



Rotich v Kiplagat & another; Mwakio (Third party) (Civil Appeal E057 of 2025) [2025] KEHC 18862 (KLR) (19 December 2025) (Ruling)

Neutral citation: [2025] KEHC 18862 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E057 OF 2025
E OMINDE, J
DECEMBER 19, 2025**

BETWEEN

PETER KIBIEGO ROTICH APPELLANT

AND

WESLEY KIPLAGAT 1ST RESPONDENT

FAITH JEPNGETICH SAMOEI 2ND RESPONDENT

AND

CATHERINE WAWUDA MWAKIO THIRD PARTY

RULING

1. By a Notice of Motion dated 26th March 2025, the Applicant seeks the following orders:
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court be pleased to grant leave to the Applicant to file an appeal out of time and issue an order of stay of execution of the Ruling and Decree issued in Eldoret Small Claims Court Claim Mo.747 of 2024.
 - d. That the Honourable Court be pleased to extend time for the filing of the appeal against the Ruling and Decree issued in Eldoret Small Claims Court; Claim Mo.747 of 2024.
 - e. Spent.
 - f. That this Honourable Court be pleased to grant an order of stay pending the hearing and determination of the intended appeal.
 - g. Upon granting prayers (c) and (d) above, provide timelines for filing the appeal.



- h. Costs be in the cause.
2. The Application is filed through Messrs K&A Advocates LLP, and is expressed to be brought under Order 42, Rule 6 & 8, Order 51 Rule 1 of the Civil Procedure Rules; Section 3 and 3A of the [Civil Procedure Act](#). It is premised on the grounds set out thereon and the contents of the Supporting Affidavit sworn by the Applicant's Advocate, Geoffrey Kipkemboi Koech.
 3. He deposed that Applicant seeks leave to file an appeal out of time against the judgement of the Small Claims Court delivered on 11th October 2024 in its entirety. That warrants of attachment were issued to Heagons Auctioneers which fact only came to the attention of the Appellant when he was stopped on the highway and his motor vehicle impounded without any notice.
 4. That the said auctioneers have proceeded and advertised the Appellant's motor vehicle registration number KDM 420U CX5 MAZDA which is due for auction on 1st April 2025 and that the said motor vehicle is co-owned by the Appellant/Applicant and Stanbic Bank.
 5. He further deposed that the delay in filing the notice of appeal was occasioned by the fact that the Applicant had filed an application dated 4th October 2024 seeking to arrest the intended Judgement when the matter came for hearing on 26th August 2024 and they had sought leave to introduce another witness, and Counsel for the 3rd party sought for time to regularize his documents.
 6. That however, the Court ruled against the Appellants by stating that the defence case had closed. That they then wrote a letter dated 27th August 2024 requesting for typed proceedings for purposes of filing an appeal to no avail. That the said Application was served upon the firm of Wambua Kigamwa. That however, the same was inadvertently not filed on the online portal due to technical Issues.
 7. He further deposed that they subsequently filed another Application dated 22nd October 2024 seeking the court's indulgence in setting aside the said Judgement and afford the Appellant/Applicant an opportunity to be heard together with the 3rd Party. That the Application was canvassed by way of written submissions and Ruling was slated for 13th December 2024 but the Court adjourned the same for reasons that it was not ready. That the said ruling was thereafter delivered on 16th December 2024.
 8. That at the time, the Applicants had closed for the Christmas Holidays and the delivery of the Ruling was never communicated to them either through SMS or uploaded on the CTS. That the said Ruling dismissed their Application citing that the application for setting aside judgement and introducing a new witness and have the Appellant heard was out of time. That this was despite the fact that the delay was occasioned by the fact that they could not access the Ruling of the Court dated 26th August 2024 until February 2025 which then prompted this application.
 9. He added that in their view, their application for leave had overwhelming chances of being granted and that this application is brought in good faith and has also been lodged expeditiously.
 10. He maintained that if stay of execution is not granted and the amount under the decree paid out, their intended appeal will be rendered nugatory and that the Applicant shall suffer substantial harm. He deposed that the Applicant is ready, willing and able to abide by such reasonable terms of stay as the Court may order, in the interest of both parties and justice to all and more particularly to order that the entire amount deposited in a joint interest earning account in the names of both Advocates.

Replying Affidavit

11. The application is opposed by the 1st and 2nd Respondents vide, the 1st Respondent's Replying Affidavit dated 1st April 2025.



12. The 1st Respondent deposed that the genesis of the claim leading to the appeal arose from a sale of a motor vehicle registration no. KBU 148 E by the Appellant to the 1st and 2nd Respondents, that the Appellant received a sum of Kshs. 430,000/= from the Respondents and it later emerged that he had no good title to sell the vehicle based on the provisions of the *Sale of Goods Act*, Cap.31
13. He further deposed that the Appellant was duly served with the pleadings and filed a response to the claim dated the 25th June 2024 through his Advocate and on 1st July 2024 sought for leave to enjoin the 3rd Respondent herein as a third party which leave was granted and he issued the requisite third party notice. That thereafter, the Appellant absconded the pre-trial directions that was scheduled for 15th July 2024 despite the date having been taken by consent. That the matter was fixed for hearing on the 26th August 2024 and that the Appellant was duly served with the notice of hearing.
14. That at the hearing the 2nd Respondents were present, the Appellant's Advocate was present and the 3rd Respondent's Advocate was also present when their evidence was taken to conclusion and the claimant's case was closed. That thereafter, the Appellant through his Advocate made an oral application to file additional documents and which motion was resisted by the Respondent's Advocate and the learned Adjudicator delivered a ruling declining the request based on the reason that it came belated after they had given their evidence to conclusion and more so after pre-trial conference.
15. It was the Respondent's contention therefore that the Appellant's and the third Respondent were accorded an opportunity to tender evidence but they did not take up the same and their cases were thus closed. That they filed their submissions on 7th September 2024 and served the Appellant but he did not file submissions and also did not attend court on the date scheduled to confirm the filing of submissions despite being notified and the Adjudicator scheduled the matter for the delivery of judgment on the 11th October 2024 and the Appellant's Advocate was duly served with the requisite notice.
16. He further deposed that on 4th October 2024 the Appellant brought an application to review the order closing its case and to arrest the judgment to which he filed a response but nonetheless, the judgment was delivered as scheduled on the 11th October 2024 with an award of Ksh. 430,000/= being made in their favour together with costs and interests because the Appellant did not prosecute the motion dated the 4th October 2024.
17. That the Applicant then proceeded to file a second application to review and set-aside the judgment and to be granted leave to introduce a new witness and file statement to which they responded ruling was delivered on the 16th December 2024 in the presence of the Applicant's as well as the Respondent's Advocate dismissing the application with costs. That the Appellant thereafter took no further action in the matter until execution was commenced by way of service of the proclamation and subsequently notification of sale on 20th February 2025 and 19th March 2025 respectively.

Further Affidavit

18. The Applicant also filed a Further Affidavit dated 15th May 2025, in which he reiterated the contents of his Advocate's Affidavit in support of the Application saving for adding that the delay in filing the appeal is not inordinate since there was a pending application before the small claims Court after the delivery of judgement, an application that the Court erred by dismissing. He offered motor vehicle registration number KBB 097S as security

Submissions

19. The Application was canvassed vide written submissions. The Applicant filed submissions dated 19th June 2025 while the 1st and 2nd Respondents' filed submissions dated 22nd June 2025.



The Applicant's Submissions

20. On extension of time within which to file the appeal, Counsel relied on the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 others [2014] KLR-SCK and Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR, He submitted that the Applicant has satisfied the above conditions as set out by the Supreme Court. He added that Applicant, through his Advocate's on record supporting affidavit dated 26th March 2025 has enumerated how he made efforts to have his day in Court and defend himself but the same bore no fruits.
21. Counsel further submitted that the delay is not inordinate since the matter was still pending before the trial court post judgement and was not in any way due to his lack of willingness to prefer an appeal against the said judgement. That the delay was also occasioned by the fact that despite judgement and the rulings delivered by the Trial Court were not availed on the e-filing platform and also his request for typed proceedings was not acceded to in time.
22. Counsel urged that there will be no prejudice suffered by the Respondent in the event the extension will be granted and submitted that the Applicant has provided security in his affidavit dated 15th May 2025 and depending the outcome of the intended appeal and so the Respondent rights are protected. Counsel urged that Article 50 of *the Constitution* guarantees parties the right to be heard and the Applicant herein was denied that right and as such prompted the instant appeal.

The Respondents' Submission

23. Regarding the prayer for extension of time, Counsel for the Respondent cited Section 79G of the *Civil Procedure Act* which requires that the Appellant to demonstrate to the satisfaction of the Court that he had a good and sufficient cause for not filing the appeal in time which he submits the Appellant has failed to do for reasons that he was aware of the judgment of 11th October 2024 since the same was delivered in the presence of his Advocate but he did not bother to appeal within 30 days as provided under Section 38 of *Small Claims Court Act*, Cap. 10A as read with Rule 30 of the Small Claims Court Rules, 2019.
24. Counsel further submitted that the Appellant has not demonstrated sufficient reason to have the appeal admitted out of time as the explanation given for the delay of over 5 months is not satisfactory. In support of this submission, Counsel cited the case *Boleyn Magic Wall Panel Ltd v Nesco Services Limited* (2022) eKLR in which it was observed;

'From the foregoing, it comes out that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion. Being an exercise of judicial discretion, like any other judicial discretion, it must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. Such discretion must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders.'

25. Further, that the timelines set in the *Small Claims Court Act*, Cap. 10A as read with the Small Claims Court Rules, 2019 are strict and failure to observe them ousts the court's jurisdiction which situation is as good as that addressed by the Aprim doctrine and cited the case of *Kenya Ports Authority v Public Procurement Administrative Review Board & 2 Others* (Civil Appeal 347 of 2017)[2024] KECA



1099 (KLR) (19 August 2024)(Judgment) in which Justices Makhandia, M'inoti, Ngugi, Tuiyott and Mativo JJ.A held;

“The principle that legislation may legitimately set the time within which a dispute is to be heard and determined has been accepted and upheld by the Supreme Court, particularly in the context of election petitions. Thus, in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others* [2014] eKLR the apex Court explained that the timelines in electoral disputes were legitimate constitutional imperatives to redress longstanding aberrations.”

26. Counsel further submitted that the jurisdiction of the Superior Court on an appeal against the decision of the Small Claims Court is confined to matters of law and the Appellant has not raised any. Counsel urged that the Appellant seeks to introduce evidential matters which the Superior Court has no jurisdiction on and so it will be a wastage of judicial time to grant the extension of time sought and cited the case of *Fidelity Insurance Company Ltd v Korir (Civil Appeal 13 of 2023)* [2024] KEHC 3365 (KLR) (22 March 2024) (Ruling) in which Justice Wananda held;

“I associate myself with the sentiments of E. K. Ogola J in the case of *Mombasa Law Society v Attorney General & another* [2021] eKLR in which he stated as follows:

“One of the objectives of the *Small Claims Court Act* is to see that small claims are disposed of using the least expensive method. This is probably because the small claims, as the name suggests, are claims whose subject is of a much lower value. Most likely for that reason, the law makers felt that the cost of Appeal to the High Court then to the Court of Appeal would be much higher than the small claim.”

For the said reasons, the High Court has to be careful and firm in admitting appeals from the Small Claims Court. The High Court is under obligation to sieve through such appeals and ensure that only those that are compliant and well-deserving see the light of day. The High Court must therefore interrogate Appeals from the Small Claims Court and admit only those that raise matters of law, not facts.

27. Regarding stay of execution, Counsel cited Order 41 Rule of the Civil Procedure Rules. He submitted that in matter the Appellant has not proved substantial loss as he is refunding the 1st and 2nd Respondents their money. He has not raised a reasonable apprehension that in the remotest chance he was to succeed on appeal that they are indigent or impecunious. He cited the case of *Meteine Ole Kilelu & 19 others v Moses K.Nailole* (2009) eKLR and *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* (1986) eKLR in this regard and further urged that the Applicant's grounds of appeal do not constitute sufficient cause has not to warrant the grant of a stay of execution for reasons that they are not points of law.

28. Further, Counsel submitted that it is settled law that the existence of strong grounds of appeal will not lead to the grant of a motion for a stay of execution where the cornerstone of substantial loss has not been established and relied on *Carter & Sons Ltd Vs Deposit Protection Fund Board & 2 Others* Civil Appeal No.291 of 1997, in which the Court held;

“...the mere fact that there are strong grounds of Appeal would not in itself justify an order for stay. The Applicant must establish a sufficient cause, secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the Applicant must furnish security and the Application must of course be made without unreasonable delay...”



29. On security for due performance, Counsel submitted that no offer for security as will be ultimately binding has been made for the due performance of the impugned decision. Counsel relied on *Richard Nyongesa Mayamba v Jane Namono Meru*, (2021) eKLR in this regard

Analysis & Determination

30. The Appellant/Applicant herein seeks for leave to appeal out of time and that in the interim, a stay of execution of the decree of the court does issue for the reasons given. Having addressed my mind to the pleadings and the submissions as herein summarized, it is my considered opinion that the issues for determination are;

1. Whether the orders for stay of execution should issue
2. Whether the Applicant should be granted leave to file an Appeal out of time

31. The principles guiding the grant of a stay of execution pending Appeal are well settled. These principles are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules which provides:

“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.

32. Further, Section 79G of the *Civil Procedure Act* provides as follows;

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.

33. Of special significance is that Section 34 of the Small Claims Court provides for the expeditious disposal of cases filed before these courts. The said provision also provides for the manner in which the court is mandated to handle all case that are filed before it in order that the mandate that is placed upon these courts to hear and determine disputes within a maximum period of six months is realized. The said provision is a mandatory one and it is as hereunder;

1. All proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day to day basis until final determination of the matter which shall be within sixty days from the date of filing the claim.

34. The time stipulated by Section 79 G of the *Civil Procedure Act* is a requirement of the law. These provisions are meant to achieve timely and orderly commencement, progress and proper determination of litigation. Given the statutory limit then, principally, any delay is inexcusable unless the Applicant shows sufficient cause to justify the same and further that any extension shall not prejudice the Respondent - See *Paul Wanjohi Mathenge Vs. Duncan Gichane Mathenge* [2013] eKLR



35. The above being the case, and in light of the provisions of the above cited Section 34 of the *Small Claims Court Act*, in keeping with the rationale for the requirement for the expeditious disposal of cases before the small claims courts, it also follows that appeals emanating from this court must also be disposed of expeditiously. It is for this reason that the law provides that such appeals should be on points of law only and in this regard, I fully associate myself with the findings of the Hon Judges in the herein cited cases of Kenya Ports Authority v Public Procurement Administrative Review Board & 2Others and Fidelity Insurance Company Ltd v Korir.
36. The court herein notes that the judgement the subject matter of the decree sought to be stayed was delivered on 11th October 2024. This Application was filed on 26th March 2025 and the orders sought under a Certificate of Urgency was based inter alia on the grounds that execution had already been commenced by Hegeons Auctioneers and the Appellant's motor vehicle KDM 420U Mazda CX5 had already been impounded and advertised for sale. Interim orders of injunction were issued in favor of the Applicant on the said 26th March 2025.
37. The Applicant gave reasons for the delay in filing the appeal as already herein summarized which reasons I have considered. Primary to the court determining whether the order of stay and the other subsequent orders herein ought to be granted, the immediate issue that the court should determine is whether the delay by the applicant in moving the court is inordinate.
38. What amounts to inordinate delay was considered in the case of Nairobi HCC No. 32 of 2010, Utalii Transport Company Limited & 3 Others v NIC Bank Limited & another [2014] eKLR and the Court in determining what amounted to inordinate delay had this to say;
- “Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable”
39. The above said, in considering the mandate of the Small Claims Court as being the expeditious disposal of cases and in light of the procedural safeguards that have been built into the relevant statute to ensure that this mandate is realized at all times in the hearing and determination of cases before these courts in a maximum period of six months, I am of the very well-considered opinion that the reasons given by the Appellant in seeking to appeal a decision of the small claims court over five months after a determination has been made amounts to a delay that is in all aspects and respects inordinate.
40. The Appellant Counsel as can be gleaned from the above summary of what transpired before the Small Claims Court were at all times aware of what was going on in court, even to the point of the delivery of the judgement which they say they filed an application to arrest and which application they also failed to prosecute.
41. They were also aware the Ruling of 16th December 2024 which they say came during their Christmas recess. But even if that were to be the case, the court is alive to the fact that the Christmas period does not extend well into the month of March and so the Respondent's assertion that the Applicant simply failed to act in good even after the delivery of the said Ruling because he did not intend to and only came to court because his motor vehicle had been attached has merit.
42. Further to the above, the Appellant has not at all demonstrated the loss that he will suffer if the orders of stay are not granted and lastly the court is not satisfied that the security that he has offered



is appropriate. I have also perused the grounds of appeal filed and in my considered opinion, they are based purely on facts and not law and therefore do not qualify as grounds upon which an appeal from the Small Claim's Court can be instituted. For the above reasons, I find no merit in the Application for leave to file the Appeal out of time firstly and also the Application seeking for stay of execution. The Application is therefore dismissed in its entirety for want of merit with costs to the Respondent and the interim orders herein issued are now hereby vacated.

READ DATED AND SIGNED AT ELDORET ON 19TH DECEMBER 2025

E. OMINDE

JUDGE

