Macharia v Mureithi alias Peter Migwi Muriithi (Miscellaneous Civil Application E050 of 2025) [2025] KEHC 16125 (KLR) (6 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16125 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

MISCELLANEOUS CIVIL APPLICATION E050 OF 2025

TW OUYA, J

NOVEMBER 6, 2025

BETWEEN

RONALD MAINA MACHARIA ..... APPLICANT

AND

PETER MIGWI MUREITHI ALIAS PETER MIGWI MURIITHI . RESPONDENT

RULING

1. The Applicant has moved this honourable court vide an application dated 27th May 2025 seeking stay of execution and extension of time to file an appeal against the decree of the Senior Resident Magistrate (Hon K. Nyaga dated 30th March 2025 in Keno Senior Resident Magistrate Court Civil Case No. E280 of 2023.

2. The application is supported by grounds on the face of it as well as the supporting affidavit of Ronald Maina Macharia on grounds that he was unable to lodge the appeal out of time was an inadvertent mistake by his erstwhile advocates. Therefore, the mistake of counsel should not be visited upon him. Further, it was averred that the appeal had great chances of success.

3. The intended appeal was filed on the basis that a default judgment was entered against the Applicant and when he sought to have it set aside, the trial court dismissed the said application prompting him to file the instant appeal seeking to file an appeal out of time.

4. The Respondent's opposed the Application vide the Replying Affidavit of Peter Migwi Mureithi on the basis that the application for extension of time to lodge an appeal was an abuse of the process of the court and strategically designed to delay and obstruct execution of a judgment that had undergone full judicial scrutiny in two different rulings by two independent magistrates.

5. It was averred that the Applicant duly entered appearance upon being served with the Plaint and even filed a statement of defence. However, the Applicant never attended court despite service of court mentions and hearings despite his advocates being served.

6. As a result, the court entered a default judgment against the Applicant in favour of the Respondent. The applicant challenged the default judgment on the basis of non-service. Nevertheless, the court dismissed the application having found that service was properly effected. Accordingly, the Applicant filed an application for stay of execution dated 4th April 2025, which was subsequently dismissed on the basis that the Applicant had been afforded several opportunities of stay of execution.

7. The instant application seeks to revisit issues that the honourable trial court has had occasion to consider in an attempt to deny the Respondent the fruit of his judgment. Furthermore, it is a settled principle of law that the insured cannot evade liability by shifting blame to an insurer under statutory management or by facing insolvency issues. The Applicant has a duty to sustain the decree that has been issued against him.

8. The Respondent relied on Nicholas Kiptoo arap Korir Salat v IEBC & 7 others [2014] eKLR where the Supreme Court emphasized that:

    a. 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

    b. A party that seeks an 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. Where there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

9. Ultimately the Respondent prayed that the application for stay of execution be dismissed and the Respondents be allowed to enjoy the fruit of the legitimate judgment through executing the valid decree.

10. Directions were issued that the matter be canvassed through written submissions. The Respondent opted not to file any submissions but rely on the Replying affidavit. The Appellant was given fourteen days to file submissions; however, he did not file any submissions by the time the time given lapsed.

11. I have considered the application, the supporting affidavit, the submissions filed as well as the authorities relied upon.

12. Section 79G of the *Civil Procedure 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."

13. It is clear therefore that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the

basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders.

14. As to the principles to be considered in exercising the discretion whether or not to enlarge time in First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65 the Court set out the factors to be considered in deciding whether or not to grant such an application and these are:

    i. the explanation if any for the delay;

    ii. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;

    iii. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

15. In the case of Thuita Mwangi vs. Kenya Airways Ltd [2003] eKLR, the Court explained that:

> " the list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered."

16. However, as was held in Kenya Commercial Bank Limited vs. Nicholas Ombija [2009] eKLR, an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court.

17. In the instant case, the Applicant argued that the failure to file an appeal within the prescribed time was the result of an inadvertent mistake by his advocate.

18. The Court of Appeal in Towett v Kibaru & another (Civil Application E191 of 2025) [2025] KECA 1650 (KLR) (9 October 2025) (Ruling) remarked thus:

> " It is a well-established principle that the mistakes of counsel ought not to be visited upon an innocent litigant who has acted diligently in pursuing his legal remedies."

19. I have also noted that the Applicant intends to appeal against a default judgment. The circumstances under which a default judgment is entered warrants judicial scrutiny to ascertain whether the same was merited or not. The Applicant should not be denied a seat in the temple of justice merely because his application to stay execution and also file set aside judgment in default have been set aside. The scales of justice tilts towards allowing the Applicant an opportunity to have his grievances with the decision of the trial court heard on merits.

20. Accordingly, I grant leave to the applicants to file the appeal out of time.

21. Regarding the question of stay of execution pending appeal, the principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:

> No order for stay of execution shall be made under subrule (1) 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 or order as may ultimately be binding on him has been given by the applicant.

22. In Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that:

> " Whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.Further the application must be made without unreasonable delay."

23. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions.

24. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to section 1A(2) of the *Civil Procedure Act*:

> 'The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective''

25. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the *Civil Procedure Act* are attained.

26. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome.

27. On the first principle, Platt, Ag.JA (as he then was) in Kenya Shell Limited vs. Kibiru [1986] KLR 410, at page 416 expressed himself as follows:

> It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.".

28. On the part of Gachuhi, Ag.JA (as he then was) at 417 held:

> " What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.

29. Dealing with the contention that the Applicant has had his application dismissed by two courts of competent jurisdiction, in the circumstances of this case, the dismissal of the Applicant's suit by two competent courts is the very reason why he has sought for redress in this honourable court. Therefore, such a contention, as advanced by the Respondent is not enough to deny the Applicant an opportunity to ventilate his appeal.

30. I am aware of the general rule that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court.

31. In Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63 it was held that:

> " To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage."

32. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.

33. As regards to the issue whether or not the applicant stands to suffer substantial loss in Job Kilach vs. Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005 the Court of Appeal citing Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999 it was held that:

> " Where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized."

34. On security, this court appreciates the legal position in Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another [2018] eKLR, where it was held that:

> " .....Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security."

35. Although the Applicant has offered a Bank Guarantee as security, the same has been rejected by the Respondent, contending that the Applicant be compelled to deposit the decretal sum in a joint account.

36. In Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:

> " 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 the 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."

37. From the foregoing decisions, it is evident that the issue of security is discretionary and it is upon the court to determine the same. Notably, in his application, the applicant stated that he is willing to offer security in the form of a bank guarantee if called upon by this Honourable Court to do so. The Applicant has offered to provide security and has therefore satisfied this ground for stay.

38. I have noted that although the Applicant has offered a bank guarantee as security, the Respondent has rejected the same while opting that the decretal sum be deposited in a joint account. Nevertheless, the Respondent has not advanced any reason for rejecting the security proposed by the Applicant. Noting that the legal requirement is the payment of any security, I find that a bank guarantee is sufficient security to safeguard the interests of the Respondent.

39. From the above analysis, it is my considered view that on a balance of interests, since the applicant is willing to deposit the decretal sum, I am convinced that the fair balance would be for the applicant to provide a bank guarantee from a reputable bank and in which case they have proposed family bank.

40. In considering the totality of the Applicant's case, there is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in *the Constitution* as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief.

41. In the premises, there will be a stay of execution pending this appeal on condition that the Applicant provides a bank guarantee from a reputable bank within 30 days from the date hereof.

42. I also direct the Applicant to ensure that the record of appeal is prepared and directions on the appeal taken within 30 days from the date of this ruling. In default, the orders of stay issued herein shall stand vacated.

43. The Upshot of the matter is that the application is disposed as follows:

    i. I grant leave to the applicants to file the appeal out of time.

    ii. There will be a stay of execution pending this appeal on condition that the Applicant deposits the decretal sum in a joint interest earning account in the names of both counsel for the Applicant and the Respondent in a reputable bank within 30 days from the date hereof.

iii. The Applicant to ensure that the record of appeal is prepared and directions on the appeal taken within 30 days from the date of this ruling. In default, the orders of stay issued herein shall stand vacated.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 6TH DAY OF NOVEMBER, 2025.

HON. T. W. OUYA

JUDGE