



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ndung'u v Kihara & another (Civil Miscellaneous E070 of 2025)  
[2025] KEHC 17749 (KLR) (27 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17749 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL MISCELLANEOUS E070 OF 2025  
EM MURIITHI, J  
NOVEMBER 27, 2025**

**BETWEEN**

**PETER KARANJA NDUNG'U ..... APPELLANT**

**AND**

**GEOFFREY NJOROGE KIHARA ..... 1<sup>ST</sup> RESPONDENT**

**WANJIRU MUGUCHIA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant filed a Notice of Motion dated 26<sup>th</sup> August, 2025 seeking the following orders:
  - a. That this Application be certified urgent and be initially heard exparte on account of its urgency.
  - b. That the Appellant/Applicant be granted leave to appeal out of time on quantum against the judgement of the Hon. Martha Opanga, delivered on 22<sup>nd</sup> July, 2025 at Wanguru.
  - c. Spent.
  - d. That there be a stay of execution of the decree emanating from the judgement delivered in Wanguru CMCC No. E087 of 2021, pending the hearing and determination of the intended Appeal.
  - e. That the Memoranda of Appeal annexed hereto be deemed as duly filed and served.
  - f. That the costs of this application be provided for.
2. The application is based on the grounds on the face of the application and the supporting affidavit of Daniel Khaemba. The applicant's case is that on 22 July 2025, the Chief Magistrate's Court (Hon. Martha Opanga) delivered a Judgment in Wanguru CMCC No. E087 of 2021, where the Court awarded the Plaintiff damages of K.Shs. 1,054,080/= plus costs and interests. The applicant is aggrieved



and dissatisfied with the said judgement on quantum and has instructed the firm of Kiruki & Kayika to appeal against the same.

3. The applicant avers that when the judgment was delivered, he was away on compassionate leave and hence was unable to go through the same and give instructions to appeal on time. He resumed office in Mid-August 2025 and upon perusal of the judgment, he noticed that the quantum awarded by the learned magistrate were inordinately high which required an appeal. He immediately sent the instructions to appeal against the said judgement via email and by then, stay of execution and time to appeal had already lapsed. The mistake on the part of the Applicant's insurer ought not to be visited upon the Applicant to deny them an opportunity to challenge the trial court's judgement. The Applicant faces an imminent and real danger of execution by the 1<sup>st</sup> Respondent to satisfy the decree emanating from the above judgement. The Applicant stands to suffer substantial loss if the application herein is not allowed as the Respondent will proceed with the process of execution.
4. Further, the applicant avers that they have lodged an appeal in this Honourable Court as the Judgment of the Honourable Magistrate is not supported by evidence that was tendered in court by the parties. The Appellant/ Applicant is ready and willing to abide by the conditions and orders that this Honourable Court may impose for the application to be allowed to appeal out of time.
5. Lastly, the applicant avers that the intended appeal has a high probability of success and it will be rendered nugatory if this application is not allowed.
6. The 1<sup>st</sup> respondent on 10<sup>th</sup> September, 2025 deposed to a Replying Affidavit that the Applicant has never served his advocates on record with any Memorandum of Appeal, indicating the intention to appeal against the decision of the trial Court.
7. The respondent avers that the Applicant has not demonstrated any reasonable cause for delay in filing an appeal, the only explanation advanced is that the Insurance Company's legal officer was on leave at the time of the delivery of the judgment. This, however, is not a sufficient justification. A corporate entity, such as an Insurance Company is expected to have internal structures in place to ensure continuity of operations regardless of the absence of a single officer.
8. Further, the respondent avers that the applicant has made the application after the respondent sent him a letter dated 23<sup>rd</sup> July, 2025 seeking settlement of the decretal sum.
9. Lastly, the application has been brought to deprive the claimant of the fruits of a lawful judgment.

### **Applicant's submissions**

10. Whether the Applicant is entitled to an extension of time to lodge his appeal.
11. The applicant submits that the delay in lodging the appeal was occasioned by the fact that the Legal Claims Officer at the applicant's insurer was out of the office on compassionate leave therefore the delay in making the decision on whether to appeal. There was failure to issue instructions to the advocates on record to file an appeal on time. It is upon resuming officer that the legal claims officer noticed the intended appeal and immediately instructed the firm of Ms. Kiruki & Kayika Advocates to file the instance application. The delay in lodging the appeal was purely inadvertent and is excusable. In addition, the delay has not been inordinate.



12. The applicant cited Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR where the Court, Ngugi, J. as he then was, while allowing an application to enlarge time within which to file an appeal said:

“...I am unable to see any substantial adverse effects granting this order will have on the Respondent other than permitting the Applicants to exercise a preciously cherished right of appeal. Lastly, while the statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not, in themselves a core substantive value in the same sense, for example, that *the Constitution* and the *Elections Act* place on the timelines for filing Elections Petitions.”

13. On stay of execution, the applicant submits that he will suffer substantial loss if stay of execution is not allowed. The respondent has threatened to proceed with execution. Further, the applicant is willing to abide with any conditions imposed by the court.

### **Respondent’s submissions**

14. On extension of time, the respondent submits that the Appellant in this case has had ample time to apply for stay and appeal the lower court decision but failed to do so without giving valid reasons for the delay. In as much the legal officer might have been on leave, no evidence has been brought forward to prove the same and any type of communication to show effort to reach said officer failed due to any incapacitation has not been proved. Its means that the delay has not been satisfactorily explained the Applicant should not be allowed to file an appeal out of time.

15. On stay of execution, the respondent submits that the memorandum of appeal draft attached does not show that the appeal has any probability of success. It does not raise grounds that would make an appeal succeed, by only stating that the trial court erred in awarding damages without giving reasons why, the intended appeal will only fail and will have wasted judicial time. Reliance was placed on Suhara Transport K Limited (Previous trading as Prime fuels Kenya Limited v Mwalimu 2025 KEELRC 2810 KLR where the Court (Monica Mbaru J.) held:

“On the second issue of stay of execution, under a miscellaneous application, once the second issue became an extension of time to file an appeal out of time, it became the sole basis for the application. There is no appeal yet. The basis for a stay of execution arises only at the trial court, not at this stage, where there is no appeal. The respondent is correct in submitting that such a prayer/order Zin the instant applicant is fatally defective and has no foundation. What would result from being granted such an order under a miscellaneous application? Where the applicant opts not to file an appeal within the allocated timelines, the order of stay would have no standing”

16. On whether there would be any prejudice, the Respondent submit that he sustained injuries which ought to be compensated by an award of damages. The Respondent is disadvantaged. He suffered loss. The Appellant, who admitted the accident stands to suffer no prejudice at all and that is why he seeks to delay this matter. The reason given by the Appellant explaining why they delayed in filing the Appeal is flimsy and unproved.

### **Issues**

17. Whether the Applicant is entitled to an extension of time to lodge his appeal.



18. Whether the Honourable Court has the jurisdiction to grant the Applicant stay of execution in Wang’uru CMCC No. E087 of 2021 pending hearing and determination of the intended appeal.

### **Analysis**

19. The Applicant moved this Court by a Notice of Motion dated 26th August 2025, seeking, among other orders, leave to appeal out of time against the judgment of Hon. Martha Opanga delivered on 22<sup>nd</sup> July 2025 in Wang’uru CMCC No. E087 of 2021.

### **Whether the Applicant is entitled to an extension of time to lodge his appeal**

20. The power to enlarge time is derived from section 79G of the *Civil Procedure Act*, which provides that appeals from subordinate courts must be filed within 30 days, “but the court may, for good and sufficient cause, extend the time.” See Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR.

### **Length of Delay**

21. Judgment was delivered on 22<sup>nd</sup> July 2025. The application was filed on 26<sup>th</sup> August 2025, approximately 35 days later, a delay of about 5 days outside the statutory window. The delay herein cannot be said to be inordinate.

### **Reason for delay**

22. The Applicant attributes the delay to the fact that the insurer’s Legal Claims Officer was away on compassionate leave, and therefore instructions to appeal were not issued in time.
23. The Respondent argues that no evidence was adduced showing the officer was on leave; that a corporate entity should not be crippled by the absence of one officer; and consequently, the reason is not sufficient cause.
24. This Court considers that although no documentary proof of the officer’s leave was provided, on a balance of probabilities, in view of the minimal delay, it is more probable than not that the delay was occasioned as stated by the applicant.

### **Chances of success of the intended appeal**

25. At the extension stage, the Court does not conduct a mini-trial of the appeal. The test is whether the appeal is arguable, not whether it will ultimately succeed. The draft Memorandum of Appeal challenges the quantum of damages. Courts have repeatedly held that whether damages were excessive is an arguable issue warranting appellate interrogation. The intended appeal is not frivolous.

### **Whether stay of execution should be granted**

26. The principles fort the grant of stay pending appeal as provided in Order 42 Rule 6(2) of the Civil procedure Rules are that:

“No order for stay of execution shall be made unless—

- a. the court is satisfied that substantial loss may result to the applicant unless the order is made;
- b. the application has been made without unreasonable delay; and



- c. such security as the court orders for the due performance of the decree has been given.

### **Delay**

27. The trial court Judgment was delivered on 22<sup>nd</sup> July 2025. The application was filed on 26<sup>th</sup> August 2025, approximately 35 days later, a delay of about 5 days outside the statutory window.
28. The delay herein cannot be termed inordinate especially considering the Applicant simultaneously sought leave to appeal out of time. The Court is satisfied that this requirement has been met.

### **Whether the applicant will suffer substantial loss**

29. The Applicant argues that the Respondents have already commenced execution. If execution proceeds, the Applicant will be compelled to satisfy the decree before the appeal is heard. There is a risk that recovery of the decretal sum from the Respondents may not be possible if the appeal succeeds.
30. In *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another* [1986] KLR 410, the Court observed that the prospect of substantial loss is the cornerstone of stay; and without it, stay cannot issue.
31. The Respondents counter that they are entitled to the fruits of their judgment. No evidence was placed before the Court showing their inability to refund the decretal sum.
32. The Court finds that the Applicant has shown the risk of substantial loss.

### **Security**

33. The Applicant expresses willingness to abide by any terms the Court may impose. Given the decretal sum (Kshs.1,054,080/=), an appropriate security is necessary to balance the rights of both parties, and the applicant shall deposit into an interest earning account in the joint names of the Counsel for the parties the said decretal within thirty days.

### **Orders**

34. Accordingly, for the reasons set out above, the Court makes the following orders:
  - a. The application for leave to file appeal out of time is granted.
  - b. The application for stay of execution pending appeal is allowed.
  - c. The applicant shall deposit the decretal in an interest earning joint account in the names of the Counsel for the parties within thirty (30) days.
  - d. In default execution ot issue.
  - e. The Appellant shall file the Memorandum of Appeal within fourteen (14) days and the Record of Appeal within sixty (60) days.
  - f. The Applicant shall pay the costs of the application in terms of Order 50 Rule 6 of the Civil Procedure Rules.
35. Directions as to hearing of the Appeal on 26/1/2026.

Order accordingly.

**DATED AND DELIVERED THIS 27<sup>TH</sup> DAY OF NOVEMBER 2025.**



**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Mr. ontita for the Appellant.

Ms. Ochieng for Respondent.

