

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL APPEAL NO. 080 OF 2025
BENARD NGETICH
KIPKORIR.....APPELLANT

VERSUS

JOHN
KORIR.....RESPONDENT

RULING

1. Before this Court for determination is a Notice of Motion application dated 26th August, 2025. The Applicant seeks the following substantive orders;

a) Spent.

b) Spent.

c) THAT there be stay of execution of the judgment delivered on 26th May, 2025 together with the decree and all its consequential orders pending the hearing and determination of the intended appeal on condition that the Appellant pays Kshs 50,000 per month to the Respondent effective from 30th September, 2025.

d) THAT this Honourable Court be pleased to grant leave to the Appellant to file an Appeal out of time against judgment delivered by Hon. Kananu on 26th May, 2025 in KERICHO SCCCOM E049 OF 2024 and the filed Memorandum of Appeal be deemed as duly filed and served.

e) THAT IN THE ALTERNATIVE the Appellant be allowed to settle decretal sum of Kshs 800,929.50 in installments of Kshs. 50,000 per month till payment in full.

f) THAT cost of the application be in the cause.

2. The application is supported by the affidavit of BENARD NGETICH sworn on 26th August, 2025 and the grounds on the face of the motion.

3. The Respondent was duly served with the application and hearing notice but did not appear at the hearing nor file any response. The application therefore proceeds undefended.

4. Even in an undefended application, this Court has a duty to satisfy itself that the orders sought are legally available and properly anchored on the pleadings and record before it.

5. Prayer 4 seeks two distinct orders; Leave to appeal out of time against the judgment delivered on 26th May, 2025 and that the filed Memorandum of Appeal be deemed as duly filed and served.

6. Since Prayers 3 and 4 directly reference the appeal and the judgment, this Court has carefully examined the Memorandum of Appeal filed herein. Its contents are as follows;

"The Appellant being aggrieved by the entire decision delivered through a Ruling by Hon. Linda Kananu on 15th August, 2025 do hereby appeal against the said decision..."

7. This Court has carefully considered the Memorandum of Appeal. The following observations are made:

a) ***The introductory paragraph is clear and unambiguous. It states that the Appellant is appealing against the Ruling of Hon. Linda Kananu on 15th August, 2025.***

b) ***Grounds 1, 2, 3, 4, 5, 7, 8, and 9 all directly challenge the ruling of 15th August, 2025 and the trial court's dismissal of the installment application.***

c) ***Ground 6 alleges that the court erred by failing to issue judgment within 60 days. This ground references the judgment.***

d) ***Ground 10 alleges that by issuing the Judgement and Ruling outside the statutory period, the same was rendered a nullity. This ground references both the judgment and the ruling.***

e) ***Prayer (c) expressly seeks an order setting aside the judgment.***

8. The question before this Court is whether the Memorandum of Appeal, read as a whole, constitutes an appeal against the judgment of 26th May, 2025.

9. The Court of Appeal in ***Peter Gichuhi v Joseph Mwangi [2020] eKLR*** held;

"An appeal is instituted by filing a Memorandum of Appeal. The Memorandum defines the scope of the appeal. The introductory paragraph of the Memorandum of Appeal

is crucial as it sets out the decision against which the appellant is aggrieved. This Court cannot entertain an appeal against a decision that is not identified in the Memorandum as the subject of the appeal."

10. In ***Kenya Breweries Ltd v Odongo [2000] eKLR***, the Court held that while a pleading must be read as a whole, the introductory paragraph serves to define and limit the scope of the appeal.

11. This Court adopts the principle that the introductory paragraph of a Memorandum of Appeal is not merely decorative. It serves the crucial function of informing the Court and the respondent of the decision being challenged. Subsequent grounds cannot expand the scope beyond what is stated in the introduction.

12. Applying the above principles to the present case, this Court finds as follows;

a) The introductory paragraph expressly limits the appeal to the Ruling of 15th August, 2025. The Appellant has chosen to appeal against that specific decision.

b) Grounds 6 and 10, while mentioning the judgment, must be read in the context of an appeal against the ruling. They can only be understood as arguments raised in support of the appeal against the ruling.

c) Prayer (c) seeks to set aside the judgment. However, a prayer cannot expand the scope of an appeal beyond

what is defined in the introductory paragraph. If it could, every Memorandum could be used to challenge decisions not mentioned in the introduction.

d) The Memorandum of Appeal, properly construed, is an appeal against the Ruling of 15th August, 2025 only. There is no appeal against the judgment of 26th May, 2025 before this Court.

13. Prayer 4 seeks leave to appeal out of time against the judgment of 26th May, 2025 and seeks that the filed Memorandum of Appeal be deemed as duly filed.

14. This Court has found that the Memorandum of Appeal on record does not challenge the judgment. It challenges only the ruling of 15th August, 2025.

15. There is therefore no Memorandum of Appeal before this Court challenging the judgment. There is no draft Memorandum annexed to the application. There is nothing upon which this Court can grant leave to appeal against the judgment.

16. In ***Richard Nchapi Leiyagu v IEBC [2013] eKLR***, the Court of Appeal held that an application for leave to appeal out of time must be accompanied by a draft Memorandum of Appeal. “The draft Memorandum serves to demonstrate the grounds the applicant intends to raise and allows the court to assess whether the intended appeal is arguable.” No such draft has been presented. This Court cannot grant leave in a vacuum.

17. Further, even if the Court were to consider Grounds 6 and 10 and Prayer (c) as constituting an appeal against the judgment, that appeal was filed without leave. It is incompetent. An appeal filed without leave is a nullity and cannot be validated by subsequent grant of leave.

18. Prayer 4 is incompetent and cannot be granted and is hereby dismissed.

19. Prayer 3 seeks stay of execution of the judgment of 26th May, 2025 pending the hearing and determination of the intended appeal.

20. Order 42 Rule 6 of the Civil Procedure Rules provides for stay of execution pending appeal. However, stay can only be granted in respect of a decree or order that is the subject of an appeal before the court.

21. This Court has found that there is no appeal against the judgment of 26th May, 2025. The appeal before this Court challenges only the ruling of 15th August, 2025.

22. The judgment is not under appeal. This Court cannot grant stay of a judgment that is not the subject of any appeal before it. Thus, prayer 3 is hereby DISMISSED.

23. Prayer 5 seeks, in the alternative, that the Appellant be allowed to settle the decretal sum of Kshs. 800,929.50 in installments of Kshs. 50,000/- per month.

24. In ***National Bank of Kenya Ltd v Samuel Nguru Mutonyi [2019] eKLR***, the Court of Appeal held;

"An application for payment of a decretal sum by installments is an application for execution. It ought to be made in the first instance to the court that issued the decree. The appellate court's jurisdiction in such matters is supervisory, not original."

25. The Applicant previously made this application before the trial court. That application was dismissed in the ruling of 15th August, 2025. The Applicant has now appealed against that ruling. Granting this alternative prayer would bypass the trial court's ruling, render the pending appeal against that ruling moot and allow the Applicant to obtain by way of an interlocutory application what he seeks in the substantive appeal. Prayer 5 is therefore not properly before this Court at this stage and is hereby DISMISSED.

26. Section 27 of the Civil Procedure Act provides that costs follow the event unless the court, for good reason, orders otherwise. The Applicant has sought substantive prayers, all of which have been dismissed. However, the application was undefended, and the Respondent incurred no costs in opposing it. In the circumstances, the just order is that there shall be no order as to costs.

27. Consequently, the notice of motion dated 26th August 2025 is dismissed with no order as to costs.

Dated, signed and delivered at Kericho this 10th day

of March, 2026.

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**J. K. SERGON
JUDGE**

In the Presence of:-

C/Assistant - Rutoh

Miss Olaki for the Applicant

No Appearance for the Respondent