

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
MISC. CIVIL APPLICATION NO. E055 OF 2025

NGURE ONESMUS
MACHARIAH.....APPLICANT

VERSUS

**MARTHER CHEPNGENO ROB & REUBEN KIPKURUI (Suing as
the legal representatives of the estate Of PHILEMON**

**KIPKORIR YEGON -
DECEASED)RESPONDENTS**

RULING

1. Before this Court for determination is a Notice of Motion
Application dated 2nd October 2025 filed by the Applicant,
Ngure Onesmus Machariah.

2. The application seeks the following principal orders:

(a) Spent.

(b) Spent.

***(c) THAT Leave be granted to the Applicant to file an
appeal***

***out of time against the judgment of Hon. T.M. Gesora
(CM)***

***delivered on 19th August 2025 in Kericho CMCC No.
E083***

of 2021.

***(d) THAT there be a stay of execution of the decree in
the***

***said suit pending the hearing and determination of
the***

intended appeal.

(e) THAT the costs of this application be in the cause.

3. The application is supported by the grounds on its face and the Supporting Affidavit of the Applicant sworn on 1st October 2025. It is opposed by the Respondents through a Replying Affidavit sworn by the 1st Respondent, Marther Chepngeno Rob, on 3rd November 2025.

4. The parties filed written submissions. The Respondents filed their submissions on 12th January 2026, and the Applicant filed his submissions on 4th December 2025.

5. The background to this application is as follows:

(a) The Respondents filed suit in the lower court, Kericho

CMCC No. E083 of 2021, seeking compensation for fatal

injuries sustained by the late Philemon Kipkorir Yegon in

a road traffic accident on 14th October 2020.

(b) After full hearing, judgment was delivered on 19th August

2025 in favor of the Respondents for a total sum of Kshs.

1,807,675/=, broken down as:

· Pain and suffering: Kshs. 50,000/=

- **Loss of expectation of life: Kshs. 150,000/=**
- **Loss of dependency: Kshs. 1,500,000/=**
- **Special damages: Kshs. 107,675/=**

(c) Liability was entered at 100% against the Applicant.

(d) The Applicant was granted 30 days stay of execution by the trial court.

(e) Being aggrieved by the judgment, the Applicant sought

instructions from his insurer to appeal.

(f) Instructions to appeal were received on 1st October 2025,

by which time the statutory 30-day appeal period had lapsed (on or about 19th September 2025).

(g) The present application was filed on 2nd October 2025.

6. The Applicant contends that;

(i) The delay in filing the appeal was not deliberate but

caused by delay in transmission of instructions from

his insurer to his advocates.

(ii) The delay of approximately 13 days beyond the appeal

window is not inordinate.

(iii) The intended appeal raises arguable grounds, particularly on liability at 100% and the quantum of damages for loss of dependency.

(iv) If stay is not granted, he will suffer substantial loss as

the Respondents may execute and there is no evidence

they can refund the decretal sum if the appeal succeeds.

(v) He is willing to provide security, specifically proposing

to deposit the entire decretal sum of Kshs. 1,807,675/=

in a joint interest-bearing account in the names of both

advocates.

7. The Applicant relies on the draft Memorandum of Appeal annexed to his Supporting Affidavit as Exhibit "NOM-1" to demonstrate the arguable nature of the appeal.

8. The Respondents oppose the application on the following grounds;

(i) The Applicant was granted 30 days stay by the trial

court but failed to act during that period.

(ii) The reason for delay (late instructions from insurer)

is not plausible.

(iii) The intended appeal has no chances of success; the

trial court's judgment is proper.

(iv) The Applicant has not established substantial loss.

(v) No security has been offered.

(vi) The application is an abuse of court process intended only to delay the Respondents from enjoying the fruits of their judgment.

9. The Respondents rely on the cases of ***Machira T/A Machira & Co. Advocates v East African Standard (No. 2) [2002] KLR 63, Luxus Woods (R) Limited v Patrick Amugune Kamadi [2016] eKLR***, and ***Nicholas Kiptoo Arap Korir Salat v IEBC & Others [2014] eKLR***.

10. Having considered the application, the responses, and the submissions of both parties, the following issues arise for determination;

(a) Whether the Applicant has established good cause to

warrant leave to appeal out of time.

(b) Whether the Applicant has satisfied the conditions for

grant of stay of execution pending appeal under Order

42 Rule 6 of the Civil Procedure Rules.

(c) Who should bear the costs of this application?

11. Section 79G of the Civil Procedure Act provides that an appeal from a subordinate court shall be filed within thirty days. However, the proviso to the section grants this Court discretion to admit an appeal out of time if the appellant satisfies the court

that he had "good and sufficient cause" for not filing the appeal in time.

12. The guiding principles for exercise of this discretion were settled by the Supreme Court in ***Nicholas Kiptoo Arap Korir Salat v IEBC & Others [2014] eKLR*** as follows;

- ***Extension of time is not a right but an equitable remedy***

 - available to a deserving party at the court's discretion.***

- ***The party seeking extension has the burden of laying a basis***

 - to the court's satisfaction.***

- ***The delay must be explained to the court's satisfaction.***

- ***The court considers whether there will be prejudice to the***

 - Respondent.***

- ***The application must be brought without undue delay.***

- ***In certain cases, the court may consider the merits of the***

 - intended action.***

13. The Court of Appeal in ***Thuita Mwangi v Kenya Airways Ltd [2018] eKLR*** added that the court should consider the length of delay, the reason for delay and the chances of the appeal succeeding.

14. The judgment herein was delivered on 19th August 2025. The 30-day appeal period lapsed on or about 19th September 2025. The present application was filed on 2nd October 2025.

15. The delay is therefore approximately 13 days. This Court finds that the delay is not inordinate. It is a short period that can be excused if properly explained.

16. In ***Concord Insurance Company Limited v Susan Nyambura Hinga, Civil Application No. 251 of 2002***, the Court of Appeal held that a delay of 28 days is not inordinate for purposes of an application for extension of time to appeal. The 13-day delay herein is even shorter.

17. The Applicant explains that the delay was occasioned by the time taken by his insurer to transmit instructions to his advocates on record. He states that instructions were received on 1st October 2025, and the application was filed immediately thereafter on 2nd October 2025.

18. The Respondents argue that this explanation is not plausible, especially since the Applicant had 30 days stay from the trial court within which he did nothing.

19. This Court appreciates that in matters involving insurance companies, there is often a chain of communication that may cause delays. The insurer must review the judgment, assess the merits of an appeal, and issue instructions. This process takes time.

20. The Applicant has explained that during the 30-day stay period, he was awaiting these instructions. Upon receipt of instructions on 1st October 2025, he moved to court the very next day.

21. This Court finds the explanation reasonable and plausible. The delay is not attributable to indolence or inaction on the Applicant's part, but to factors beyond his direct control.

22. Further, the court is guided by the constitutional imperative under Article 159(2)(d) of the Constitution to do justice without undue regard to procedural technicalities. While timelines are important, they should not operate to shut out a party from pursuing a legitimate appeal where the delay is short and explained.

23. The Applicant has annexed a draft Memorandum of Appeal marked "NOM-1". The grounds raised are;

(i) The trial magistrate erred in holding the Applicant 100% liable without considering the evidence on record.

(ii) The awards for loss of expectation of life (Kshs. 150,000/=) and loss of dependency (Kshs. 1,500,000/=) are inordinately high.

(iii) The trial magistrate failed to consider the Applicant's submissions.

24. The Respondents submit that the appeal has no chances of success as the trial court's judgment is proper.

25. On this point, this Court adopts the principle in ***Samuel Mwaura Muthumbi v Josephine Wanjiro Ngugi & another [2018] eKLR***, where it was held that an applicant need not demonstrate that the appeal will succeed, but only that it is arguable and not frivolous.

26. An arguable appeal is not one that must succeed, but one that deserves to be heard. The grounds raised herein, particularly on liability and the computation of loss of dependency, are not frivolous. They raise triable issues that warrant ventilation before an appellate court.

27. This Court therefore finds that the intended appeal is arguable.

28. The Respondents argue that they will suffer prejudice if the application is allowed, as they have waited since August 2025 to enjoy the fruits of their judgment.

29. The Court must balance two competing rights, that is, the Respondent's right to enjoy the fruits of a judgment, and the Applicant's constitutional right of appeal.

30. In ***George Kianda & another v Judith Katumbi Kathenge & another [2018] eKLR***, the court cited with approval the holding in ***Wajjee's (Uganda) Ltd v Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188*** that costs can heal any sore in litigation.

31. This Court finds that any prejudice the Respondents may suffer can be adequately compensated by an award of costs or by conditions imposed to protect their interests, such as security for the due performance of the decree.

32. Having considered the length of delay (13 days), the explanation for delay (awaiting insurer's instructions), the arguability of the appeal, and the compensable nature of any

prejudice, this Court finds that the Applicant has established good and sufficient cause to warrant leave to appeal out of time.

33. Accordingly, prayer (3) of the Notice of Motion dated 2nd October 2025 is hereby allowed.

34. Having granted leave to appeal out of time, the Applicant now seeks a stay of execution pending the hearing and determination of the intended appeal.

35. The conditions for grant of stay of execution pending appeal are set out in Order 42 Rule 6(2) of the Civil Procedure Rules:

(a) The court is satisfied that substantial loss may result

to the applicant unless the order is made;

(b) The application has been made without unreasonable

delay; and

(c) Such security as the court orders for the due

performance of such decree or order as may ultimately

be binding on him has been given by the applicant.

36. These conditions are cumulative. All must be satisfied.

37. Judgment was delivered on 19th August 2025. The application was filed on 2nd October 2025. This is approximately 6 weeks after judgment.

38. Considering that the Applicant was awaiting instructions from his insurer, and that upon receiving instructions on 1st October 2025 he filed the application the next day, this Court finds that the application was made without unreasonable delay.

39. The Applicant must demonstrate that substantial loss may result if the stay is not granted.

40. The decretal sum herein is Kshs. 1,807,675/=, which is a significant amount. If execution proceeds and the appeal succeeds, there is a risk that the Respondents may not be in a position to refund the money.

41. In the Replying Affidavit, the Respondents have not demonstrated their financial capacity to refund the decretal sum should the appeal succeed. The burden shifts to the Applicant to show that the Respondent may not be in a position to refund.

42. In ***National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR***, the Court of Appeal held that substantial loss does not merely refer to the amount of money, but to the state of affairs that will irreparably affect the applicant if execution proceeds and the appeal succeeds.

43. This Court finds that the Applicant has demonstrated the risk of substantial loss, as there is no evidence that the Respondents are persons of means capable of refunding the decretal sum.

44. The Applicant's appeal, if successful, would be rendered nugatory if the decretal sum is paid out and cannot be recovered.

45. On the issue of security, the Applicant in his Supporting Affidavit (paragraph 11) stated that he is "willing to abide by any conditions that this Honourable court would deem fit to grant."

46. In his written submissions, the Applicant has made a specific proposal:

"The applicant proposes that the entire decretal sum of Kshs. 1,807,675/= be deposited in a joint interest earning account in the name of both advocates on record within a timeframe specified by this court."

47. The Respondents argue that no security has been offered. However, this Court notes the clear offer made in the Applicant's submissions.

48. The Applicant's willingness to deposit the entire decretal sum demonstrates good faith and provides adequate protection to the Respondents. If the appeal fails, the Respondents will have their money. If the appeal succeeds, the Applicant will be entitled to a refund.

49. This Court finds that the condition of security is satisfied by the Applicant's proposal.

50. Having found that the application was made without unreasonable delay, Substantial loss may result if stay is not granted and the Applicant has offered security to deposit of the entire decretal sum, this Court finds that the Applicant has satisfied the conditions for grant of stay of execution pending appeal.

51. Accordingly, prayer (4) of the Notice of Motion dated 2nd October 2025 is hereby allowed, but subject to conditions as set out by this court.

52. The general rule under Section 27 of the Civil Procedure Act is that costs follow the event. However, in applications of this nature, it is often appropriate to order that costs be in the cause.

53. This Court orders that costs of this application shall abide the outcome of the intended appeal.

53. In the end, The Notice of Motion dated 2nd October 2025 is hereby allowed.

(a) Consequently, leave is hereby granted to the Applicant

to file an appeal out of time against the judgment of

Hon. T.M. Gesora (CM) delivered on 19th August 2025

vide Kericho CMCC No. E083 of 2021 within 14 days from the date hereof.

(b) An Order for Stay of Execution is hereby granted pending the hearing and determination of the intended

appeal, on condition that:

i. The Applicant shall, within forty-five (45) days from the date hereof, deposit the entire decretal sum of Kshs. 1,807,675/= in a joint interest-bearing account in the names of the advocates for both parties, to

be opened and operated jointly by the said advocates.

ii. In default, the order for Stay of Execution shall automatically lapse.

(c) Cost of this application shall abide the outcome of the intended appeal.

Dated, signed and delivered at Kericho this 26th day of February, 2026.

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**J. K. SERGON
JUDGE**

In the presence of:-

C/Assistant - Rutoh

No Appearance for Respondent

Muresia for the Applicant