

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E314 OF 2024

BETWEEN

**MADISON GENERAL INSURANCE KENYA LTD.....
APPLICANT**

VERSUS

**SIMON MUTISO KINGOO
RESPONDENT**

RULING

1. This Ruling is in respect of the Appellant's/Applicant's Notice of Motion dated 22nd May 2025, which seeks the following orders that;
 - a. Spent
 - b. Spent
 - c. This Honourable court be pleased to extend time and grant leave to the Appellant/Applicant to lodge an appeal out of time against the entire judgment delivered on 15/2//2024 by Hon. Paul Matanda Wechuli (Mr.), P.M in PMCC No. E071 of 2020 Madison General Insurance Kenya Limited versus Simon Mutiso Kingoo.
 - d. Upon such leave being granted the Appeal herein vide the Memorandum of Appeal dated 29/11/2024 and filed

on 3/12/2024 be admitted out of time and deemed duly filed and served.

e. Costs of this Application be in the cause.

2. The application is premised on the 11 grounds set out on the face of the Notice of Motion which are amplified in the Applicant's supporting affidavit sworn on 22nd May 2025 by Moses Barasa, the Legal Officer in the employ of the Applicant Company.
3. In the said affidavit, the deponent avers that he testified as a witness in Kithimani PMCC No. E071 of 2020, Madison Insurance Company Kenya Limited v Simon Mutiso King'oo, where monetary judgment was delivered against the Applicant on 15th February 2024.
4. Upon delivery of the judgment, he states that he sought further instructions on the way forward from M/s Madison Insurance Company Kenya Limited and, while awaiting those instructions, the matter was inadvertently closed and the file archived, resulting in the lapse of the statutory 30day period for lodging an appeal. He further depones that on 29th November 2024, he reached out to the advocates on record to follow up on the appeal instructions, whereupon he was informed of the oversight in archiving the file.
5. Consequently, the appeal was lodged on 3rd December 2024, and, out of an abundance of caution that the Respondent would likely raise an objection that the appeal was time-

barred, the present application was filed. He additionally avers that the appeal raises arguable issues with high chances of success and annexes a copy of the Memorandum of Appeal in support. He states that the Respondent has extracted a decree in the trial court and, on 22nd April 2025, issued a notice of intended execution for the decretal sum of Kshs. 1,065,020/= . He believes that the Applicant will suffer prejudice, irreparable loss, and damage if the orders sought are not granted.

6. The application was opposed by the Respondent through a Replying Affidavit sworn on 17th June 2025. The Respondent deposed that judgment was delivered on 15th February 2024 in the presence of the Applicant's advocate and, therefore, the assertion that the file was inadvertently closed and archived does not arise. He further states that even if the primary file had been closed, most law firms operate a bring-up system to track files requiring action, and thus the Applicant's averments are an afterthought. He avers that from 15th February 2024, nine months lapsed before the instant appeal was lodged, which amounts to indolence, and that the onus lies with a litigant or client to follow up on their matter. With regard to the draft Memorandum of Appeal, the Respondent contends that there is no proof that it was paid for and that it remains a mere abstract. He further states that the alleged Memorandum of Appeal

dated 29th November 2024 and filed on 3rd December 2024 took the Applicant an additional four months, and, more importantly, that it was not until service on 22nd April 2025 of the notice of intention to execute that the Applicant filed the present application for stay, another 30 days after service of the decree which, he argues, further demonstrates indolence on the Applicant's part.

7. Pursuant to directions issued by this Court, stay of execution was granted on 23rd May 2025 pending the hearing and determination of the application, and parties were directed to file written submissions. The Applicant filed submissions dated 29th September 2025, while the Respondent's submissions are dated 30th September 2025.

Applicant's submissions

8. The Applicant, in his submissions, began with a brief introduction and reiterated the grounds set out in support of the instant application. He submits that the events giving rise to the delay are regretted and apologies are tendered. He further contends that the intended appeal is strong and arguable, principally on the basis that the trial court allegedly misapprehended material evidence particularly regarding whether the Defendant, now the Respondent, was using a hired motor vehicle and failed to sufficiently

consider the investigation report and the corroborating testimony of the Respondent's own witness.

9. On the issue of leave and extension of time to appeal, the Applicant relies on Section 79G of the Civil Procedure Act and submits that there exists a reasonable and satisfactory explanation for the delay in filing the appeal. He argues that the 30day statutory period lapsed on 16th March 2024 and, while the Applicant's advocates awaited instructions from the instructing client, the file was inadvertently closed and archived. By the time instructions were confirmed, a delay of nine months had elapsed, running from the expiry of the appeal period to 29th November 2024.
10. The Applicant submits that mere presence of counsel at the delivery of judgment does not negate the need for corporate instructions and internal clearance before lodging an appeal, especially in insurance related matters. He maintains that the inadvertent closure of the file has been sufficiently explained on oath by the Applicant's legal officer, and there exists no basis for disbelieving the explanation in the absence of clear evidence of malice or deliberate delay. The Applicant therefore asserts that the explanation amounts to "good and sufficient cause" within the meaning of Section 79G of the Civil Procedure Act. While relying on **Namak Sacco Limited v Mutungi (Civil Misc. E002 of 2023) [2024] KEHC (KLR) (11 March**

2024) (Ruling), the Applicant urges this Court to find favour with the explanation, extend the benefit of doubt, and notes that the Respondent has not demonstrated that he will suffer irrecoverable or any prejudice should leave and extension of time be granted.

11. On stay pending appeal, the Applicant relied on Order 42 Rule 6 of the Civil Procedure Rules in submitting that the court is enjoined to balance the interests of the parties and to see to it that an appeal is not rendered nugatory due to hardship and or inability of recovery or restitution of a successful Appellant. The Applicant submits that they express considerable reservations and genuine, well founded apprehensions about the Respondent's ability to refund any payments in the event of a successful appeal since his ways and means are unknown. The Applicants have submitted that they are ready and willing to deposit the judgment sum in escrow in an interest earning bank account in the names of the two law firms for the parties hereto and that this would suffice as reasonable security pending either appeal or such further orders of court.

12. In conclusion the Applicant urged the application be allowed and that the Memorandum of Appeal can either be deemed duly filed or can be filed separately within the next seven days.

Respondent's submissions

13. The Respondent commenced her submissions by providing a brief background to the present application. The Respondent submitted that on the date of delivery of the judgment where the trial court declared that the Defendant is entitled to compensation under the policy cover for the loss of KBC 604J and an order that the Plaintiff is liable to compensate and or indemnify any tort claims by third parties that arise out of use of the insured Motor Vehicle Registration Number KBC 604J, counsels for the parties were present and no stay of execution of the judgment was sought. The Respondent submits that it was only on 3rd December 2024 after nine months that the Appellant purported to file an appeal against the said judgment delivered on 15th February 2024. The Respondnet also submits that no motion seeking any order for stay of execution was filed in tandem with the purported filing of the appeal. Further that the Respondent never sought leave to file appeal out of time.

14. The Respondent submitted on two issues for determination that is whether the application and appeal should be struck out in limine and whether the court should extend time within which the appeal ought to be filed.

15. On the first issue, the Respondent made reference to Section 79G of the Civil Procedure Act in submitting that what the Applicant is purporting to do by filing this instant

application is to invite the court to acquiesce and aid blatant breach of the law and breathe life to an appeal that was dead at inception. While referring to the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commissions & 7 others [2014] eKLR** and the case of **Neeraj Jayatilaiya Kalaiya versus Cheruiyot & 5 others (Environment & Land Case E394 of 2021) [2022] KEELC 2669 (KLR) (23 June 2022) (Ruling)**, the Respondent submits that any document filed out of time without leave of court is a nullity and the court cannot validate the same and ought to be struck out. Therefore, the Respondent submits that the instant application having been filed within an appeal that has been filed out of time without leave of sought ought to fail and be struck out in limine together with the appeal as they are both a nullity in law.

16. On the second issue on whether the court should extend time within which the appeal ought to be filed, the Respondent made reference to the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commissions & 7 others [2014] eKLR**, the case of **Thuita Mwangi versus Kenya Airways Limited [2003] eKLR**, the Respondent submits that the appeal is untenable, lacks merit, and fails to raise any serious triable issues with a reasonable chance of success. No arguable appeal can arise from proceedings that took over nine

months to formulate, particularly where the Appellant had clear grounds to challenge the trial court's judgment but instead chose to delay. The Respondent contends that the Appellant is merely clutching at straws in an attempt to avoid settling the decretal sum.

17. On the issue of delay, the Respondent submits that the Applicant has not provided a reasonable explanation for the failure to institute the appeal within the statutory period. The claim that the advocate archived the file is a red herring, bearing no correlation to the Applicant's failure to lodge the appeal in time.
18. On the issue of stay, the Respondent made reference to the case of **Odinga & Another v Independent Electoral and Boundaries Commission & 2 others; Aukot & Another (Interested Parties); Attorney General & Another (Amicus Curiae) (presidential Election petition 1 of 2017) [2917] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (with dissent- JB Ojwang & N Ndungu, SCJJ)**, the and proceeded to submit that parties are bound by their pleadings and therefore the court cannot traverse outside what has been pleaded to grant what has not been sought noting that the prayer sought by the Applicant is for interim stay of execution of the decretal sum pending the hearing and determination of the application.

19. In conclusion, the Respondent submitted that the court the applicant's appeal and application dated 22nd May 2025 are frivolous, fatally flawed, bad in law and the same should be dismissed with costs to him.

Analysis and Determination

20. I have considered the affidavits by parties and submissions made in respect of the motion and the issues arising for determination are;

- a. Whether the Applicant should be granted leave to appeal out of time.**
- b. What orders should this court issue.**

Whether the Applicant should be granted leave to appeal out of time

21. The legal provision for leave to appeal out of time is Section 79G of the Civil Procedure Act which states as follows: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for 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."

22. Section 95 of the Civil Procedure Act states as follows;

"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."

23. The principles for granting an application for leave to appeal out of time are now well settled. In the case of Nicholas Kiptoo Arap Salat (Supra), it was held that:

"... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

"... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

- a. “extension of time is not a right of a 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 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-to- case basis;**
- d. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;**
- e. whether there will be any prejudice suffered by the respondents, if extension is granted;**
- f. whether the application has been brought without undue delay;”**

24. In the case of **Odera Obar & Co Advocates v Acquva Agencies Limited (2021) eKLR** where the court held as follows:

“The law does not set out any minimum or maximum period of delay. All it states is that the delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable”

25. The Court of Appeal in **Thuita Mwangi v Kenya Airways Ltd [2003] KECA 201 (KLR)** summarised the familiar matrix of relevant factors to be considered: length of the delay; reason for the delay; prospects of success of the appeal; and the degree of prejudice to the respondent.
26. To begin with, it is settled law that an appeal filed out of time without prior leave is incompetent and amounts to a nullity. The proper course is to seek extension of time before lodging the appeal. Filing an appeal first and only thereafter seeking leave is procedurally irregular and, strictly speaking, wrong. See the case of **Nicholas Kiptoo Arap Korir Salat (Supra)** That said, this court will invoke Article 159(2) (d) of the Constitution and will determine the applications for extension of time despite the irregular sequence.
27. Guided by the above authorities, it is clear that in an application for extension of time, the Applicant must explain the delay in filing the appeal to the satisfaction of the court. The court will evaluate and determine whether the applicant offers a credible explanation and demonstrates an arguable appeal with prospects of success sufficient to justify the court's indulgence.
28. The Applicant's pleaded reason for delay is that, having been a witness at trial, and after judgment was delivered on 15th February 2024, its instructing office "inadvertently

closed and archived the file.” The oversight was only discovered later, leading to delay in instructing counsel and lodging the appeal. The applicant state that the appeal was lodged on 3rd December 2024 and that this application was filed because the Applicant anticipated an objection that the appeal was filed out of time.

29. The Respondent contests this account, noting that the applicant’s counsel was present when judgment was delivered. He argues that the explanation is a mere afterthought. The Respondent insists that the Applicant bore a duty to instruct its advocates promptly and prosecute the appeal diligently.

30. On the length of delay, the period from 16th March 2024 until 3rd December 2024, when the Memorandum of Appeal was lodged, a period of about nine months, the Applicant relies on inadvertence and internal administrative oversight which included file closure and archiving. The Court must weigh this against contemporaneous conduct.

31. The Respondent emphasizes that the Applicant’s counsel was present when judgment was delivered, an occasion that would ordinarily prompt immediate instructions on whether to appeal. The Applicant, however, explains in its affidavit that instructions were being sought from the corporate client and that, during this process, the file was inadvertently archived while awaiting clearance.

The explanation offered is not inherently implausible. In the absence of evidence of mala fides, the Court accepts the account as a genuine administrative lapse rather than a deliberate delay.

32. On the arguability of the appeal, The Applicant relies on asserted misapprehension by the trial court of material evidence, in particular; whether the vehicle was a hired motor vehicle and the trial court's treatment of the police investigation report and certain corroborating testimony. I have perused the draft Memorandum of Appeal which raises both factual and legal issues which the Applicant now seeks to have ventilated on appeal. While I express no concluded view on the merits at this interlocutory stage, I am satisfied that the proposed grounds are not frivolous on their face as they raise matters of fact and of law which, if established, could have a material bearing on the outcome. This factor therefore weighs in favour of exercise of the court's discretion to enlarge time.

33. The Respondent argues that it has already extracted a decree and is pursuing execution of the decretal sum. It submits that undue delay has harmed it and that the Applicant's conduct smacks of indolence. In the present case there is no evidence that the Respondent will be irretrievably prejudiced if leave is granted. The Applicant has indeed offered to deposit the judgment sum in an interest-earning escrow account in the joint names of both

parties' counsel which signals willingness to provide security.

34.I find that the Applicant has furnished a plausible explanation of inadvertence together with a draft Memorandum of Appeal which raises arguable points that merit appellate scrutiny. Prejudice to the Respondent can be adequately addressed by an order for security for costs. Accordingly, exercising the discretion conferred by Section 79G and Section 95 of the Civil Procedure Act, I am satisfied that it is just and equitable in the circumstances to grant the applicant leave to lodge the appeal out of time subject to the following orders;

- a. The Applicant is granted leave to file an appeal out of time. The appeal to be filed within 14 days.
- b. Leave to appeal granted above is on the condition that the Applicant provides security for the decretal sum within thirty (30) days from the date of this Ruling by depositing Kshs 1,065,020/= into an interest-earning account in the joint names of both advocates for the parties
- c. the applicant to provide to the Court and to the Respondent evidence of such deposit.
- d. The costs of the application shall be accorded to the respondent.

Orders accordingly.

Dated, signed and delivered at Machakos this 12th day of February, 2026

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant

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