



REPUBLIC OF KENYA



KENYA LAW
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**Ngugi v Njeru (Civil Appeal E128 of 2025)
[2026] KEHC 655 (KLR) (Civ) (29 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 655 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E128 OF 2025**

**AC MRIMA, J
JANUARY 29, 2026**

BETWEEN

CHARLES IKENYE NGUGI APPELLANT

AND

BENJAMIN MUTAKU NJERU RESPONDENT

RULING

Background

1. Benjamin M. Njeru, Respondent herein, instituted Milimani Small Claims Commercial Case No. E100 of 2025 (hereinafter referred to as ‘the suit’) against Charles Ikenye Ngugi, the Appellant/Applicant. He sought to recover special damages for costs he incurred to repair his motor vehicle after being involved in a road traffic accident, he claimed was caused by the negligence of the Applicant. Despite the Applicant’s denial of responsibility, the trial Court found him wholly liable for the accident. It also established that the Respondent proved special damages of Kshs. 389,070/-.

The Application:

2. In a bid to forestall the execution process, the Applicant, pursuant to Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules as read with section 78(1)(d) of the *Civil Procedure Act*, lodged the instant application by way of a Notice of Motion dated 14th July 2025. It was supported by his Affidavit deposed to on a similar date. He sought the following orders: -
 1. Spent
 2. Spent.



3. That pending the hearing and determination of the appeal filed herein, the Honourable Court be pleased to grant a stay of execution of the Judgment by Hon. J. W. Nasimiyu dated, signed and delivered on the 5th of May 2025 in the Nairobi Small Claims Civil Case No. E1001 of 2025.
4. That cost of this application be provided for.
3. In the grounds and Affidavit in support of the application, the Appellant centred his appeal on the financial prejudice he faced, the imminent commencement of execution proceedings, and the claimed merit of the appeal. The Applicant asserted he has an arguable appeal that will be rendered nugatory if the stay of execution is not granted. It was his case that in the impugned judgment, special damages were not strictly proved as required by law. The Applicant further stated that the trial Court erred by misinterpreting and misapplying Section 32(1) and (2) of the *Small Claims Court Act* No. 2 of 2016 and by ignoring clear evidence that the alleged damages were attributable to the Respondent not the him.
4. Regarding risk of prejudice, Applicant argued that if the appeal is successful and he would have already paid the Kshs. 424,070.00/=, he is apprehensive that he will be unable to recover the sums from the Respondent. He claimed that it would subject him to further long, expensive litigation, causing great prejudice. In the end, he asserted that he had instituted the application timeously and urgently.

The Submissions:

5. The Appellant filed written submissions dated 25th July 2025. It was his case that he had satisfied the three conditions for granting a stay of execution under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. He claimed that he is likely to suffer irreparable and substantial loss if compelled to pay the colossal and punitive judgment amount and that execution would lead to irreversible actions, rendering the appeal nugatory. The Appellant stated that should the appeal succeed, he may be unable to recover the sums if paid. He relied on various authorities, among them the decision in Kenya Shell Limited -vs- Benjamin Karuga Kibiru & another KECA 94 (KLR) where it was observed that that substantial loss is the cornerstone of the jurisdiction for granting a stay. The Applicant cited the authority in RWW - vs- EKW (2019) eKLR to assert the position that the purpose of stay is to preserve the subject matter so the appeal is not rendered nugatory.
6. As regards delay, it was his case that the application had been instituted timeously, consistent with Order 42 Rule 6(2)(a) of the Civil Procedure Rules. He posited that the impugned judgment was delivered on 5th May, 2025, and the application was filed on July 14, 2025 and as such, he moved promptly once the threat of execution became imminent. It was his case that the delay, if any, is not egregious and has been explained. On the need for security for due performance, a requirement under Order 42 Rule 6(2)(b), it was his case that the Court has the discretion to set reasonable and just security terms. And is willing to abide by any order as to security that the Court may direct.
7. In rebutting the Respondent's argument that the main appeal was filed out of time, a requirement under Section 79G of the *Civil Procedure Act*, it was his case that this Court has inherent jurisdiction under Section 3A of the *Civil Procedure Act* to make orders for the ends of justice. He claimed that the delay was not inordinate or occasioned by dilatory tactics, and dismissing the appeal on this technicality would deny him the constitutional right to access justice, especially given the substantive legal issues raised in the appeal.



The Respondent's case:

8. Joseph Mokuia Manyara, an Advocate of the High Court, swore an affidavit on 17th July 2025, on behalf of the Respondent, in opposition to the application. From the outset, he deposed that the appeal, was filed out of time. It was his case that the Memorandum of Appeal is dated 14th July 2025, which is more than 60 days after the judgment, contrary to Section 79G of the *Civil Procedure Act*. He stated that the trial Court granted a 30-day stay of execution, which was considered ample time to lodge an appeal.
9. He noted that The Appellant/Applicant had not filed a separate application seeking leave from the Court to file the appeal out of time, which requires citing sufficient cause for the delay. It was his case that on this ground alone, the application and the entire appeal should be dismissed. He deposed further that the Appellant is using the appeal as a delay tactic to frustrate the Respondent's effort to enjoy the fruits of his judgment. He claimed that the appeal was filed only after the extraction of the warrants of attachment of movable property, which were issued on 23rd June 2025, suggesting it is an afterthought. He stated that the application and appeal raises no triable issues since the subordinate Court relied on invoices and payment receipts produced by the Respondent to arrive at the special damages. He asserted that the trial court underwent a full trial process where evidence was adduced, the Respondent was cross-examined, and documents were adopted in line with the *Small Claims Court Act*.
10. As regards the requirement for security it was his claim that should the Honourable Court be inclined to allow the appeal to be filed out of time, the Appellant should be ordered to deposit the decretal sum of Kshs. 439,163.78 as security as required order under Order 42 rule 6 (2) of the Civil Procedure Rules, 2010, to ensure due performance of the decree.
11. In conclusion the Respondent prayed that the Orders sought in the application be dismissed with costs for being frivolous and an abuse of the Court process

The Submissions:

12. The Respondent urged his case further through written submissions dated 28th July 2025. He largely reiterated the deposition on his advocates' affidavit and maintained that the application and the entire appeal should be dismissed
13. On the failure to seek leave to appeal out of time, the Respondent submitted that the case was a legal nullity. He drew support from the Supreme Court decision in Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 others [2014] eKLR where it was observed that filing an appeal out of time without first seeking and obtaining leave of the Court renders the document a nullity and of no legal consequence. In a bid to lend credence to the claim of abuse of court process, the Respondent alleged that the Appellant only conjured up the appeal after being served with the Decree and warrants of attachment with a view to arbitrarily delaying execution.
14. The Respondent submitted that if the Court were inclined to allow the appeal to be filed out of time (even without an application for leave), the Appellant should be ordered to deposit the decretal sum of Kenya Shillings Four Hundred and Thirty-Nine Thousand, One Sixty-Three and Seventy-Eight Cents (KES. 439,163.78/-) as security in the Honourable Court pursuant to Order 42 rule 6(2) of the Civil Procedure Rules. Drawing on the case of Gianfranco Manenthi & Another -vs- Africa merchant Assurance Co. Ltd [2019] eKLR\$, the Respondent emphasized that the objective of security is to ensure the successful litigant can enjoy the fruits of the judgment if the appeal fails, and to prevent litigants from delaying execution through vexatious and frivolous appeals.



15. Ultimately, the Respondent prayed that the Court dismiss the application and the entire appeal with costs.

Analysis:

16. Based on the pleadings, affidavits, and parties' rival submissions, two primary issues emerge for determination, namely;
- i. Whether the appeal is competent, and by extension, whether the Notice of Motion dated 14th July 2025, is properly before the court.
 - ii. Depending on (i) above, whether the Appellant/Applicant has satisfied the conditions for the grant of a stay of execution under Order 42 Rule 6(2) of the Civil Procedure Rules.
17. A consideration of the above issues now follow.

(a) Whether the appeal and the application are properly before this Court:

18. The Respondent raised a preliminary issue regarding the validity of the appeal itself. This is a jurisdictional question that must be resolved before the merits of the stay application can be considered. It is common ground that the impugned judgment was delivered on 5th May 2025 and that the Memorandum of Appeal was filed on 14th July 2025. A calculation of the time reveals a delay of 70 days. Since the appeal arose from a decision of the Small Claims Court, the jurisdiction of the High Court to deal with appeals from that Court is donated by Section 38 of the *Small Claims Court Act* as read with Rule 30 of the Small Claims Court Rules. The law provides that appeal to this Court shall be in accordance with Order 42 of the Civil Procedure Rules.
19. Section 79G of the *Civil Procedure Act* provides the 30-day timeline for filing an appeal. The Respondent contended that the 70-day delay was well outside the statutory limit. The Respondent's reliance on the Supreme Court authority in *Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR is central. That case established that the timely filing of an appeal is not a procedural technicality but a fundamental step. Essentially, an appeal filed out of time, without a valid order (leave) extending time, is a nullity. In the case the learned Supreme Court Judges approvingly made reference to the decision of the Supreme Court of California in the case of *Silverbrand -vs- County of Los Angeles* [2009] 46 Cal. 4th 106 where the following was said;
- “As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite.
- Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal.”
- (Sic) The purpose of this requirement is to promote the finality of judgements by forcing the losing party to take an appeal expeditiously or not at all.”
20. Whereas the Appellant acknowledged the delay in the submissions, he urged this Court to invoke its inherent jurisdiction under Section 3A of the *Civil Procedure Act*. However, this Court is cautious to note that the inherent jurisdiction contemplated under Section 3A cannot be invoked to override an express statutory provision of Section 79G of the *Civil Procedure Act*. A time limit for filing an appeal set by a statute is not a mere procedural technicality. It is a substantive and mandatory requirement that



goes to the very root of a court's authority to hear the matter. In this Court's assessment, the proper procedure was for the Appellant to, alongside the stay application, contemporaneously seek orders for leave to enlarge time to lodge the appeal and lay a basis to the satisfaction of this Court why discretion to extend time should be exercised in its favour.

21. A litigant must not take it for granted that a Court will as a matter of right extend time without laying a basis. In *Michael Kinyanjui Mbuthia -vs- John Kamau Nganga HCCA 322 of 2008*, the Court was categorical that an appeal filed out of time could only be deemed duly filed if leave of Court is sought to that effect. In the *Nick Salat case (Supra)* the learned Supreme Court Judges fortified the foregoing in the following terms: -

“...it is incumbent on the Applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default. (emphasis added).

22. Therefore, in absence of such an application, the Appellant's appeal, having been filed 70 days after judgment without any justification or explanation and without an application for leave to file it out of time, is fatally defective. The delay, without any reason, is indicative of lack of diligence and is an abuse of Court process. Following the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat -vs- IEBC & 7 others (supra)*, this Court must find that the Memorandum of Appeal filed on 14th July 2025, is a nullity and of no legal effect.

23. This Court must also note that the whole objective of establishing the Small Claims Court is to expedite the resolution of disputes. The Learned Apex Judges in the above case observed thus;

.... Time is a crucial component in dispensation of justice, hence the maxim: Justice delayed is justice denied. It is a litigants' legitimate expectation where they seek justice that the same will be dispensed timeously. Hence, the various constitutional and statutory provisions on time frames within which matters have to be heard and determined.

24. It follows, therefore, that the application for a stay of execution is brought pending the hearing and determination of an incompetence appeal filed. Since the appeal is a legal nullity, then here is no valid appeal pending before the Court. In the premises, the application for a stay cannot be granted in a vacuum. The orders for stay are ancillary orders that must be anchored to a competent appeal. Inevitably, the Notice of Motion dated 14th July 2025, is itself incompetent and must fail.

25. Given the above findings, the Court has no jurisdiction to proceed to the second stage of analysing the merits of the stay application under Order 42 Rule 6. The conditions therein are only considered when a competent application is pending before the Court. As the underlying appeal is a nullity, then the application for a stay lacks any legal to stand on.

Disposition:

26. Based on the foregoing analysis, the following orders hereby issue:
- (a) The preliminary point raised by the Respondent succeeds and consequently, the Memorandum of Appeal dated 14th July 2025, having been filed out of the statutory time limit without leave of the Court, is incompetent and a nullity.
 - (b) The Appellant/Applicant's Notice of Motion dated 14th July 2025, is consequently incompetent and is hereby struck out.



- (c) The interim orders of stay of execution are hereby discharged.
- (d) Costs to the Respondent.
- (e) This matter is hereby marked as closed.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF JANUARY, 2026.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Mr. Wandabu, Learned Counsel for the Appellant

Mr. Mukira for Manyara, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.

