

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISC. APPLICATION NO. E276 OF 2024

DENNIS NZOBYA KAWEEESAINTENDED
APPELLANT/APPLICANT

-VERSUS-

SAMMY NTHUNGU1ST
RESPONDENT

HELLEN GATHIRU KINUTHIA2ND
RESPONDENT

RULING

The application

1. This ruling is on the Notice of Motion application dated 4th September 2024 brought under Sections 79G, IA, 1B & 3A of the Civil Procedure Act, Order 51(1) of the Civil Procedure Rules and any other enabling provisions of the Law for orders that:-
 - a **Spent.**
 - b **Spent**
 - c THAT this Honourable Court be pleased to extend time and grant leave to the Applicants/ Intended Appellants to lodge their Memorandum of Appeal out of time against the Judgement and/or Decree entered against them by the Honourable M. A. Otindo Principal Magistrate in Civil Suit No. 758 of 2019 Machakos Law Courts.
 - d THAT this Honourable Court be pleased to grant a stay of execution of the Judgment and/or Decree issued by Honourable M. A. Otindo Principal Magistrate in Civil Suit No. 758 of 2019 Machakos Law Courts pending the hearing and determination of this Application.
 - e THAT this Honourable Court be pleased to grant a stay of execution of the Judgment and/or Decree issued by Honourable M. A. Otindo Principal Magistrate in Civil Suit No. 758 of 2019 Machakos Law Courts pending the full hearing and determination of the intended Appeal.
 - f THAT this Honourable Court allow the Applicant to furnish the Court with security in the form of a Bank Guarantee from a

reputable Bank pending the full hearing and determination of this Appeal.

g THAT the Application be heard inter partes on such date and time as this Honourable Court may direct.

h THAT The costs of this Application abide the outcome of the Appeal.

i THAT this Honourable Court be pleased to issue any other order and/ or direction it deem fit to grant in the circumstances.

2. The application is supported by the supporting affidavit of **Dennis Nzobya Kaweesa**, the Applicant sworn on 4th September 2024 and is based on the following grounds that:-

a. Judgment herein was entered on 02/07/2024 and the Applicant and 2nd . defendant were found to be 100% liable jointly and severally. The respondent was awarded General Damages Kshs.250,000/=; special damages of Ksh.5,550/= with costs and interest.

b. The Applicant being dissatisfied with the said judgment have preferred an Appeal on quantum and liability.

c. That the Applicant's Appeal has high chances of success.

d. That the delay in filing the appeal and application was occasioned by the fact that after judgment was delivered on 07/02/2024 our insurers were undergoing managerial structural changes leading to the Bank accounts of the insurer being frozen for an indeterminate period of time and hence the time to launch an Appeal had already expired.

e. The Applicant is reasonably apprehensive that the Respondent, as Decree Holder, may proceed and levy execution against them.

f. That the judgment is of substantial amount and the Applicant is apprehensive that if the Respondent is paid he may deal with the same in a manner prejudicial to the

Applicant and if the appeal is successful, he might not be able to recover the same from the Respondent.

- g. That the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove his financial standing.
 - h. Unless Stay of Execution is granted, and the Respondent levy and/or executes the said judgment of 07/02/24 the Applicant appeal will be rendered nugatory and the Applicant will suffer irreparable loss and damage.
 - i. The Applicant's Insurer is ready, willing and able to furnish the Court with a Bank Guarantee as security to the court.
 - j. This Application is made in good faith and will not occasion any prejudice to the plaintiff/ respondent.
 - k. That the Respondent will not be prejudiced in any way if the application is allowed.
 - l. That the Application has been brought without unreasonable or undue delay.
 - m. That unless stay of execution is ordered, irreparable loss will result to the Applicant.
3. The Applicant avers that the delay in filing the instant application was occasioned by the fact that his insurers were undergoing managerial structural changes leading to the Bank accounts of the insurer being frozen by a Court order for an indeterminate period of time and hence the time to launch an Appeal had already expired.
4. The Applicant states that his appeal has a high chance of success as the 1st Respondent did not deserve the quantum and he was not liable for the accident. The Applicant annexed a letter by the 1st Respondent's Advocate threatening execution and averred that if the 1st Respondent levies execution against him, the same will render the appeal nugatory and he will suffer irreparable loss and damage.
5. Premised on the foregoing, the Applicant invited the court to consider whether the Court should exercise its discretion to grant the

Applicant leave to file his appeal out of time and whether a Stay of Execution of the Judgment and Decree dated 2nd July 2024 should issue.

The 1st Respondent's Response

6. The 1st Respondent is opposed to the instant application through the Replying Affidavit sworn on 9th October 2024 by **Munyoki Muthangya** Advocate for the Respondent contending that the application is fatally defective and based on misrepresentation of facts and therefore should be struck out forthwith.
7. The 1st Respondent avers that the Applicant is untruthful and his averments in the supporting Affidavit are not plausible as no evidence has been brought to support if there were any instructions sought or issued to appeal the judgment of the trial Court.
8. It is further averred that the Applicant has had the right to Appeal which he sat on until its expiry hence occasioning undue delay which no excusable reason has been advanced by the Applicant. That the Applicant's advocate was present in court when the said judgment was delivered on 2nd July, 2024 and that on 23rd August, 2024, the Applicant was served with a tabulation judgement letter.
9. On 2nd September, 2024 the Applicant was served with a Draft Decree for comments but did not raise any objection to the same and the same was presented to court for assessment and endorsement.
10. The 1st Respondent states that the application herein is an afterthought meant to delay and deny the 1st Respondent from enjoying the fruits of justice. The 1st Respondent averred that it is in the interests of justice that the instant Application be dismissed with costs.
11. Without Prejudice to the foregoing, the 1st Respondent proposed that if the Court is minded to grant the Leave to Appeal out of time, then the same be granted with conditions that pending the hearing and determination of the Appeal the Applicant to;
 - a) pay a half of the judgment Sum together with cost of the suit to the 1st Respondent being Kshs.216,319.6 within 30 days from date of the order, and

- b) the balance of Kshs.216,319.65/= be deposited in a joint-interest earning account in the names of both Advocates within 30 days from the date of the order,
 - c) in default of compliance with either of the above orders, the stay of execution to lapse forthwith and execution to issue without reference to court.
12. The 1st Respondent is opposed to issuance of a Bank Guarantee as security since the guarantee does not provide security of interests which is part of the decree of the court and therefore, the Guarantee is insufficient security to the Decretal sum and is meant to prejudice the 1st Respondent's award.

No response by the 2nd Respondent

13. The 2nd respondent, though duly served, did not file a response to the application herein and the Applicant invites this court to treat this application as unopposed on the part of the 2nd Respondent.
14. The application was canvassed through written submissions. The Applicants submissions are dated 28th February 2025 while the 1st Respondent's submissions are dated 12th February 2025. The 2nd Respondent did not file submissions.

Analysis and determination

15. I have perused and considered the application, the supporting affidavit, the Replying Affidavit, the trial court's judgement and the rival submissions filed by the parties' counsel as well as the judicial decisions relied upon. In my view, the issues for determination are as follows:
- a. Whether the court should exercise its discretion to grant the Applicant leave to file her appeal out of time;***
 - b. Whether the Applicant has met the prerequisite for grant of stay of execution pending appeal;***
- a. Whether the court should exercise its discretion to grant the Applicant leave to file his appeal out of time;**
16. Extension of time is not a right of a Party but an equitable remedy that is only available to a deserving Party at the discretion of the court and a Party who seeks for an extension of time has the burden of laying a basis to satisfaction of the court as was held in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commissions & 7 others (2014) eKLR.**

17. Section 79G of the Civil Procedure Act states: -

“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 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.

18. It is clear from the wording of Section 79G of the Civil Procedure Act that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of **Diplack Kenya Limited vs William Muthama Kitonyi [2018] eKLR** which held that an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

19. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] eKLR** enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;*
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;*
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;*
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;*
- f. Whether the application has been brought without undue delay.*

20. Similarly in the case of **Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR**, the Court of Appeal in considering an

application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

21. Applying the above principles to the present application, the judgment herein was delivered on 2nd July 2024. The Applicant filed the current application together with the annexed Memorandum of Appeal on 5th September 2024. This is about two months outside the time limited for filing an appeal. The Applicant has attributed the delay in filing his appeal to the fact that his insurers were undergoing managerial structural changes leading to the Bank accounts of the insurer being frozen by a court order for an indeterminate period of time and hence the time to launch an Appeal had already expired.
22. The 1st Respondent in response to the above contention argues that the Applicant is untruthful and his averments in the supporting Affidavit are not plausible as no evidence has been brought to support if there were any instruction sought or issued to Appeal the judgment of the trial Court.
23. It is further averred that the Applicant has had the right to Appeal which he sat on until its expiry hence occasioning undue delay which no excusable reason has been advanced by the Applicant. That the Applicant's advocate was present in court when the said judgment was delivered on 2nd July, 2024 and that on 23rd August, 2024, the Applicant was served with a tabulation judgement letter.
24. On 2nd September, 2024 the Applicant was served with a Draft Decree for comments but did not raise any objection to the same and the same was presented to court for assessment and endorsement.

25. The 1st Respondent states that the application herein is an afterthought meant to delay and deny the 1st Respondent from enjoying the fruits of justice.
26. Given that the only ground that the Applicant is relying on for extension of time is that his Insurers bank accounts had been frozen by a court order, he has failed to provide proof of when the said freezing order was lifted and how that prevented him from filing the Appeal within time. The Appeal was expected to be filed by the Applicant and or his Advocates and not by his Insurer.
27. I have considered the delay in filing the appeal and I find that two months delay in filing an appeal is inordinate and the reasons given by the Applicant for the delay have not been satisfactorily explained to the court as required by the law. **In JOSEPH NGIGI IBARE -VS- MYOVI JAMES & ANOTHER [20161 eKLR** at page 2 the Court noted that even a two days delay ought to be satisfactorily explained for the court to exercise its discretion in granting leave to file appeal out of time.
28. I have not had the privilege of perusing the trial court's proceedings to ascertain the evidence on record, but again, in the absence of any proof shown in the application how the Applicant's Insurer's frozen bank accounts affected his filing of the Appeal within time, I am equally persuaded just like the 1st Respondent that the Applicant has not given any plausible reasons for the delay in filing the appeal and the instant application amounts to an abuse of the process of court and the same lacks merit.
29. Without prejudice to the foregoing, I have similarly perused the draft Memorandum of Appeal as well as the trial court's judgement dated 2nd July 2024. I find that the appeal does not raise any arguable or triable issue. The Applicant having failed to adduce evidence at the trial court, the Respondent's case was thus not controverted.

b. Whether the Applicant has met the prerequisite for grant of stay of execution pending appeal;

30. I have perused the Bank Guarantee dated 6th July 2023 by Family Bank which the Applicant proposes to issue as security for costs. I notice that the instant application was filed on 5th September 2024, long after the said Guarantee which is for a duration of twelve months had long expired and there is nothing to show that the same had been renewed. Further, there is nothing to show that the said Guarantee was given specifically for this case and or to the Applicant herein. I find the said Bank Guarantee to be unreliable and

insufficient security. Assuming I had found the prayer for leave to file appeal out of time to be merited, the stay of execution prayer would have been declined for lack of sufficient security for costs.

31. The upshot is that the application dated 4th September 2024 lacks merit and is dismissed with costs to the 1st Respondent.

32. It is hereby so ordered.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 30TH OCTOBER 2025

**NOEL I. ADAGI
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 30TH OCTOBER 2025

In the presence of :

Ms. Ego for Mr. Masila for 1st Respondent

N/A for Applicant & 2nd Respondent

Milly- Court Asst.