

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA COURT**  
**HIGH COURT CIVIL MISC APPEAL NO. E089 OF 2025**  
**BRIAN MUCHENDITSI MUKOLWE.....**

**APPLICANT**

~VERSUS~

|                                |                |                                   |
|--------------------------------|----------------|-----------------------------------|
| <b>GEOFFREY<br/>RESPONDENT</b> | <b>KADIMA</b>  | <b>LUTTA.....1<sup>ST</sup></b>   |
| <b>ANNE<br/>RESPONDENT</b>     | <b>NASAMBU</b> | <b>WANGILA.....2<sup>ND</sup></b> |

**RULING**

1. The applicant herein filed a Motion dated on 8<sup>TH</sup> May,2025 under Certificate of urgency seeking the following orders. on 12<sup>th</sup> May,2025 for directions on the Notice of motion dated on 8<sup>th</sup> May 2025 whereby court made the following orders:

2. The applicant further filed a Notice of Motion, dated on 8<sup>th</sup> May 2025 seeking the following orders:

- i. **THAT** Leave be granted to the Applicant BRIAN MUCHENDITSI MUKOLWE to file appeal out of time against the judgment or decree of ATANGA THOMAS OBUTU (CM), Magistrate in Mumias MCC/E149/2023 delivered on 20.2.2025.
- ii. **THAT** the annexed draft memorandum of appeal be deemed duly filed upon payment of the requisite fees.
- iii. **THAT** consequently the court does grant stay of execution of the judgment delivered on 20/2/2025 of the pending, hearing and determination of the intended appeal.
- iv. **THAT** costs of the application were to be in the cause.

3. The application was equally grounded by supporting Affidavit dated 8<sup>th</sup> May,2025 citing the following grounds: -

- I. THAT he was aggrieved by the entire judgment or decree of ATANGA THOMAS OBUTU (CM), Magistrate in Mumias MCCE149/2023 delivered on 20.2.2025.
- II. THAT when the matter was coming up for judgment on 20/2/2025, his counsel did not inform him that the matter was fixed for judgment on the said date.
- III. iii. THAT his counsel who was appointed by his insurance company (CIC) informed him via email on 11th March 2025 that judgment had been entered against him and that counsel were in negotiations to settle the judgment debt.
- IV. THAT his counsel on 29th March 2025 informed him that the respondent's counsel had declined to negotiate over the decretal sum.
- V. THAT as such, the failure of the inadvertent institute of an appeal within time was therefore in no way deliberate to defeat justice.
- VI. THAT he prays that the annexed memorandum of appeal be deemed as duly filed upon this court granting his leave.
- VII. THAT it is in wider interest of justice that the orders that were being sought herein should be granted.
- VIII. THAT what was deponed herein was true to the best of his own knowledge, information and belief.

### **THE APPLICANTS' SUBMISSIONS.**

4. The applicant moved this court vide notice of motion dated on 8th May 2025. The appeal was a quantum awarded in **MCC NO. E149/2023** vide judgment entered on the 20<sup>th</sup> February, 2025.
5. The applicant further sought orders for stay of execution in respect of the said judgment pending the hearing and determination of this appeal. The applicant in his supporting affidavit dated on 8th May 2025 states that the suit motor vehicle was insured by CIC Insurance Company Limited.
6. The insurance company through their lawyer conducted the case and judgment of Kshs 5,654,46 was entered in favor of the respondents. The insurance company attempted to agree on the reduction quantum, but the negotiations failed.
7. The applicant through the insurance paid a sum of Kshs 3,000,000 to the judgment debtors after attempts to negotiate down the decretal sum were not successful. It became clear that an appeal would be necessary. The prescribed period for appeal had lapsed.
8. Whether the court exercised its discretion to grant the applicant leave to file this appeal out of time.
9. Whether the applicant met the pre-requisite for grant of execution pending appeal.
10. It is clear from, **Section 79(a) of the Civil Procedure Act** that before the court considers the extension of time. The applicant

must satisfy the court that they have good and sufficient cause for not filing the appeal on time. The applicant presented documentation detailing how his lawyer and the respondent's lawyers were entertaining negotiations to have quantum reduced which in turn fell through.

11. In **Leo Mutiso v Rose Helen Wangari Mwangi (1999)** **(EKLR)** the court of appeal laid the guiding principles for extension of time:

".. the decision whether or not to extend time for appealing is essentially discretionary. Matters which the Court takes to account include:

- I. The length of the delay.
- II. The chances of the appeal succeeding if the application is granted.
- III. The reason for the delay.

12. If the delay is approximately 2 months from the date of judgment. The same is fully explained and attributable to active and ongoing negotiations, as confirmed by the Affidavit in support. Courts hold that delay occasioned by settlement discussions is excusable in **Mongira & Another v Makori & Another [2005]** **ekLR** The court held that:

***"A delay may be excused if reasonable explanation is given. It all depends on the circumstances. "***

13. The judgement was delivered on 20th February,2025 while the application was dated on 8th May,2025.
14. The delay was explained. Furthermore, the applicant was informed that the negotiations had fallen through on 25<sup>th</sup> April ,2025.
15. The delay herein was not inordinate and was attributed to engagements with the respondent herein which the appellant was hopeful that they would reach an amicable agreement.
16. The applicant through his advocates and insurance company had already paid Kshs 3,000,000/= (Three Million Shillings Only) against the decretal sum. The respondents already had partial enjoyment of the fruits of the judgement. The intended appeal raised serious issues of both fact and law.
17. The appeal was not frivolous and had a high likelihood of success. No prejudice will be occasioned to the respondent that cannot be compensated by costs.
18. The applicant respectfully urged the court to exercise its discretion in the applicants' favor and allow the application as prayed.

## **B. RESPONDENTS' SUBMISSIONS**

19. The applicant moved this court vide a notice of motion dated 8th May 2025, for orders as stated on the face of the application.
20. The Respondent, in opposing the said application, filed a replying affidavit sworn on the 23rd day of May, 2025.
21. Court directed that application be canvassed by way of written submissions the Respondents submitted as follows; The Respondents submitted Prayer 1 of the application had since been spent and wish to submit on the following issues:
- I. Whether or not the Applicant had met the threshold to be granted leave to file an appeal out of time.
  - II. Whether or not the Applicant had satisfied the conditions for grant of stay pending appeal as set out in of time **Order 42 Rule 6(1& (2) Civil Procedure** Rules if time is enlarged.
22. The Respondent wished to respond hereunder: **On whether or not the Applicant had met the threshold to be granted leave to file an appeal out of time**, the respondent made the following submissions.
23. That the Respondents' humble submissions that the instant application was destitute of merit misplaced and brought in bad faith with the aim of delaying the course of justice.
24. Stated that the statutory provisions of respecting an appeal from the judgment or decree of a subordinate court to the High Court

were clear. Section 79G of the Civil Procedure Act provides that:  
"79G. **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 satisfied the court that had good and sufficient cause for not filing the appeal in time.**

25. The court in **Dilpack Kenya Limited V William Muthama Kitonyi [2018] Eklr** observed that; an applicant seeking enlargement of time to file an appeal or admission of an already filed an appeal must show that has good cause for doing so since as held in **Feroz Bequm Qureshi and Another versus Maganbhai Patel and Others [1964] EA 633** *there is no difference between the words "sufficient cause" and "good cause"*. It was therefore held in **Daphne Parry versus Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, it's interpretation must be in accordance with judicial

principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant. "

- a. Further in **DILPACK KENYA LIMITED versus WILLIAM MUTHAMA KITONYI (2018] eKLR** its decision the court opined that 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 and 2 others Nairobi (Milimani) HCCC NO, 2255 of 2000 [200211 EA 65** the Court set out the factors to be considered in deciding whether or not to grant as follows;
  - (i) The explanation 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;
- i. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favor of the applicant.

27. It was not disputed that the judgment in the lower court was delivered on 20th February, 2025 and that the application was filed on 9th May, 2025; which was **47 days beyond the 30 days stipulated in section 79G of the Civil Procedure Act**. The applicant's counsel had not given an explanation that the instructions to appeal were given after the last date of filing an appeal. The Respondent submitted that there is no evidence of instructions to the applicant's advocate. They submitted that the delay was inordinate. Section 79G of the Civil Procedure Act requires that before the Court enlarges the time for appealing the applicant must satisfy the court that he had good and sufficient cause for not filing the appeal in time. Thus, the applicant has not given sufficient cause for the delay.

28. They submit that the Respondents were never privy to the communication between the Applicant and their counsel. The Applicant's counsel did not indicate whether they followed up with their client before the appeal period lapsed thus the Respondents cannot be punished for the Applicant's misfortune.

29. They further submitted that this appeal is an afterthought since the applicant's previous counsel who was instructed by his insurer, saw no need to institute the intended appeal but instead instructed his client to settle to the extent of their statutory limit.

30. Further, while communicating to the applicant his said counsel did not advise on an appeal instead informed the applicant of the need for him to settle the balance of the decretal sum. The Applicant has failed to state to this court that after the stay period issued by the Trial court.

31. The applicant failed to state to the court that after the stay period issued by the Trial Court lapsed, execution was done and the decree which they intended to appeal against was partially settled by the Insurer to the extent of their statutory limit. They submit that the Applicant was on a fishing expedition and was on a mission to frustrate the respondents who have since not yet reaped the fruits of litigation. While the Applicant had the right to appeal, the court is supposed to weigh this against the success of a litigant who should not be deprived of the fruits of his judgment. They called upon this court to ensure that neither any party suffers prejudice. The court in **Supa Hauliers Ltd versus David Masinde Musungu [2015] eKLR** made reference to the case of **M/s Portreitz Maternity. Versus James Karanga Kabia, Civil Appeal No. 63 of 1997** where the Court said that: ***-"That right of appeal must be balanced against an equally weighty right of the Plaintiff to enjoy the fruits of the judgment delivered in his favor. There must be a just cause for depriving the Plaintiff of that right"***.

32. The respondent further urged the court that the Applicant did not meet the threshold hence disallow the instant application. ***On Where***

***the Applicant had satisfied the conditions for grant of stay pending appeal set out in Order 42 Rule 6 (1& (2) Civil Procedure Rules if time was enlarged, they submitted that:***

i. In the highly unlikely event time is enlarged, they stated that **Order 42.Rule 6 States- in case Of appeal**

*(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from the order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*(2) No order for stay of execution shall be made under sub-rule (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.*

33. The Applicants application did not avail any security as contemplated by the above mentioned provisions. Security is a legal instrument under Order **42 rule (6) (2) (c)** of the civil procedure rules 2010. The purpose of security under order 42 is to guarantee due performance of such decree or order as may be binding on the Applicant and not punish the judgment debtor. They submit that in the absence of any such security the Applicant had failed to meet the threshold set for the court to be granted the orders sought.

34. On perusal of the Memorandum of Appeal the applicant seemed to be aggrieved as to the amount of general damages, it was evident that even if the appeal succeeds, the Respondent would still be awarded an amount commensurate to the injuries he suffered. Hence it would be unjust to grant stay as prayed in the application.

35. The respondent further states that from the judgment, liability was not admitted before the trial court. Liability was an issue before the trial court which found the Applicant 100% liable for the said accident. That being the findings of the court, the Applicants cannot be estopped from challenging it in an appeal. Be it as it may, the court was satisfied that the Applicant was liable for the occurrence of the accident and so liable for the pain suffered by the Respondent.

36. The Respondent states that they should therefore not be denied the enjoyment of the fruits of the judgment. The court must have had therefore balanced the interest of both parties, and make appropriate orders. They urged the court, that in the highly unlikely event it is inclined to allow the application dated on May 2025, the same be on condition that the applicant herein deposits the entire balance of the decretal amount plus costs in a joint interest earning account in the names of the counsel on record pending the hearing and determination of the appeal in the alternative, the entire balance of the decretal sum be deposited in court the hearing and determination of the appeal.

37. The respondent stated that, they are submitting that the Application dated 8<sup>th</sup> May 2025 lacks merit and they pray that it may be dismissed with costs to the Respondent.

### **ANALYSIS AND DETERMINATION**

#### **a. WHETHER THE PRAYER FOR EXTENSION OF TIME IS MERITED.**

38. Courts are strictly inclined and persuaded by the *raison de'etre* established under of section **79G** *Every appeal from a subordinate court to the High Court shall be filed within a period of thirty (30) 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.*

The Supreme Court in **Nicholas Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**

*(Salat case):*

***“.....counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed. What we hear the applicant telling the court is that he is acknowledging having file a ‘document’ he calls ‘an appeal’ out of time without leave of the court. Pursuant to Rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the Notice of Appeal. Under Rule 53 of the Court’s Rules, this court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one needs to first seek extension of that time before he can proceed to do that which the law requires.***

***By filing an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize***

***such ‘an appeal’, is tantamount to moving the court to remedy an illegality. This, court cannot do. To file an appeal out of time and seek the court to extend time is presumptive and inappropriate.no appeal can be filed out of time without leave of the court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court.” (Emphasis added)*** in granting and/or disallowing such application whenever any is preferred to court.

In **CHARLES KARANJA KIIRU VS CHARLES GITHINJI MUIGWA [2017] ECLR** where the Respondent had delayed for 41 days before filing an appeal and where the High court enlarged time to enable the respondent file an appeal out of time, the appellant was aggrieved by the order enlarging time claiming that the learned Judge erred in law and fact by exercising his discretion and extending time for filing an appeal out of time yet no sufficient reason had been offered to justify the same, the Court of Appeal cited this court’s decision in **WANJIRU MWANGI & ANOTHER [2015] ECLR AND APA INSURANCE CO. LTD VS MICHAEL KINYANJUI MUTURI [2016] E KLR** in dismissing the appeal.

**B. WHETHER THE APPEAL IS ARGUABLE OR WITH HIGH CHANCE OF SUCCESS?**

39. Section **79B** of The Civil Procedure Act Cap 21 Laws of Kenya and I quote verbatim; -

**Before an appeal from a subordinate Court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against may, notwithstanding Section 79C, reject the appeal summarily” thus it remains a subject to be tested and unearthed at the hearing of the intended appeal and not at the interim stage hence courts must limit itself in indulge on the same at his stage.**

40. That from the record of the lower court judgment was made on 20<sup>TH</sup> February, 2025. This instant application was to allow an extension for filing and appeal out of time was made and filed on 8<sup>th</sup> May, 2025 after a lapse of the statutory timelines envisaged thereon time required under law however plausible reasons have been made including but not limited to the actions of an advocate.

41. From the foregoing there is no doubt, the discretion of this court to enlarge time for filing of a late appeal is unfettered. However, that discretion must be exercised judiciously and not capriciously. On the material placed before me and supported by the above decisions, I am satisfied that A period of 50 days. **That delay is not inordinate or unreasonable and therefore failure to establish sufficient**

***cause or reason is not a reason for this court to fetter its discretion to lock the door of justice to the applicant.***

42. This is not to say that this court would condone or forgive inordinate delays but that it must do whatever is necessary to rectify mistakes where it serves the interests of justice.

43. For all the above reasons, I find and hold that the Misc. Application seeking enlargement of time to file an appeal out of 30 days challenging judgment in Mumias MCC 149 of 2025 is merited. The same is hereby allowed.

From the foregoing I proceed to issue the following orders; -

#### **FINAL ORDERS AND DISPENSATION**

44. In the end, I find the Misc. Application by the applicant herein meritorious. I grant the prayers sought and order as follows:

45. That the Applicant is granted leave to file an appeal out of time against the judgment in Mumias MCC No. 149 of 2025 delivered on 20.2.2025.

46. That the draft memorandum of appeal be deemed as dully filed and served upon payment of requisite court fees.

47. That the applicant to pay the respondent throw away costs of Kshs. 30,000/= within the next 30 Days failure of which the Leave will be deemed as Declined.

48. This file is effectively closed.

49. Right of Appeal 30 days.

**DATED SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS  
27<sup>TH</sup> OF NOVEMBER, 2025.**

**S.N. MBUNGI**

**JUDGE**

**In The Presence of;**

**CA:** Angong'a

Mr. Alukwe for the Respondents present.

Ms. Mukolwe for the Applicant , online.