

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

MISCELLANEOUS CIVIL APPLICATION NO. E202 OF 2025

MAGDALINE WANJIKU

MUCHOKI.....1ST APPLICANT

BIG TWO STARS AUTO SPARES.....2ND

APPLICANT

VERSUS

SIMON MUGWE CHEGE.....

.....RESPONDENT

R U L I N G

Brief facts

1. The application dated 28th October 2025 seeks for orders of leave to file an appeal out of time against the judgment of Thika CM Court Civil Case No. E075 of 2021 delivered on 21st August 2025. The applicants further seek for orders of stay of execution of the said judgment pending hearing and determination of the appeal.
2. The 1st respondent opposed the application and filed grounds of opposition dated 5th November 2025.

Applicants' Case

3. The applicants state that on 12st August 2025, the court below delivered judgment in Thika CMCC E075 of 2021 in favour of the respondent. The applicants aver that they sent an email to their

insurer through their advocates which was not delivered and they only learnt of the inadvertent delivery failure when they wrote a follow up email reminding them of the judgment and their attendant obligations therein.

4. The applicants state that they are aggrieved by the decision of the trial court and wish to appeal the judgment on quantum which appeal is competent and has appreciable chances of success. The applicants argue that the delay in filing the appeal was not intentional as the error was honest and inadvertent mistake on the part of the advocates on record.

5. The applicants argue that there is no legal impediment barring the respondent from pursuing execution of the judgment much to their detriment as they are exposed to irreparable loss. The applicants further state that the respondent is a person of unknown means and thus if the judgment sum is paid, there is no telling if the respondent shall be in a position to refund the same.

The Respondent's Case

6. The respondent states that the application has been brought after inordinate delay as judgment was delivered on 21st August 2025 which is over two months ago. Further the applicants have not given good and

convincing reasons why the application should be allowed. The respondent states that the application is highly prejudicial to him. However, in the event that the application is allowed, the respondent prays that the court orders the applicants

to pay him half the decretal sum of Kshs. 708,052/- and deposit the other half in court within 14 days as the intended appeal is based on quantum solely.

7. Parties put in written submissions.

The Applicants' Submissions

8. The applicants rely on the case of **Leo Sila Mutiso vs Rose Hellen Mwangi [1999] eKLR** and submit that they have candidly, sufficiently and plausibly explained the delay. Further, the failure to file the appeal within time was not deliberate, contumelious or actuated by indolence but was occasioned by an inadvertent mistake of counsel in the transmission of an email notifying the insurer of the delivery of judgment.

9. The applicants further refer to the decisions in **Philip Chemwolo & Another vs Augustine Kubende [1982-88] 1 KAR 103** and **Belinda Murai & Others vs Amos Wainaina [1978] eKLR** and submit that a litigant should not be condemned unheard an account of a genuine mistake of counsel. The applicants argue that the delay was inordinate and once the error was discovered, they

moved the court with reasonable promptitude and utmost good faith.

10. On the arguability of the intended appeal, the applicants argue that the draft memorandum of appeal raises substantial questions on the assessment of quantum including whether the learned trial

magistrate applied the correct principles and whether the award made was manifestly excessive in the circumstances.

11. Relying on the case on **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR**, the applicants submit that they have demonstrated that execution may issue at any moment. Further, the respondent is a person of unknown means and there is no assurance that any sums paid would be recoverable should the appeal succeed, thus the intended appeal shall be rendered nugatory. To support their contentions, the applicants rely on the case of **National Industrial Credit Bank Limited vs Aquinas Francis Wasike & Another [2006] eKLR**.

12. The applicants submit that they have brought the instant application timeously and they are ready and willing to abide by any reasonable conditions on security that the court may impose.

The Respondent's Submissions.

13. The respondent relies on the cases of **Lukas Ng'ang'a Ndungu vs Emmanuel Kiluu Mutua (Civil Appeal No. E047 OF 2024) [2024] KEHC 6276 (KLR) (6 June 2024) (Ruling)** and submits that the instant application is incompetent, has been brought after inordinate delay, an abuse of the court process and ought to be dismissed.

The Law

Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;

14. **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.

15. 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.

16. 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.

17. 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.”

18. Judgment herein was delivered on 21st August 2025 and the applicants filed the current application on 28th October 2025. This is about two months outside the time limited for filing an appeal. The applicants have attributed the delay in filing their appeal on the ground that their advocates sent an email to their insurer which email was never delivered as they came to learn later.

19. The applicants blames their advocates for sending an email to the insurance company which was never delivered. On perusal of the record, the applicants have not annexed any evidence from their advocates to show that an email was sent to the insurance company and that it bounced. Furthermore, the advocates must have received evidence of the bounced email on their end. The said applicant did not annex an affidavit of his advocates to that effect. It is evident that the applicants have not annexed any evidence to support their allegation or claim of a bounced email. The other issue that arises is whether the applicants ever followed up their case after judgment. It is trite law that it is not enough for a party in litigation to simply blame the advocates on record for all manner

of transgressions. Parties have the responsibility to follow up their cases even though they may be represented by a counsel. +

20. The reliance placed on the inaction by counsel to lodge an appeal is not sufficient cause for this court to exercise its discretion in favour of the applicants. Accordingly, it is my considered view that the applicants have not given any plausible explanation on the reasons for delay.

21. On the perusal of the intended Memorandum of Appeal and the judgment of the trial court, it is my considered view that the appeal does not raise pertinent issues of law. It is therefore, evident that the chances of success of the intended appeal are limited, in my view.

22. In the circumstances it is my considered view that the applicants have not established to the satisfaction of the court that time should be enlarged to enable them file an appeal.

23. Having declined to grant the prayer for extension of time to appeal, the prayer for stay of execution of the trial court's judgment and decree automatically fails since there is no existent appeal.

24. It is thus my considered view that the application dated 28th October 2025 lacks merit and is hereby dismissed with costs to the respondent.

25. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED
AT THIKA THIS 5TH DAY OF FEBRUARY 2026.***

F. MUCHEMI

JUDGE