



Muthee v Great Rift Shuttle Limited (Miscellaneous Civil Application E181 of 2025) [2025] KEHC 18949 (KLR) (18 December 2025) (Ruling)

Neutral citation: [2025] KEHC 18949 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL APPLICATION E181 OF 2025
FN MUCHEMI, J
DECEMBER 18, 2025**

BETWEEN

BONIFACE NJOROGE MUTHEE APPLICANT

AND

GREAT RIFT SHUTTLE LIMITED RESPONDENT

RULING

Brief facts

1. The application dated 16th September 2025 seeks for orders of leave to file an appeal out of time against the ex parte judgment in Ruiru Small Claims Court SCCC No. E713 of 2024 delivered on 9th December 2024. The applicant further seeks for orders of stay of execution of the said judgment pending the hearing and determination of the appeal.
2. The respondent opposed the application and filed a Replying Affidavit dated 7th November 2025.

Applicant's Case

3. The applicant states that learnt of the suit in the trial court when the firm of M/s Vintage Auctioneers served him a proclamation for attachment and sale of moveable property. The applicant avers that he has never been served with or become aware of any summons to enter appearance, plaint or any other pleadings pertaining to the instant suit. The applicant argues that the said judgment was entered on the strength of misrepresented facts and deliberate false affidavits by the respondent and the court process servers who he shall have cross examined to ascertain that he was never served.
4. The applicant states that he is likely to lose his property on the basis of being condemned unheard. The applicant avers that he has a very strong and plausible defence which he is capable of proving that he was not liable for any accident forming the subject matter of the suit which ought not to be ignored.



5. The applicant avers that he filed an application in the trial court seeking to have the impugned judgment set aside however the application was dismissed. The applicant argues that he stands to suffer immense prejudice in the event the respondent executes the trial court judgment without him being heard and a miscarriage of justice would be occasioned in such event as he shall suffer unwarranted loss of property.

The Respondent's Case

6. The respondent states that default judgment in the trial court was delivered on 9th December 2024 in their favour for the sum of Kshs. 906,326/- together with costs and interest. The respondent argues that the instant application is an attempt to delay execution of the judgment of the trial court as it has been over eleven (11) months since judgment was delivered in the lower court which period the applicant has not accounted for.
7. The respondent further argues that the instant application is materially defective as the grounds on which is predicated were conclusively considered and determined by the lower court vide the applicant's earlier application dated 5th February 2025 hence the application is res judicata. Furthermore, the applicant has not annexed a draft memorandum of appeal to demonstrate if his grounds of appeal are arguable.
8. The respondent states that no security has been offered to guarantee that the decree would be settled in the event the intended appeal is concluded against the applicant. The respondent further argues that the court ought to balance the parties interests and direct that the applicant deposit the decretal sum in court.
9. The applicant filed a Further Affidavit dated 12th November 2025 and states he took necessary steps to arrest the impugned judgment expeditiously and he was not aware of the suit until the respondent's auctioneers appeared with instructions to auction his assets. The applicant argues that since he has demonstrated that judgment in the trial court was unfairly awarded, he urges the court not to direct that he furnish any security of costs. He further states that he is willing to comply with the court's directive.
10. Directions were issued that parties put in written submissions. The record shows that the applicant complied by filing his submissions whereas the respondent had not filed its submissions by the time of writing this ruling.

The Applicant's Submissions.

11. The applicant reiterates what he deposed in his affidavit and submits that the instant application cannot be said to be res judicata as the instant court has jurisdiction to exercise its discretion in determining whether time to appeal may be enlarged and whether conservatory orders ought to be granted to avoid miscarriage of justice.
12. The applicant relies on the case of Chris Munga N. Bichage vs Richard Nyagaka Tongi & 2 Others [2013] KECA 141 (KLR) and submits that he has a valid appeal which ought to be ventilated and determined on merit and further he has a valid defence to the trial suit but was denied a chance to be heard when the respondent failed to properly serve him.
13. The applicant argues that he stands to suffer immense prejudice in the event the respondent executes the trial court judgment without him being heard and a miscarriage of justice would be occasioned and he further would suffer unwarranted loss of property.



14. Relying on the case of *Kenya Road Transporters vs Joyce Muthoni Ng'ang'a & Kenya Cannery Limited* [2000] KECA 239 (KLR), the applicant submits that he ought not to be condemned to furnish security of costs as the respondent failed to serve him with the suit papers.

Determination And The Law

- (a) Whether this application is resjudcata as alleged by the respondent
- This application seeks for orders of leave to file an appeal out of time and for orders of stay pending appeal. The application before the lower court sought for setting aside *ex parte* judgment entered against the applicant therein and to allow the applicant to defend the suit. This application is, therefore different from the one that was before the lower court. As such, this application is not res judicata in my considered view.
- (b) Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;
15. Section 79G of the *Civil Procedure Act* states:-
- 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 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.
16. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.
17. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;



f. Whether the application has been brought without undue delay.

18. Similarly in the case of Paul Musili Wambua vs Attorney General & 2 Others [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

19. Applying the above principles to the present case, the judgment herein was delivered on 9th December 2024 and the applicant filed the current application on 25th September 2025. This is about nine months outside the time limited for filing an appeal. The applicant has attributed the delay in filing his appeal on the ground that he was not served with the trial court’s pleadings and thus he only became aware of the matter when auctioneers visited his place to auction his goods. On perusal of the trial court record, there is an affidavit of service dated 13th November 2024 which provides that the applicant was served with the mention notice and the statement of claim on 12th November 2024 at 4.12pm through whatsapp, via his telephone number 0782745975. Furthermore, the whatsapp message was delivered as was demonstrated by the two ticks. The applicant did not enter appearance nor did he respond to the claim leading to the default judgment entered on 9th December 2024.

20. It is therefore, evident that the applicant was properly served through whatsapp and he was aware of the proceedings but he chose not to attend or do anything to defend his interests in the case. In the circumstances, the applicant has not given any plausible reasons for the delay in filing the appeal. Furthermore, the delay of nine months is inordinate and inexcusable.

21. The applicant has not attached the intended Memorandum of Appeal or the judgment of the trial court for the court to assess whether the grounds raised are arguable on appeal. That notwithstanding, the court has already determined that the applicant was properly served with the pleadings and chose not to enter appearance or file a statement of defence thus default judgment entered was regular and lawful. As such, I find that the applicant has not established to the satisfaction of the court that time should be enlarged to enable him file her appeal. In the circumstances, the court cannot grant any orders of stay of execution as it has determined that the applicant has not demonstrated that he ought to be granted leave to appeal out of time.

22. The prayer to file an appeal out of time having failed, the prayer for stay pending appeal is automatically rendered moot.

23. Accordingly, the application dated 16th September 2025 lacks merit and is hereby dismissed with costs to the respondent.

24. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 18TH DAY OF DECEMBER 2025.

F. MUCHEMI



JUDGE

