

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT THIKA**

**MISCELLANEOUS CIVIL APPLICATION NO. E214 OF 2025**

**SIMON GITAU MACHARIA.....**

**.....1<sup>ST</sup> APPLICANT**

**PETER MWICHIGI RUTH.....2<sup>ND</sup>**

**APPLICANT**

**VERSUS**

**PETER MUNGAI NDUNGU (Suing through as the legal  
representative of the Estate of JACINTA WAITHERA  
NDUNGU(DECEASED).....**

**.....RESPONDENT**

**R U L I N G**

**Brief facts**

1. The application dated 18<sup>th</sup> November 2025 seeks for orders of leave to file an appeal out of time against the judgment in Gatundu CM Court Civil Case No. E206 of 2022 delivered on 9<sup>th</sup> July 2025 pending the hearing and determination of the appeal.
2. The respondent opposed the application and filed a Replying Affidavit dated 4<sup>th</sup> December 2025.

**Applicants' Case**

3. The applicants aver that Britam General Insurance Co (K) Ltd is the insurer of their motor vehicle registration number KCH 642N. The applicants further state that on 9<sup>th</sup> July 2025, the lower court delivered judgment in Gatundu CMCC E206 of 2022 in favour of

the respondent and awarded him damages in the total sum of Kshs. 2,675,150/- plus costs and interest. Being aggrieved by the said judgment, the applicants state that they instructed their advocates to lodge an appeal on liability however the time to file an appeal has lapsed. The applicants argue that by the time sufficient instructions were obtained from the insurance to appeal, time had run out as the insurance sent the email to appeal on 10<sup>th</sup> November 2025.

4. The applicants state that they are aggrieved by the decision of the trial court and wish to appeal against the judgment on liability which appeal is competent and has appreciable chances of success. The applicants argue that the delay in filing the appeal is not so inordinate or so great as to be inexcusable.

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 said amount.

6. The applicants aver that the insurance is ready to deposit the judgment sum in court as security and to abide by any condition issued by the court.

### **The Respondent's Case**

7. The respondent states that the supporting affidavit is fatally defective for being in violation of Order 19 Rule 3(1) as it is sworn by a person who is not a party to this suit and as such is not able to prove the facts on her own personal knowledge. The deponent of the said affidavit is an advocate of the High Court of Kenya and a Legal Claims officer at Britam General Insurance Co (K) Ltd who is not a party to this suit and swearing such an affidavit exposes her to becoming a potential witness if she was to be subjected to cross examination under Order 19 Rule 2(1) when herself and her employer are not party to the instant suit.
8. The respondent states that the application has been brought after inordinate delay as judgment was delivered on 9<sup>th</sup> July 2025 which is over five months ago.
9. The respondent further states that the applicants have not shown that they will suffer substantial loss if they were to pay the decretal amount and they have not shown that the intended appeal would be rendered

nugatory if the orders of stay of execution are not granted. The respondent further states that they have not assessed costs or extracted a decree from the lower court thus there is no decree capable of being executed. Further the fact that the process of execution is likely to be put in motion by itself does not amount to any substantial loss. It is incumbent upon the applicants to demonstrate any substantial loss that may be occasioned to them by placing material evidence before the court for consideration.

10. The respondent avers that he is a successful businessman based in Olkalou and a commercial farmer and in the unlikely event that the intended appeal succeeds, he would be able and willing to refund any sums required of him.

11. The respondent argues that if the prayers sought are granted he stands to be prejudiced as he would be kept from enjoying the fruits of a valid judgment which he has patiently been waiting for since he was involved in an accident together with his wife, the deceased and he is currently solely responsible for the upkeep of their children and payment of the decretal amount would go a long way in mitigating loss.

12. The respondent further argues that the applicants have not given any plausible explanation on the delay in seeking the orders sought. Further, the respondent states that the applicants ought to pay him half the decretal sum being Kshs. 1,562,546/- and the other half deposited

in a joint interest earning account in the names of both advocates within twenty one days of the court's ruling.

13. The respondent argues that the instant application and intended appeal are an after thought as the applicants are aggrieved on the issue of quantum but their draft memorandum of appeal raises pure issues of liability and furthermore, the current matter is related to Gatundu Civil Suit No. E207 of 2022 where liability was determined at 100% by the trial court and the applicant herein has already settled the claim therein.

14. Parties put in written submissions.

### **The Applicants' Submissions**

15. The applicants rely on **Order 42 Rule 6 of the Civil Procedure Rules** and the case of **Edward Kamau & Another vs Hanna Mukui Gichuki & Another [2015] eKLR** and submit that the decretal sum of Kshs. 2,675,150/- is colossal and the respondent has not filed any affidavit of means or produced any material to prove that he may be able to recompense or refund the decretal sum if the appeal succeeds. The applicants further submit that the delay was not inordinate as the instant application was filed seven days of receiving instructions to appeal the matter.

16. Relying on the case of **Selestica Limited vs Gold Rock Development Ltd [2015] eKLR**, the applicants submit that they are willing to abide by conditions set by

the court on security. Further the respondent shall only suffer prejudice of minimal delay compensable through costs and interest.

17. The applicants further rely on the case of **Edith Gichugu Koine vs Stephen Njagi Thoithi [2014] eKLR** and submit that they have not refused to pay but they are dissatisfied with the judgment of the lower court on the quantum awarded as there was no proof of earnings provided in the lower court yet the trial court proceeded to adopt a monthly earning of Kshs. 15,000/-.

### **The Respondent's Submissions**

18. The respondent relies on the case of **Matuu High School vs Kitema (Misc. App. E105 of 2021 (2022) eKLR** and submits that the instant application is fatally defective for being in violation of Order 19 Rule 3(1) as the same is sworn by a person who is not a party to the suit and is not able to prove the facts on her own personal knowledge thus the application ought to be struck out.
19. The respondent further relies on **Section 79G of the Civil Procedure Act** and the cases of **Omar Shurie vs Marian Rashe Yafar (Civil Application No. 107 of 2020) UR; Nick Salat vs Independent Electoral and Boundaries Commission & 7 Others** (no citation given) and **Susan Ogutu Oloo & 2 Others vs Doris**

**Odindo Omolo (2019) eKLR** and submits that the delay was approximately five months and the applicants did not offer any explanation as to the delay apart from the allegation that the instructions to appeal were received late. Nothing stopped the applicants from filing a memorandum of appeal within the stipulated 30 days as they were duly represented by counsel on 9/7/2025 when judgment was delivered and were aware that any intended appeal ought to have been filed within time. Thus, the explanation by the applicants for the delay is inadequate.

20. Relying on the cases **of Samvir Trustee Limited vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** and **Victory Construction vs BM (A Minor Suing through the next friend one PMM) [2019] eKLR**, the respondent argues that the applicants have

not demonstrated any substantial loss they may stand to suffer if stay of execution is not granted. The respondent further relies on the case of **Mwaura Karuga t/a Limit Enterprises vs Kenya Bus Services Ltd & 4 Others [2015] eKLR** and submits that the applicants ought to pay half the decretal sum being Kshs. 1,562,546/- within fourteen days of the ruling and the balance be deposited in a joint account in the names of both counsels on record.

### **The Law**

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

21. **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.**

22. 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.

23. 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.**

24. 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.”**

25. The respondent took issue with the supporting affidavit for it was not sworn by the applicant. The said affidavit is sworn by one Rosemary Wanjiku Kimani, as Assistant Claims Officer of Britam General Insurance Co. Ltd, The deponent clearly explains in paragraph 3 that she works for the Insurer of the applicant’s vehicle registration number KCH 642 N. The insurance company is liable to pay any compensation to a 3<sup>rd</sup> party in regard to the insured vehicle. This nexus as explained is in my view sufficient and in

order for the said claims officer to swear the affidavit in regard to the intended appeal.

26. Judgment in the trial court was delivered on 9<sup>th</sup> July 2025 in the presence of both advocates. The current application was filed on 18<sup>th</sup> November 2025 which is about two months outside the time limited for filing an appeal. The applicants attribute the delay to the insurance company for giving instructions to appeal on liability late. I have perused the record and noted that judgment was delivered in the presence of both advocates of the parties. The insurer was thus notified of the said judgment as early as the date of judgment which is 9<sup>th</sup> July 2025 but did not give instructions to appeal on time. The insurer has not given any reasons why it took them so long to give instructions to appeal. The email correspondence between the insurer and their advocates show that the insurance company was aware of the judgment and execution as their advocates sent them an email on 27<sup>th</sup> October 2025 inquiring whether the insurance had paid the decretal sum. The delay of two months may not be inordinate but the applicant is obligated to give plausible reasons for the delay. The supporting affidavit does not explain the delay as required by the law.

27. The applicants have attached the intended Memorandum of Appeal and without delving into the merits of the appeal, the grounds raised are not arguable.

Furthermore, the instruction email from the insurance shows that the applicants intend to appeal on the issue of quantum only. But the intended

Memorandum of Appeal shows that the applicants intend to appeal on the issue of liability only. This discrepancy does not portray seriousness on part of the applicant. The question is whether this intended appeal is meant to buy time by blocking execution for some time. As such, I find that the applicants have not established to the satisfaction of the court that time should be enlarged to enable them file their appeal. In the circumstances, the court need not grant orders of stay of execution as it has already determined that the applicants have not demonstrated that orders for leave to appeal out of time should be granted.

28. Accordingly, the application dated 18<sup>th</sup> November 2025 lacks merit and hereby dismissed with costs to the respondent.

29. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED  
AT THIKA THIS 27<sup>TH</sup> DAY OF FEBRAURY 2026.***

**F. MUCHEMI  
JUDGE**