



Buscar (EA) Ltd v Kahuthia (Dcd - Suing through Harun Njuguna Wanjiku) (Miscellaneous Civil Application E038 of 2025) [2026] KEHC 5121 (KLR) (27 March 2026) (Ruling)

Neutral citation: [2026] KEHC 5121 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
MISCELLANEOUS CIVIL APPLICATION E038 OF 2025**

TM MATHEKA, J

MARCH 27, 2026

BETWEEN

BUSCAR (EA) LTD APPLICANT

AND

**KAHUTHIA (DCD - SUING THROUGH HARUN NJUGUNA
WANJIKU) RESPONDENT**

RULING

Introduction

1. The Application for determination is dated 10/05/2025 and was filed under certificate of urgency. It is brought under Sections 3A, 79G & 95 of the *Civil Procedure Act*, Orders 22 Rule 22, 42 Rule 6, 50 Rule 6 & 51 Rule 1&3 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. It seeks the following orders;
 - a. Spent.
 - b. Spent
 - c. That the impending warrants of attachment, proclamation notice be stayed pending hearing of the Application and the intended appeal.
 - d. That this honorable Court be pleased to extend time and/or grant leave and/or permission to the Applicant to lodge an appeal out of time against the judgment and decree rendered on 27/03/2025 vide Makindu SPMCC No. 167 of 2018.
 - e. That consequent to prayer (c) above being granted, the Applicant be at liberty to file the memorandum of appeal within 14 days and or such shorter period as the honorable court may deem fit and expedient.



- f. That the honorable court be pleased to grant an order of stay of execution of the judgment and decree rendered on 27/03/2025 vide Makindu SPMCC No. 167 of 2018 together with all consequential orders arising therefrom and/or attendant thereto, pending the hearing and determination of the intended appeal.
 - g. That, as a condition for stay of execution pending the hearing and determination of this appeal, the honorable court be pleased to order and or direct the Applicants to provide/issue security for the entire decretal sum in a joint interest earning account in the name of both advocates for the parties.
 - h. That the costs of the Application do abide the intended appeal.
2. The Application is supported by the grounds on its face and the affidavit of Peter Kibe sworn on the same day. He deposed that he is the Operations Manager of the Applicant hence competent to swear the affidavit. That, the trial court judgment was to be delivered on 02/12/2024 but the same was not ready and the court advised that it would be delivered on notice, contrary to the Registrar's guidelines that judgment should never be on notice. That, the judgment dated 27/03/2025 was uploaded in the CTS without knowledge of his advocates where the court awarded 100% liability, 70,000/= general damages, 200,000/= loss of expectation of life, 1,500,000/= loss of dependency and 80,000/= special damages. A copy of the judgment is exhibited as PK.
 3. That, upon checking the CTS, the advocate was surprised to find out that the Respondent had lodged warrants of attachment which were pending signature from the court. The copies of the warrants, proclamation notice and Auctioneers fees are exhibited as PK 1. That, he is desirous of lodging an appeal against quantum and the intended appeal is merited, arguable and raises pertinent point of law thus has overwhelming chances of success. The draft Memorandum of Appeal is exhibited as PK-2.
 4. He deposed that they are ready and willing to abide by such terms and/or conditions as the honorable court may deem fit and expedient. That he is able and willing to provide security for the entire decretal sum by opening a joint interest earning account. That, if the payments are ordered to be made to the Respondent as a condition for stay of execution, then such payments will be utilized and alienated and recovery will be arduous in the event that the intended appeal succeeds.
 5. That, if the orders sought are not granted, then he stands condemned by the trial court judgment and decree which does not appear to be in consonance with the obtaining jurisprudence. That, the Respondent is so keen to execute the decree and that would deny/deprive him access to the various moveable properties which the Respondent intends to dispose.
 6. The Application was opposed through the Respondent's Replying Affidavit sworn on 20/05/2025 where he deposed that the Application is frivolous and an abuse of court process and offends the provisions of Order 42 Rule 6(2)(1) of the Civil Procedure Rules. That, the Applicant was notified of the judgment via the judgment notice dated 01/04/2025 sent via email on 03/04/2025. The judgment notice and delivery report are exhibited as HNW-1.
 7. He deposed that according to counsel from his advocate which he verily believes to be true, a right of appeal must be balanced against the equally weighty right of a Respondent to enjoy the fruits of judgment and there must be a just cause of depriving the Respondent of that right.
 8. That, the Applicant has not demonstrated how substantial loss would arise in this instance, by showing, either that the Respondent would be unable to refund any monies paid to him under the decree or that payments in satisfaction of the decree would occasion difficulty to the Applicant. That, the Applicant has not demonstrated furnishing of security for the due performance of the decree.



9. He deposed that he is a person of means with resources to refund a sum of kshs 2,121,909/= if the appeal is allowed. That, the Applicant's depositions disclose no bonafide triable issue of his inability to refund the decretal sum. That, the Applicant will not be prejudiced if the Application is dismissed as they have not demonstrated how he would be unable to refund the decretal award.
10. He deposed that this court has discretion to order half of the decretal sum to the tune of kshs 966,650/= be given to him as he is a person of financial means and the rest be deposited in a joint interest account in the names of both advocates on record.
11. Directions were given that the Application be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

Applicant's Submissions

12. It was submitted that failure to file the intended appeal within the required statutory timelines was occasioned by the judgment of the trial court being delivered in the absence of both counsels contrary to the Chief justice directives. That the delay is not very inordinate to warrant this court to fail to exercise its discretion in favour of the Applicant. Reliance was placed on the case of Kenya Power & Lighting Company Ltd -vs- Rose Anyango & Another [2020] eKLR where the court stated as follows with regard to a delay of 40 days;

“However, this court does not find that the delay is inordinate as to deny the applicant an opportunity to ventilate its grievances by way of an appeal to this Court.”

13. It was submitted that the Respondent has not established that he has been prejudiced in any manner by the said delay and reliance placed on the case of Nicholas Kinto Arap Korir Salat -vs- Independent Electoral and Boundaries Commissions & Others (2013) eKLR where the court stated;

“Deviation from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness.”

14. As to whether the memorandum of appeal raises arguable issues, it was submitted that the Applicant is appealing on quantum and liability as the same is excessive and not proportionate for a 24-year-old who succumbed on the same day of the accident and that the administrator is one person where there is a minor involved.

Reliance was placed on the case of Kenya Revenue Authority -vs- Sidney Keitany Changole & 3 Others (2015) eKLR where the court stated;

“This Court has further held that the Applicant need only prove or establish one arguable point nothing that an arguable appeal is not necessarily one that will succeed but one that is not frivolous.”



15. As to whether substantial loss will occur, it was submitted that the Respondent's means are unknown and it is highly unlikely that he will be capable of refunding the decretal amount in the event that the intended Appeal succeeds since the Respondent has not disclosed or furnished the Court with any documentary evidence to prove his financial standing. Reliance was placed on the case of Edward Kamau & Anor -vs- Hannah Mukui Gichuki & Anor (2015) eKLR where the court opined;

“I am in agreement with the applicants that in the absence of an affidavit of means, it may be construed that the respondent is not possessed of sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed.”

16. It was submitted that since there is reasonable apprehension that the Respondent will be unable to repay the decretal amount, the evidentiary burden is shifted to him to show that he has financial resources to satisfy the decretal amount.

17. On the issue of security, it was submitted that the Applicant has already expressed willingness to deposit the whole amount in a joint interest earning account or as the court may deem fit. It was proposed that security be in the form of a bank guarantee to secure the entire decretal amount, which is an acceptable form of security.

Submissions by the Respondent

18. Reference was made to section 3(4) of the *Evidence Act* for the submission that the onus of proving the Respondent's inability to repay the decretal sum goes beyond throwing an allegation without evidence. Reliance was placed, inter alia, on the case of Kan Travellers Co. Ltd & Anor -vs- Ndalul & Savola (Suing as the legal representatives of the estate of Zacharia Wasike) & Anor: Civil Appeal 149 of 2022 where the court stated;

“It is trite law that a mere claim that the Respondent cannot refund a decretal sum is not sufficient. There must be reasonable grounds provided by the Applicants to show that the Respondent cannot make refund of the decretal sum after which the Respondent will be called upon to discharge her evidential burden. Though the Respondent in the instant case did not provide evidence to show his financial capabilities nor did he swear an affidavit of means. In that regard, I do find that the Applicants have not demonstrated substantial loss.”

19. It was acknowledged that the Applicant has expressed willingness to give security for the due performance of the decree.

20. Having looked at the Application, response and rival submissions, the only issue for determination is whether the Application is merited;

Analysis & Determination

21. Section 79G of the *Civil Procedure Act* provides that:

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 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 in time.



22. The proviso implies that an intended appeal should be in place or be filed together with the Application seeking leave for extension of time to file it. This view is buttressed by the case of Mugo & Others –vs- Wanjiru & Anor [1970] EA 482 where the court stated as follows: -
- “Clearly, as a general rule the filing and service of the notice of appeal ought to be regularized before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”
23. In this case, the Applicant has attached a draft memorandum of appeal to this miscellaneous application which, in my view, qualifies as an intended appeal for purposes of guiding the court on whether to grant the orders sought.
24. It is now well settled that the extension of time or its denial is an exercise of discretion by the court and the factors to consider are as indicated by the Court of Appeal in the case of Mwangi -vs- Kenya Airways Ltd (2003) eKLR to wit; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the Respondent if the Application is granted.
25. The judgment was delivered on 27/03/2025 and this Application was filed on 12/05/2025, approximately 45 days later. The law requires appeals from subordinate Courts to the High Court to be filed within 30 days from the date of the decree or order appealed against. After lapse of the statutory period, the delay in this matter is 15 days.
26. The reason given by the Applicant’s is that the judgment was initially scheduled to be delivered on 02/12/2024 but the court indicated that it was not ready and that it would be delivered on notice. That neither party was informed on the date of judgment. However, the Respondent has exhibited email communication showing that the Applicant was served with judgment notice on 03/04/2025. It is trite that even a delay of one day should be sufficiently explained.
27. As regards the prayer for stay, Order 42 Rule 6 of the Civil Procedure Rules is instructive on the conditions which should guide the Court. They are; whether substantial loss will occur if stay is not granted, whether the Application has been filed without unreasonable delay and furnishing security for the due performance of the decree. I have already dealt with the question of delay.
28. As for substantial loss, the Applicant is apprehensive that if the decretal amount is released to the Respondent, he may not recover the same if the appeal succeeds. The trial court found the Applicant to be 100% liable and awarded damages of kshs 1,850,000/= plus costs and interest. The amount is quite substantial and without an affidavit of means from the Respondent, the court can only speculate about his ability to refund. The information of the Respondent’s financial status is exclusively and peculiarly within his knowledge.
29. As for security, the Applicant has expressed willingness to comply with the orders of the court and has proposed to give a bank guarantee for the entire award. The proposed bank guarantee was not exhibited hence the court is not in a position to interrogate it and it is common knowledge that bank guarantees are usually for a specific period. In this case, there is no information on whether the bank guarantee has lapsed or not. There is also no information on whether enforcing it would be problematic due to issues of privity of contract. In my view, the bank guarantee is not appropriate.
30. The Court has a duty to balance the competing interests between the parties. While it is the Appellants’ right to pursue an appeal, the Respondent should also enjoy the fruits of his judgment. In this case,



the Applicant is contesting apportionment of liability but there is no dispute that the deceased was a passenger which means that the Applicant will not be let off the hook completely and as a consequence, the Respondent will not go home empty handed.

31. In the circumstances I am of the view that this application is tenable with conditions

- I. That an order be and is hereby issued to extend time for the Applicant to lodge an appeal out of time against the judgment and decree rendered on 27/03/2025 vide Makindu SPMCC No. 167 of 2018. The Applicant to file the memorandum of appeal within 7 days, and the Record of Appeal within 30 days hereof. Mention before the DR in 30 days to confirm compliance.
- II. That an order be and is hereby granted to stay of execution of the judgment and decree rendered on 27/03/2025 vide Makindu SPMCC No. 167 of 2018 together with all consequential orders arising therefrom and/or attendant thereto, pending the hearing and determination of the intended appeal on condition that one third of the decretal sum be released to the respondent, and the balance deposited in a joint interest earning account in the name of both advocates for the parties within 45 days hereof. In default the stay will lapse.
- III. That the costs of the Application do abide the appeal.

DATED SIGNED AND DELIVERED VIRTUALLY VIA (CTS) THIS 27TH MARCH 2026

MUMBUA T MATHEKA

JUDGE

