



Ipala v KSW (Minor Suing through his Father & Next Friend JWW) (Civil Miscellaneous Application E237 of 2025) [2025] KEHC 16987 (KLR) (20 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16987 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL MISCELLANEOUS APPLICATION E237 OF 2025
MS SHARIFF, J
NOVEMBER 20, 2025**

BETWEEN

CATHERINE GRACE IPALA APPLICANT

AND

KSW RESPONDENT

MINOR SUING THROUGH HIS FATHER & NEXT FRIEND JWW

RULING

1. Catherine Grace Ipala, the Applicant has brought the Notice of Motion dated 30th October 2025, pursuant to Section 79G, Section 1A and 3A of the *Civil Procedure Act*, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Order 22 Rule 22, Section 5 (b) of the Insurance (Motor Vehicle Third Party Risks Act) and Article 159 of *the Constitution* of Kenya 2010 seeking, inter alia, stay of execution of the Judgment entered in the Chief Magistrate Court Bungoma Cause No. E046 of 2024 delivered on 10th July 2024, pending hearing and determination of the application and appeal and grant of leave to file an appeal out of time from the judgement and decree of the Chief Magistrate Court Bungoma Cause No. E046 of 2024 delivered on 10th July 2024.
2. The Applicant's Motion is brought on the grounds on the face of the application and the Supporting Affidavit sworn on 30th October 2025 by Catherine Grace Ipala, Applicant herein, wherein she averred that an ex-parte judgement was delivered in Bungoma CMCC No. 46 of 2024 on 10th July 2024, and that she only became aware of the said suit vide her insurance agent in May 2024. According to her, she followed up with the insurance agent who proceeded to inform her insurer, but her insurer delayed in dispatching instructions to their representing advocates, who later proceeded to file an application to set aside the ex-parte judgement to enable her defend the suit. She averred that the application dated 13th August 2024, was dismissed for want of prosecution as the acting advocate failed to attend Court due to illness prompting her to file another application dated 29th August 2025, for reinstatement of her application dated 13th August 2024.



3. She averred that the application dated 13th August 2024, was reinstated and ruling was delivered on 24th April 2025, setting aside the ex-parte judgement on condition that she pays the throw away costs of Kshs. 10,000/= within 30 days from the date of the ruling and in the event of failure so to do, the judgement would revert. Further, she deposed that due to internal wrangles, her insurer failed to authorize the payment of the said amount within the set timelines and that she only became aware of the same when the time had lapsed and that vide an application dated 7th August 2025, her Counsel had moved the lower court for extension of time to make the said payment, but the said application was dismissed on 14th October 2025, giving the Respondent the greenlight to proceed with execution.
4. The Applicant further deposes that she wishes to appeal the lower Court's decision on quantum as the same is quite high for the nature of injuries sustained by the Respondent, and that the chances of success of her intended appeal are high. She deposed that some of her properties have already been attached and are scheduled to be sold on 7th November 2025 and that she will suffer substantial and irrecoverable loss unless an order of stay is issued and that if the Respondents proceeds to execute and her intended appeal succeeds, the chances of recovering the decretal sum would be impossible.
5. In response, the Respondent herein swore a Replying Affidavit on 7th November 2025, opposing the Motion application and terming the same as vexatious, frivolous, scandalous and an abuse of the Court due process. According to him, on 18th June 2023, the Respondent herein was involved in a road traffic accident that brought about the suit instituted on 25th January 2024, with summons to enter appearance been duly served upon the Applicant herein as per the Affidavit of Service filed on 10th November 2025.
6. He averred that the failure by the Applicant to enter appearance and file her Defence resulted in an entry of an interlocutory judgment whereafter the matter proceeded on formal proof, a judgment was finally delivered and execution commenced. That the Applicant moved the Court vide an application dated 13th August 2024, seeking to set aside the ex-parte judgement but on 28th August 2024, despite allocation and fixing of a hearing date by consent of parties, the Applicant and her Counsel were a no show leading to the dismissal of the application for want of prosecution.
7. He averred that on 29th August 2024, the Applicant sought reinstatement of her application dated 13th August 2024, and on 6th February 2025, the Applicant's application dated 29th August 2024, was allowed on condition that she pays the Respondent Kshs. 6,000/= within 30 days from the date of the ruling. Also, it is imperative to note that on 24th April 2025, the Court allowed the application dated 13th August 2024, on the condition that the Applicant pays the Respondent Kshs. 10,000/= within a period of 30 days from the date of the ruling, but the Applicant failed to settle the said sums.
8. Further, he averred that due to the Applicant's laxity to adhere to the Court orders for setting aside the ex-parte judgement, execution proceeded prompting the Applicant to file another application dated 7th August 2025 which was dismissed on 16th October 2025.
9. The Respondent maintains that the Applicant did not become aware of the summons vide her insurance agent as alleged as she was personally served with summons to enter appearance, and with reference to the Applicant's averment that she had become aware of the ex-parte judgement on 5th May 2024, hence her delay of 1 ½ years before filing this application, the Respondent averred that her delay is without merit and inexcusable.
10. Finally, the Respondent averred that the Applicant's intended appeal on quantum has nil chances of success as the trial Court's award was in tandem with the injuries the minor sustained and that the



Applicant's application fails to meet the conditions as set out under Order 42 Rule 6 of the Civil Procedure Rules, 2020.

11. On 10th November 2025, this Court issued directives that the Applicant's Motion application be canvassed by way of oral submissions.

Applicant's submissions

12. In a nutshell, the Counsel submitted that the Applicant has demonstrated the substantial loss she will incur if execution of the trial Court's ex-parte judgement is not stayed. Counsel argued that since the judgment was rendered on 24th July 2024, the Respondent has already commenced execution by attaching the Applicant's properties vide warrants of attachment dated 27th October 2025 and that the same has already been advertised by the auctioneers with the auction happening on 7th November 2025.
13. Counsel argued that vide a letter dated 7th November 2025 from Eshikoni Auctioneers, the auctioneers sold off the attached properties for a sum of Kshs. 303, 500/= and that they remitted Kshs. 200,000/= to the Respondent's Advocates as part of payment of the decretal sum and the balance of Kshs. 103, 500/= was used to cover the auctioneer costs. Counsel submitted that there was no availed information on who purchased the properties and no valuation report was availed. Counsel insisted that the Applicant will suffer irreparable loss if execution proceeds and if she is not granted the chance to ventilate her appeal before this Court.
14. The applicant's Counsel submitted that Respondent has not demonstrated that he is in a position to refund the decretal sum if the Applicant's intended appeal succeeds. Counsel argued that the Applicant is apprehensive as the amount realized from the attached goods does not cover the whole decretal amount, the Respondent will still pursue her for further attachment of her properties unless stay orders issue, least she suffers substantial loss.
15. Counsel posits that a delay of 1 year and 3 months in moving this Court has been duly explained by the Applicant as she was seeking redress before the trial Court and that the delay was solely the mistake of the Applicant's Advocates and her insurance company as there was a lapse of communication with regards to Court orders.
16. On the issue of security, Counsel for the Applicant submitted that the Applicant is ready to provide security for the decretal sum and that she is willing have the decretal sum deposited in an interest earning account in the names of the parties advocates herein.
17. On the arguability of the Applicant's intended appeal, Counsel for the Applicant submitted that the Applicant's intended appeal has a high chance of success as the same is on quantum; that it is the Applicant's position that the award on general damages which the trial Court made of Kshs. 1, 500,000/= and the future medical costs of Kshs. 350,000/=, were excessive in the circumstances of the case and she now wishes for this Court to re-evaluate the same.

Respondent's submissions

18. Counsel for the Respondent submitted that the conduct of the Applicant at the trial Court clearly demonstrates that she is undeserving of the prayers as sought in her application herein. Counsel submitted that the delay of 1 ½ years has not been explained by the Applicant herein and her sudden desire to act was prompted by the act of execution hence it is evident that her application is made out of mischief and her conduct was contrary to the dints of equity which demands that the Court be approached with clean hands.



19. Counsel for the Respondent submitted that the prayers for stay pending the determination of this application and appeal has already been overtaken by events and if the Applicant is aggrieved by the conduct of the auctioneer, then her grievance cannot be remedied in her current application.
20. On the issue of substantial loss, Counsel for the Respondent submitted that the minor who was a hit by the Applicant's motor vehicle has already suffered substantial loss given the conduct of the Applicant at the lower Court thus the Applicant cannot be allowed to eat her cake and have it.
21. On the issue of the intended appeal, Counsel submitted that the Applicant was granted a chance to participate in the lower Court proceedings but opted not to do so and that the awards on general damages and future medical cost made by the trial Court were commensurate to the injuries sustained by the Respondent and the delay in moving this Court after 1 ½ years from the date of delivery of the judgment is inexcusable.
22. Counsel submitted that the Applicant blatant defiance of the trial Court's orders should guide this Court's decision on whether to allow this application or not. Further that in the event this court allows the application then it would be condoning abuse of Court process by the Applicant.
23. Further, Counsel submitted that the Applicant's Counsel on record is the same Counsel that represented her in the trial Court and if at all the applicant's current predicament was due to mistakes of her counsel then she should not visit them upon the respondent but she should instead escalate the same to the Advocates Complaints Commission.
24. Finally, the respondent's Counsel posits that the Applicant's application has not met the threshold under Order 42 Rule 6 of the Civil Procedure Rules and proceeded to rely in the case of Alfred Kiduvawa Savatia vs Nandi Tea Estate & Another (2018) eKLR.
25. Counsel urged this Court to dismiss the Applicant's application and allow further execution of the trial Court's judgement.

Analysis and Determination

26. Upon considering the application herein the affidavit in support thereof and the replying affidavit in opposition thereto plus the rival oral submissions of the parties herein, it is my considered opinion that the issues for determination are as follows;
 - i. Whether this Court should enlarge time for appeal.
 - ii. Whether the order for stay should issue;
 - iii. Who pays the costs?

Whether this Court should enlarge time for appeal.

27. In considering the issue of timely filing of the appeal which is germane to this case, this Court is guided that discretion to extend time is unfettered. There is no limit to the number of factors the Court would consider so long as they are relevant. These factors include but are not limited to the period of delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, or whether the matter raises issues of public importance. All these are relevant but not exhaustive factors. (see Seventh Day Adventist Church East Africa Ltd. & Another v M/S Masosa Construction Company Civil Application No. Nai. 349 of 2005).



28. The Applicant laid down reasons for the delay in the Application and the Supporting Affidavit as wrangles at her insurance company, lack of communication by her insurer and failure by her Advocate to communicate to her about hearing dates. The Respondent has lodged objection concerning the cause of the delay. The history of the matter clearly reveals that the Applicant had not only been indolent but has also been contemptuous of orders issued by the trial court, which court had times without number been gracious enough to indulge her. I do agree with the Respondent that the Applicant keeps shifting goal posts and her reasons for the delay are due to negligence of her current advocates on record who were also her advocates in the lower court yet she has not taken any steps to change her advocates or to lodge complaints against them for professional negligence before the Advocates Complaints Commission or the Advocates Disiplinary Tribunal, yet she now craves for orders of stay of execution and leave to file an appeal out of time. I do find that the period for delay is inordinate. This court aids the vigilant and not the indolent. The case belongs to the party and not the party's advocates wherefore the party takes the fall for any indolence on it's part.
29. The extension of time for appeal is undoubtedly an exercise of discretion. Subsequently, there must be some material before the Court to enable its discretion to be so exercised. This Court should exercise discretion where there is a valid reason and explanation for the delay. In *Harris Horn Senior, Harris Horn Junior v Vijay Morjaria Nyeri Civil Appeal No. 223 of 2007* the Court made observations therein inter alia as follows:
- “(32) As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case.”
30. I find that the evidence presented by the Applicant in the Supporting Affidavit does not justify the delay of 1 ½ years in filing this application. The applicant has also defied two court orders wherefore her hands are tainted.
31. The respondent who has a judgment is equally entitled to the protection of his right to a fair hearing which entitles the enjoyment of the fruits of judgment made in his favour. I do agree with the respondent that the applicant squandered her chances in the trial court and is now bent on frustrating the execution process which has already commenced. The bona fides in her application are suspect more so as she still has faith in the very same advocates whom she accuses of material lapses in communication.
32. In light of the reasons aforestated I am not inclined to extend time for filing of an appeal.
33. Premised on the decision reached herein above the Applicant's other prayers fall by the way.
34. On the balance I do find that the application herein is devoid of merit and I thus dismiss it with costs to the Respondent assessed at Ksh 15,000.
35. This file is marked as closed
- It is hereby so Ordered.

DATED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF NOVEMBER 2025.

M.S. SHARRIFF

Judge



In the presence of:

.....for the applicant

.....for the Respondent

Peter Machoni - Court Assistant

