

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
MISC. CIVIL APPLICATION NO. E076 OF 2025

MICHAEL MWANGI.....APPLICANT

VERSUS

TERESIA WANGECI MUTHONI.....
RESPONDENT

RULING

1. By a Notice of Motion dated 28th February, 2025 brought under Article 159 (2) (d) of the Constitution, Sections 1A, 1B, 3A, 79G, and 95 of the Civil Procedure Act, Order 42 Rule 6 (1), (2), and (7), Order 50 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules, 2010, the Applicant seeks Orders that;-

1) Spent.

2) The court grant the Applicant leave to appeal out of time regarding the judgment/decree in NAKURU CMCC 853 of 2018.

3) Spent.

4) A stay of execution of the judgment and/or decree be granted pending the final determination of the intended Appeal.

5) The entire decretal sum of Kshs. 2,569,852=, plus costs and interest, be deposited in a joint interest-earning account in the names of both advocates pending the hearing and determination of the intended Appeal.

6) The court issue any other order it deems just, appropriate, and expedient.

7) The costs of this application be provided for.

2. In the supporting Affidavit sworn on even date by Cherotich Faith Advocate, the deponent states that the Applicant is aggrieved by the judgment in Nakuru CMCC No. 853 of 2018 delivered on 19th December 2024 which decision was in the following terms in favour of the Respondent against the Applicant:-

- Liability100%
- General damages..... Kshs. 2,000,000=
- special damages.....Kshs. 269,852=
- Cost of future treatment.....Kshs. 300,000/=
- Costs and interest

3. It is explained that the Applicant intends to appeal the judgment but the 30-day period for filing an appeal has lapsed and that the delay was caused by an inadvertent and excusable delay in receiving instructions from their instructing client, Directline Assurance Ltd, who informed them that the Claims Officer who received the judgment terms left the company before issuing further instructions.
4. It is deponed that the law firm of Kairu & Mc Court Advocates was appointed to represent the Applicants in place of Kimondo Gachoka & Co. Advocates, a change that was formalised by a consent and that upon follow-up for payment and further instructions, the client instructed the firm to file an appeal.
5. The Applicant believes that the intended appeal raises numerous triable issues and points of law as outlined in the draft Memorandum of Appeal and therefore, it has a high chance of success.
6. He is concerned that the Respondent will commence execution proceedings, which would cause him substantial and irreparable loss and damage. Further, that the Applicant's right of appeal will be injured if he is not granted leave to appeal out of time.
7. It is further deponed that the Respondent's financial means is unknown, which raises concerns about her ability to refund the decretal amount should the appeal succeed.
8. The deponent states that as a condition for the orders sought, the Applicant is ready to deposit the entire decretal sum into a joint interest-earning account in the names of both advocates pending the appeal's determination.

9. It is stated that granting the present application will preserve the subject matter of the intended appeal and protect his right of appeal. That further, the Respondent will not suffer any prejudice by the prayers sought in this application which has been brought in good faith and without undue delay.
10. The Respondent has opposed the application through the Replying Affidavit sworn by her advocate George Kirumba Mbiyu on 17th March 2025 arguing that the application herein lacks merit as no valid reasons have been provided to justify granting the orders requested.
11. The deponent states that the Applicant's counsel was aware of the judgment delivered on 19th December, 2024 and that the reason given for the delay herein that a claims officer left employment as hearsay, as it is not supported by any documents.
12. While stating that the 30-day period for filing the appeal expired around 10th February, 2025, he believes the filing of this application was triggered by the letter to the Applicant which the Respondent's Advocates sent on 25th February, 2025, threatening to apply for execution without further notice.
13. Counsel argues that the application is an afterthought intended to delay the Respondent from receiving the fruits of justice. He believes the Applicant has failed to adequately explained the delay and that the application has been brought with unreasonable delay.
14. However, he states that if the court decides to allow the application, then he prays that it be on condition that the Applicant pays half of the decretal sum, including interest and costs, and deposit the other half in a reputable bank in a joint account for both counsel within a specified period.

Applicant's Submissions

15. The Applicant has outlined the following four issues for determination; -
 - 1) **Whether the court has jurisdiction to grant the orders.**
 - 2) **Whether the intended appeal is arguable.**
 - 3) **Whether the success of the appeal would be rendered nugatory without a stay.**

4) Whether a bank guarantee is appropriate security.

16. On the first issue, the applicant asserts that the court has jurisdiction to grant a stay of execution under Order 42 of the Civil Procedure Rules. To support this, reliance was placed on the case of **Global Tours & Travels Ltd; Nairobi H.C Winding Up Cause No. 43 of 2000**, where Ringera J (As he then was) stated that granting a stay is a matter of judicial discretion exercised in the interest of justice and the key factors to consider include; the need for expeditious case disposal, the prima facie merits of the appeal, whether it is arguable and whether the application was brought expeditiously.
17. On whether the appeal is arguable, the Applicant submits that the Draft Memorandum of Appeal raises trial issues with a high chance of success, specifically arguing that the award of compensatory damages breached the common law doctrine of stare decisis.
18. He reiterates that if a stay of execution is not granted, the appeal will be rendered nugatory and the applicant will suffer irreparable damage as the Respondent might proceed with execution, as the judgment was delivered electronically in the absence of both parties.
19. The Applicant cites **Butt-Vs-Rent Restriction Tribunal [1982] KLR 417**, where it was held that discretion should be exercised not to prevent an appeal. Further that in **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited-Vs-Aquinas Francis Wasike & another (UR)**, the Court placed the onus on the Respondents to prove their ability to refund the decretal sum if the appeal succeeds.
20. On the issue of security, he submits that the decretal sum is substantial and they are concerned he will not be able to recover the money if it is paid to the Respondent. He reiterates his proposal of depositing the entire decretal sum in court as an appropriate form of security.
21. In support of argument, he cites the Court of Appeal case of **Nduhiu Gitahi v Warugongo [1988] KLR 621**, where it was held that security can take

many forms, such as a bank guarantee or payment into court, as long as it is adequate to protect the opposing party.

22. In addition, he cites the case of *Francis Kariuki Mwangi v Gitutu & another (Miscellaneous Civil Appeal E008 of 2024)*, where High Court granted a stay on the condition that half of the decretal sum be paid to the Respondents and the other half deposited in a joint interest-earning account.

Analysis and Determination.

23. Though the Respondent's Advocate informed the court that submissions had been filed, none were filed in the Case Tracking System (CTS) platform and no hard copy was furnished to this court.
24. Based on the Application herein, the supporting and the Replying Affidavit together with the Submissions filed herein, the issues for determination are;-

- 1. Whether time should be extended/enlarged to allow the Applicant to file appeal out of time.**
- 2. Whether this Court should issue a stay of execution of the Judgement delivered on 19th December, 2024, pending the hearing and determination of the intended appeal.**
- 3. Who should meet the costs of this application.**

25. On the first issue, Section 79G of the Act provides that: -

“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.”

26. It is settled law that the court has discretion to grant application for extension of time under Section 79G of the Civil Procedure Act if the

Applicant satisfies the court that he had good and sufficient cause for not filing the appeal on time.

27. Indeed, the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd [2003] eKLR* had this to say: -

*“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai. 255 of 1997) (unreported)*, the Court expressed itself thus: “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”.*

28. Further the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others [2014] eKLR* held: -

“...It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant. This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

- 1) 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.**
- 2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.**
- 3) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.**
- 4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.**
- 5) Whether there will be any prejudice suffered by the respondents if the extension is granted.**
- 6) Whether the application has been brought without undue delay; and**
- 7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

29. In this case, the impugned judgement was delivered by Hon. Elizabeth Juma (CM) on 19th December, 2024 which means that the 30-days period for lodging the appeal lapsed on 11th February, 2025. In that computation, the date between 21st December 2024 to 13th January 2025 is excluded in line with Order 50 Rule 4 of the Civil Procedure Rules.

30. The reasons given for delay including that the Claim's Officer of the instructing Client Directline Assurance Limited, left its employment without bringing the decision to their attention hence their inability to instruct their advocates on time to Appeal are reasonable.

31. On the stay of execution, the conditions to be satisfied under Order 42 rule 6 of the Civil Procedure Rules, 2010 are well settled that: -

- 1) The application must be brought without unreasonable delay.**
- 2) The Applicant must demonstrate that they will suffer substantial loss unless the order sought is granted.**

3) The Applicant must furnish security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

32. With the period of filing the appeal having lapsed on 11th February, 2025, the delay herein is for a period of 20 days which cannot be termed as inordinate. As the period of filing the appeal having lapsed on 11th February, 2025, the delay herein is for a period of 20 days which cannot be termed as inordinate.

33. regard substantial loss, the Applicant's argument that he is apprehensive that execution will commence if stay Orders are not granted and that the Appeal will be rendered nugatory is satisfactory. Further, the Respondent's Replying Affidavit does not challenge the Applicant's argument that she is a lady of straws and would be unable to refund the said decretal sum if the Appeal succeeds.

34. On security for due performance, this Court is persuaded by the decision of F. Gikonyo, J in the case of **Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates (2014) eKLR** that:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

35. In this case, the Applicant herein has offered to deposit the entire decretal sum in a joint account in the names of both advocates on record herein for due performance of the decree while the Respondent's proposal is that half

of the decretal sum be paid to him and the other half be deposited in an interest earning account.

36. A look at the Draft Memorandum of Appeal annexed to the application shows that the Applicant is challenging the judgment on quantum only. His argument that the award was excessive is an arguable issue for appeal.

37. In light of the foregoing, and in order to balance the rights of both parties, this Court grants the following orders: -

- 1. Leave be and is hereby granted to the Applicant to file intended appeal out of time.**
- 2. The Applicant to file and serve the Memorandum and Record of Appeal within 30 days from the date of this Ruling.**
- 3. Stay of execution of the Judgment delivered on 19th December, 2024 by Honourable E .Juma (CM) in Nakuru CMCC No. 853 of 2018 be and is hereby granted pending hearing and determination of the Intended Appeal.**
- 4. The Applicant shall pay the Respondent half ($\frac{1}{2}$) of the decretal sum and deposit the remaining half ($\frac{1}{2}$) of the decretal sum in a joint interest-earning bank account to be held in the names of the Counsel for the Applicant and Counsel for the Respondent within thirty (30) days from the date hereof.**
- 5. In default of (2) and (4) above, the stay Orders shall automatically lapse.**
- 6. Costs of the application to abide the outcome of the Appeal.**

Dated, signed and delivered at Nakuru this 10th Day of November, 2025.

PATRICIA GICHOHI
JUDGE

In the presence of:

Ms Cherutich for Applicant

Mr. Mbiyu for Respondent

Kamau, Court Assistant

ORIGINAL