30th September 2024, the following directions do hereby issue: -
 - (i) The filing of a Record of Appeal is hereby dispensed with.
 - (ii) The trial Court's file shall be availed forthwith.
 - (iii) The Appellants shall file and serve written submissions on the appeal within 14 days of this order.
 - (iv) Once served, the Respondents to file and serve written submissions within 14 days of service.
 - (v) The Appellants shall file and serve rejoinder submissions within 7 days of [iv] above.
- (c) This matter shall be fixed for highlighting of submissions on a date to issue.
- (d) Pending the determination of the appeal, there be a stay of execution of the decree in Milimani CMCC No. E5985 of 2018 on condition that the Appellants shall deposit the sum of Kshs. 500,000/= [Read: Kenya Shillings Five Hundred Thousand Only] in Court within 30 days and in default execution shall issue.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2025.

A. C. MRIMA

JUDGE



Ruling No.1 virtually delivered in the presence of:

Mr. Harrison Kinyanjui, Learned Counsel for the Appellants/ Applicants.

Miss. Nyambane, Learned Counsel for the Respondents.

Michael/Amina – Court Assistants.

