

Republic of Kenya

In the High court of Kenya at Makueni

Miscellaneous Application number 119 of 2024

Nixon NGUGI WAWERU.....

Applicant

vs

Thomas LEGHA MAGEMBA .....

Respondent

**RULING**

The application before me is the Notice of Motion dated 5th August 2024 brought under order 21 Rule 1B, order 22 rule 22, order 40 rule 6, order 51 rule 1 of the Civil Procedure Rules, section 1A, 1B and 3 A of the civil procedure act, article 159(2) (a) & (d) of the Constitution of Kenya.

The applicant seeks orders that the court be pleased to extend time and grant leave to the applicants/ intended appellants to lodge their memorandum of appeal out of time against the judgment and /or decree entered against them by the honorable GL Okwengu SRM in Kilungu Civil Suit number E120

of 2021, and also stay of execution of the judgment and decree issued by the same court in the same case and further that the court to allow the applicant to furnish it with security in the form of a bank guarantee from a reputable bank pending the full hearing and determination of the appeal.

The grounds for the application are on the face of the application mainly that there was judgment entered on 17<sup>th</sup> January 2024 where the applicant was found to be 100 percent liable and respondent was awarded general damages of Kenya shillings 800,000 and special damages of Kenya shillings 93,250 Plus costs and interest that the applicant was dissatisfied with the judgment and has preferred an appeal on quantum.

That the reason for the delay in filing their appeal and their application was occasioned by the fact that after the judgment was delivered the applicant's insurers were undergoing Managerial structural changes leading to the bank accounts of the insurer being frozen for an indeterminate period of time and hence the time to launch an appeal had already expired.

The application is supported by the affidavit of Nixon NGUGI Waweru the insured of motor vehicle registration number KBU

535A at whose instance the claim herein is being prosecuted. He has annexed a copy of the order freezing the accounts of Direct Line Insurance , the draft memorandum of appeal, and the letter threatening execution.

There are no pleadings by the respondent . There is no replying affidavit or submissions by the respondent.

The applicant filed written submissions dated 30<sup>th</sup> May 2025.

In the submissions it is indicated that by the time of filing the submissions they had not received any replying affidavit from the respondent.

I have carefully considered the application and I have looked at the record.

On 23<sup>rd</sup> August 2024 I issued the first directions for the Notice of Motion to be served upon the respondents within seven days. i.e., by 30<sup>th</sup> August 2024. By the time of filing the submission on 30<sup>th</sup> May 2025 the applicant had not served the respondent. There is no evidence by way of a replying affidavit to demonstrate service of the application or any of the dates the matter came for hearing or mention or even the submissions.

The record demonstrates this;

The matter came from mention on the 14<sup>th</sup> of October and counsel for the applicant told the court that she did not have her file. On the 5<sup>th</sup> of February Waweru appeared holding brief for the applicant and it was stated that they had not received any response from the respondent and asked for a date before the judge. The matter was mentioned on the 24<sup>th</sup> of April where there was no appearance on the part of the respondent and they sought directions for their application. Directions were given and the matter given a mention date on 31<sup>st</sup> March of 2025 . For some reason the matter was not mentioned. It finally came before me on the 26<sup>th</sup> of May 2025 and Miss Muema held brief for Mr. Ouko who sought an extension of time for 14 days to file their submissions, and again directions were given on the 23<sup>rd</sup> of June 2025, Miss Muema appeared holding for Mr. Ouko and there was no appearance for the respondent.

The court sought to find out if they had served and the court was told that they had served that morning but was not sure whether they had served the mention date. The court allowed

for the time for service upon the respondent and gave another date for directions.

The matter came before the DR on the 15<sup>th</sup> of August and Miss Otieno appeared for the applicant informed the court that the matter was to confirm submissions and that they had filed and asked us for a ruling date. The matter was given date for ruling.

I have gone to CTS and have not found a single affidavit of service to confirm that my directions of 23<sup>rd</sup> August 2024 were complied with. I noted that there had been change of advocates from Kimondo Gachoka & Co advocates and to Kairu McCourt and company advocates. However, it is evident that at the time of filing their submissions they did not check to see whether the court's directions were complied with.

There is no way I would proceed to grant orders against the respondent without their getting the opportunity to be heard.

Does the application have merit? The applicant never annexed the alleged Judgment from the subordinate court.

The conduct of the applicant is wanting. For more than a year after getting stay they did not comply with the court's direction.

It was also not evident the relationship between the freezing order and filing the appeal.

In the circumstances, the application is declined for non-compliance with court directions.

Orders Accordingly.

Dated, signed and delivered this 22<sup>nd</sup> December 2025

Mumbua T Matheka

Judge