

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
MISCELLANEOUS CIVIL CASE NO E015 OF 2025

JOHNSON

KASUMBA

MBATHA.....APPLICANT

VS

DANIEL MUTUAL KIMWELE & ELIZABETH MULI (suing as legal representatives and administrator of the estate of kimanzi mutua- deceased).....RESPONDENT

RULING

1. The matter for determination is an application dated 16.10.2025 seeking for orders that:
 - i. Spent.**
 - ii. Spent.**
 - iii. Pending the hearing and determination of this application inter partes, there be an order for stay of execution of the judgment and/or decree in Garissa Chief Magistrate’s Court Civil Case No. E027 of 2022 Daniel Mutua Kimwele & Elizabeth Muli - suing as the legal representatives of the estate of Kimanzi Mutua (deceased) vs John Kasumba Mbatha and Another as against the applicant.**
 - iv. There be stay of execution of the judgment and/or decree in Garissa Chief Magistrate’s Court Civil Case No. E027 of 2022 Daniel Mutua Kimwele & Elizabeth Muli - suing as the legal representatives of the estate of Kimanzi Mutua (deceased) vs John**

Kasumba Mbatha and Another pending the hearing and determination of the intended appeal.

- v. Leave be granted to the applicant to lodge an appeal out of time against the judgment and decree in Garissa Chief Magistrate's Court Civil Case No. E027 of 2022 Daniel Mutua Kimwele & Elizabeth Muli - suing as the legal representatives of the estate of Kimanzi Mutua (deceased) vs John Kasumba Mbatha and Another.**
- vi. Subject to prayer 4 above, the annexed draft memorandum of appeal be deemed to be duly filed and properly on record.**
- vii. This Honourable Court be pleased to grant any further directions that may be necessary for the expeditious determination of the intended appeal.**
- viii. Costs of this application be provided for.**

2. The application was grounded upon the facts on its face and further supported by the affidavit of Moses Barasa, the Legal Officer of Madison General Insurance Kenya Limited, sworn on 16th October 2025. It was deposed that the trial magistrate delivered a judgment on 21.08.2025, finding the applicant wholly liable and entering judgment against him for Kes. 2,376,550 plus costs. It was further averred that although a temporary 30-day stay of execution had been granted, the same had since lapsed, thereby exposing the applicant to the risk of execution.

3. It was explained that immediately after the judgment, the applicant's insurer arranged to change legal representation from

Mutua Waweru & Company Advocates to G. Mutua & Co. Advocates. It was noted that a delay arose because the new advocates were unable to obtain pleadings in time to file an appeal within the statutory period. It was averred that once fees were settled and the physical file released, the insurer moved to regularize representation.

4. It was further deposed that since both the insurer and the applicant were dissatisfied with the trial court's findings, there was need to seek leave before filing an appeal. The applicant maintained that the late filing was not intentional but was occasioned by the circumstances as already enumerated. It was argued that the intended appeal is arguable as it raises weighty issues on liability and therefore, the application ought to be allowed.
5. Daniel Kimwele, on behalf of his co-respondent stated in his sworn response dated 27.10.2025 that the application is incompetent and amounts to an afterthought. He contended that the deponent had sworn to matters outside his personal knowledge, contrary to the provisions of Order 19 Rule 3 of the Civil Procedure Rules. He further observed that the stay previously granted had already lapsed and that no notice of appeal had been served upon them to demonstrate any intention to appeal the trial court's determination. It was his position that, as judgment debtors, they had a constitutional right to enjoy the fruits of their judgment.

6. He also averred that no sufficient reason had been advanced to explain why the appeal had not been filed within the prescribed time. He emphasized that equity aids the vigilant and not the indolent, and therefore urged the court to strike out the application. He argued that the applicant's uncertainty about his financial capacity was not a valid basis for presuming inability to repay the decretal sum. In his view, the applicant had failed to demonstrate any likelihood of suffering substantial loss, and the court ought not to speculate on such loss. Consequently, he urged the court not to exercise its discretion in favor of the applicant and to dismiss the application.
7. The application was canvassed by way of written submissions.
8. The applicant's counsel submitted that the motion before the court sought leave to file an appeal out of time and a stay of execution of the judgment and decree pending appeal. He stated that under Section 79G of the Civil Procedure Act, the court has discretion to extend time, guided by the principles set out in **Thuita Mwangi vs Kenya Airways Ltd, [2003] eKLR** namely; the length of delay, the reason for the delay, the chances of success of the intended appeal, and the degree of prejudice to the respondent.
9. It was contended that the delay of twenty-six days was occasioned by circumstances beyond the Applicant's control, as detailed in the supporting affidavit, and was neither deliberate nor inordinate. He emphasized that the intended appeal raised arguable grounds, particularly on liability, since the trial court

had imposed one hundred percent liability on the Applicant despite evidence suggesting contributory negligence by the deceased rider.

10. Turning to the issue of stay of execution, counsel urged that Order 42 Rule 6 of the Civil Procedure Rules does empower the court to grant such relief where the applicant demonstrates substantial loss, filed the application without unreasonable delay, and offered security for due performance of the decree. He maintained that the decretal sum of over two million shillings was substantial and that the Respondents had not shown any ability to refund it if the appeal succeeded, thereby exposing the Applicant and his insurer to irrecoverable loss.
11. He pointed out that the Respondents had filed a response but had not discharged the evidentiary burden under Section 112 of the Evidence Act to prove their financial capacity. He referred to **Amal Hauliers Ltd vs Abdulnasir Abukar Hassan [2018] KEHC** to support the position that even a delay of several months could be excused, and **Toiyoi Investment Ltd vs Uchumi Supermarket Ltd [2019] KEHC** to underscore the position that stay orders could issue even in respect of money decrees.
12. Counsel further submitted that the application was filed promptly upon the takeover by the new advocates and that the insurer had expressed willingness to provide security. He urged the court to balance the Respondents' right to enjoy the fruits of judgment with the Applicant's right to pursue an appeal, stressing that denying stay would render the appeal nugatory. He concluded by

asserting that the Applicant had satisfied all the legal conditions and prayed that the court exercise its discretion in the interest of justice by granting both leave to appeal out of time and stay of execution pending appeal.

13. The respondents, in their submissions dated 03.11.2025, stated that the application was not proper since it sought leave to appeal out of time in Garissa CMCC E037 of 2022, yet the applicants had not invoked Order 40 of the Civil Procedure Rules which, according to them, provided the legal basis for the grant of the orders sought. They maintained that the application, having failed to cite the correct provisions of the law, it was a non-starter.
14. They further contended that parties were bound by their pleadings and that in this case the court ought not to speculate or investigate what the applicants wanted from the Honourable Court. It was their view that the orders sought by the applicants ought to have been grounded in Order 40 of the Civil Procedure Rules, which governs extensions of stay of execution orders.
15. The respondents also argued that the applicant had failed to meet the threshold for the grant of the orders sought, pointing out that the application had been filed close to ten days after the delivery of judgment on 21.08.2025. They emphasized that any delay should be explained to the court and relied on the authority of **Joseph Ngigi Ibare vs Myovi James & Another (2016) eKLR.**

16. In addition, they submitted that the applicant had not demonstrated the substantial loss that would result if stay was not granted. To support this position, they cited **Kenya Shell Limited vs Kariga (1982-88) 1 KAR 1018**, where the court had observed that substantial loss was the cornerstone of the jurisdiction for granting stay.
17. The respondents further contended that the applicant had not furnished any security for the due performance of the decree, and therefore were undeserving of the prayers sought. He opined that, even if the court were inclined to allow the application, it should only be granted on just terms.
18. I have considered the application, response and the submissions by the parties. Issues that emerge for determination are;
- i. **Whether sufficient reasons to extend the time for filing the appeal have been tendered;**
 - ii. **Whether there are sufficient grounds tendered to grant order of stay of execution.**
19. Under Section 79G of the Civil Procedure Act, time for filing an appeal from a judgment of the subordinate court to the High Court is 30 days. The same provides that:
- 79G. Time for filing appeals from subordinate courts**
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.

20. Further, section 95 of the civil procedure Act goes further to state that;

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

21. From the two provisions above quoted, it is not proper for the respondent to state that the application is improperly filed under a wrong provision instead of Order 40 of the civil procedure rules which in my view deals with issues regarding injunctions.

22. When an application for extension of time is before a court, the court ought to take into account several factors as was observed by the court in the case of **Sila Mutiso vs Rose Hellen Wangari Mwangi Civil Application No. 255 of 1997 UR** where the Court stated:

“It is now well settled that the decision whether or not to extend 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.”

23. Similarly, drawing from comparative jurisprudence on the matter of enlargement of time pending appeal, the Supreme Court of Appeal of South Africa in the case of **S vs Smith [2012] 1SACR 567** elaborated the test to be applied on applications for leave to appeal in the following manner:

What the rest of reasonable prospect of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore the applicant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding, more is required to be established than there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, a rational basis for

the conclusion that there are prospects of success on appeal.

24. As such, extension of time within which to appeal is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.
25. The question therefore is whether the applicant has met the above conditions.
26. As for the length of the delay, it is not in dispute that the impugned judgement was delivered on 21.08.2025 and the application herein filed on 16.10.2025 which is roughly two months from the date of the said judgment. In the case of **Jaber Mohsen Ali & Another vs Priscillah Boit & Another E & L No. 200 of 2012 {2014} eKLR** the Court stated that what is unreasonable delay is dependent on the circumstances of each case. Even one day after Judgment/Ruling could be unreasonable delay depending on the Judgment/Ruling of the Court and any order given thereafter.
27. The applicant submitted that upon delivery of the judgment, they changed legal representation from Mutua Waweru & Company Advocates to G. Mutua & Co. Advocates. That the delay occurred because the new advocates could not obtain the pleadings in time to file an appeal within the statutory period. It was further indicated that once the fee was settled and the physical file released, the insurer moved to regularize the representation. [See **Richard Nchapi vs IEBC & 2 Others (supra)** and further, in **Abdulla Lule vs R (1960) EA 21,**

where the applicant's application to appeal out of time was allowed because he did not obtain the judgement and proceedings of the lower within 14 days to enable him to appeal.

28. The right to be heard is not only constitutionally entrenched but it is also the corner stone of the Rule of law; a valued right; and is so basic that a decision which is arrived at in violation of it will be nullity, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice. [See Article 50 of the constitution].
29. In the same breadth, Article 159 (2) (d) of the 2010 Constitution of Kenya mandates this court to administer substantive justice without undue regard to procedural technicalities. In my view and in the interest of justice, the reasons for the delay of close to two months was justified and reasonable.
30. As for the chances of the intended appeal succeeding, I have perused the draft memorandum of appeal dated 16.10.2025. It is trite that in deciding whether an appeal is arguable or not, the court is bound to consider whether the said intended appeal raises a bona fide issue for determination by the Court. For the intended appeal to be termed as arguable, all that is needed in Law is that there be even one arguable point and that will suffice [See **Commissioner of Customs vs Anil Doshi, {2017} eKLR; Joseph Gitahi Gachau & Another vs Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008**].

31. Having perused the memorandum of appeal, the applicant has urged this court to consider the fact that the trial court dismissed the applicant's case for the reasons inter alia that the trial magistrate misdirected himself by improperly analyzing the evidence by apportioning him 100% liability and further, that the trial magistrate did not properly evaluate the totality of the evidence on record thus arriving at an unsupported determination. In my view, the issues raised by the applicant are arguable; however, it is essential to note that an arguable appeal does not necessarily mean an appeal that will or must succeed.
32. As for the prejudice which the respondent stands to suffer should leave be granted, from the respondent's replying affidavit, I did not come across any credible evidence to indicate any prejudice that would outweigh the grant of the orders sought that would not be cured by way of costs.
33. Considering that the extension of time to file appeal is a matter of exercise of judicial discretion, where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in the applicant's favour and especially where the delay in filing the appeal has been satisfactorily explained. However, discretion of the court must always be exercised judiciously and that the applicant having expressed his intentions to be heard by this court on appeal, it is my considered view that an opportunity should be availed to him to do so. To that extent, leave is granted and the memorandum of appeal filed deemed as duly filed.

34. The second limb of this application is that the said leave does operate as a stay of execution of the judgment of the trial court pending the hearing and determination of the appeal.
35. Generally, stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules 2010. As a rule, for orders of stay of execution to be granted, the applicant must satisfy the conditions to wit; - that substantial loss may result to the applicant unless the order is made; that the application has been made without undue delay; and that 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. The principles upon which the foregoing prayer can be allowed are now well settled by superior courts as espoused in various authorities inter alia; **Halai and Another vs Thornton & Turpin (1963) Ltd [1990] KLR**.
36. As for the likelihood to suffer substantial loss if the stay is not granted, from the pleadings, the applicant submitted that, the decretal sum of over two million shillings was substantial and that the Respondents had not shown any ability to refund it if the appeal succeeded, thereby exposing the Applicant and his insurer to irrecoverable loss. However, the respondents urged this court to dismiss the application and if by any chance the court is inclined to allow it, then the court proceeds to do so on just terms. The applicant did not establish that the respondent was a person of no means and incapable of refunding the decretal sum should the appeal succeed. On that ground alone,

it is my finding that the element of substantial loss has not been established.

37. As to the delay in bringing the application before this court, the same has already been dealt with elsewhere in this ruling and therefore, I find that the requirement as to timeliness in bringing the application is equally satisfied.
38. As to the security for costs, the applicants have not provided security for the due performance of the decree. The objective of depositing security is to balance the interest of both parties and also to safeguard the decretal sum should the appeal succeed. In the case of **Butt vs Rent Restriction Tribunal [1979] KECA 22 (KLR)** the court held thus; -

“....5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

39. I am aware that a successful litigant must enjoy the fruits of its judgment. On the other hand, the aggrieved party must exhaust the right of legal redress. To balance the two, deposition of security shall apply.
40. In the end, the application is hereby allowed and the following orders are commendable to me.

- i. That leave be and is hereby granted to the applicant to file an appeal out of time.**
- ii. That the annexed draft memorandum of appeal dated 16.10.2025 is hereby deemed as duly filed.**
- iii. That the applicant to file and serve the Record of Appeal within 30 days from the date of this ruling.**
- iv. That stay of execution be and is hereby issued pending hearing and determination of the appeal on condition that the applicant deposits the full decretal sum in an interest earning account jointly held in the names of their respective advocates within 30 days in default execution to issue.**
- v. That costs shall be in the cause**
- vi. Mention on 17-02-2025 for further directions.**

Dated, signed and delivered virtually this 17th day of December 2025

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J.N.ONYIEGO

JUDGE