



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

COUNTY COURT NAME: MAKUENI HIGH

COURT

CASE NUMBER: HCCCMISC/E028/2025

BERNARD WANJOHI NDIRANGU VS PIUS

KAWINZI KIIO

RULING

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
MISC. CIVIL APPLICATION NO. E028  
OF 2025**

**BERNARD WANJOHI NDIRANGU.....APPLICANT**

**-VERSUS-**

**PIUS KAWINZI KIIO.....RESPONDENT**

**RULING**

**Introduction**

1. The Application for determination is dated 13/03/2025 and was filed under certificate of urgency. It is brought under Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A, 2B & 3A, 79G & 95 of the Civil Procedure Act and all other enabling provisions of the law. It seeks the following orders;



a) *Spent.*



b) *Spent*

c) **THAT** this honorable Court be pleased to grant an order a stay of execution of the judgment in TAWA CMCC E131 of 2023; Pius Kawinzi Kii -vs- Benard Wanjohi Ndirangu pending the hearing and determination of the intended appeal.

d) **THAT** this honorable Court be pleased to grant leave to the Applicant to appeal out of time against the judgment delivered on 06/02/2025 by Hon. Stephen Jalang'o in TAWA CMCC E131 of 2023; Pius Kawinzi Kii -vs- Benard Wanjohi Ndirangu.

e) **THAT** the costs of the Application be provided for.

2. The Application is supported by the grounds on its face and the affidavit of Mercy Kaima sworn on the same day. She deponed that she is the Legal Officer of M/s Sanlam Insurance Company - the Applicant's insurer-and has instructions from the Board of Directors to swear the affidavit. That, she has ostensible authority of the Applicant, under subrogation rights, to swear the affidavit. That, the trial court judgment was delivered in favor of the Respondent and a thirty-day stay of execution was granted. The judgment is exhibited as **MK-1**.

3. That, upon the lapse of the said stay, the Respondent began the process of execution and instructed auctioneers who are in the process of attaching the Applicant's property. A letter requesting copy of signed decree, a copy of decree and copy of warrants of sale are exhibited as **MK 2A, 2B & 2C** respectively.

4. That, the insurer was served with a proclamation notice **(MK-3)** which expired on 18/03/2025 and the insurer intends to appeal on the issue of quantum as per the draft Memorandum of Appeal **(MK-4)**. That, the insurer is of the firm belief that the said appeal is

arguable and the Applicant is willing to furnish security for due performance of decree. That, no prejudice will be occasioned to the Respondent as he will have an opportunity to fully participate in the Appellate proceedings. That, the Applicant undertakes to comply with any further directions of this court. That, the Application has been brought without undue delay and the court is vested with unfettered discretion to grant the orders sought.

5. The Application was opposed through the Respondent's Replying Affidavit sworn on 01/04/2025 where he deponed that the Application is unmeritorious, frivolous and an abuse of court process. That, the Applicant has not complied with Order 42 Rule 6(2)b of the Civil Procedure Rules.
6. He deponed that he is entitled to fruits of the judgment as the successful litigant and he stands to be prejudiced if the Application is allowed. That, litigation must come to an end and the Application has not raised any ground that could lead to the same being heard and determined.
7. He deponed that if the court is to order any security, then  $\frac{3}{4}$  should be paid to him directly as the issue of liability is not disputed. That, the same should be paid in cash and not through a bank guarantee. That, the Applicant is misleading the court by averring that he (Respondent) may deal with the funds in a prejudicial manner as he has not produced any financial position of the Respondent's present or past expenses.
8. Directions were given that the Application be canvassed through written submissions. Accordingly, the parties complied and filed their respective

submissions.

**Applicant's Submissions**

9. Reference was made to section 79G of the Civil Procedure Act for the submission that the court has unfettered discretion to enlarge time for filing appeals from the subordinate courts. Reliance was

placed on the case of **Mwangi -vs- Kenya Airways Ltd (2003) eKLR** where the Court of Appeal stated;

*“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay, secondly; the reason for the delay, thirdly (possibly), the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted.”*

10. It was submitted that it was the insurer who delayed in instructing their advocates and that the delay was only 5 days hence not unreasonable. That, in the case of **Chase Bank Ltd -vs- Diana Moraa Abuta (2021) eKLR**, the Court of Appeal deemed a delay of 9 months not inordinate. Reliance was also placed on the case of **David Ngugi -vs- The Board of Governors Kamahuha Girls High School (2016) eKLR** for the submission that; the law does not set out any minimum or maximum period of delay and all that is required is that any delay should be explained.
11. It was submitted that the Applicant is challenging the assessment of damages hence the grounds are not frivolous and the appeal is very arguable. That, the Respondent has not demonstrated the prejudice he will suffer if leave to appeal out of time is granted. It was contended that right of appeal is a constitutional right which encompasses the right to fair hearing.
12. With regard to the prayer for stay of execution, it was submitted that the Application was filed without undue delay as it was filed immediately after lapse of the 30-day automatic stay. That, substantial loss will



occur as the Respondent has not demonstrated ability to refund the decretal award if the appeal succeeds.

Reliance

was placed *inter alia* on the case of **Daniel Chebutul Rotich & 2 Others -vs- Emirates Airlines; Civil Case No. 368 of 2001**



where the court (*Musinga J-as he then was*) stated;

*“Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay decretal sum.”*

13. Further reliance was placed on the case of **National Industrial Credit Bank -vs- Aquinas Francis Wasike & Anor; Civil Appln No. NAI 238 of 2005 (UR 144/2005)** where the Court of Appeal held;

*“This court has said before and it would bear repeating that while legal duty is on the applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or the lack of them. Once an applicant expresses a reasonable fear that an applicant would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter that is peculiarly within his knowledge.”*

14. It was submitted that the judgment against the Applicant is of a substantial amount of kshs **714,767/=** and the amount is still accumulating interest hence it will be in the economic interest of the Applicant to be granted stay. That, the Applicant is willing to furnish security pending the determination of the appeal.

### **Submissions by the Respondent**

15. It was submitted that the Application herein was filed four days after it was drawn and 8 days after lapse of the 30-days stay granted by the trial court. That, the reason for delay given by the Applicant is just a mere reason



to justify this condition. That, no justifiable reason has been given for issuing late instructions yet the insurer



was well aware of the progress of the suit. It was contended that this conduct amounts to undue delay.

16. It was submitted that the Applicant only claims to have an arguable appeal but has not disclose any substantial loss that he will suffer. That, in civil proceedings, a party has the burden of proving or disproving any fact within their knowledge. Reliance was placed *inter alia* on the case of **Winfred Nyawira Maina -vs- Peterson Onyiego Gichana (2015) eKLR** where the court stated;

*“The substantial loss under Order 42 Rule 6 of the Civil Procedure Rules especially where money decree is involved lie in the ability of the Respondent to pay back the decretal sum should the appeal succeed. The legal burden of proving this inability lies with the applicant and does not shift. But it is not enough for the Applicant to merely state that the Respondent cannot refund the sum paid. There must be cogent evidence which show the inability or financial limitation on the part of the respondent to refund the decretal sum. And it is only when such prima facie evidence is laid before the court by the Applicant that the evidential burden shifts to the Respondent. Evidential burden does not arise on mere averment that the Respondent cannot refund the money as the Applicant intends the court to believe.”*

17. It was submitted that if leave to appeal out of time is granted, an order for suitable security should be issued pending the determination of the appeal. That at least  $\frac{3}{4}$  of the decretal sum should be released to him and the balance be put in a joint interest earning account in the names of both advocates.
18. Having looked at the Application, response and submissions, the only issue for determination is

whether the application is merited;

**Analysis & Determination**

19. 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.*

20. 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.”*

21. In our 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 the grant the orders sought.

22. 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 (Supra)** *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.

23. The judgment was delivered on 06/02/2025 and this Application was filed on 17/03/2025, approximately 41 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 11 days.
24. The reason given by the Applicant's insurer is that the delay in instructing the advocate was on their part but the reason for the late instructions was not given yet even a delay of one day should be explained. In the interests of justice however, my view is that the court should indulge the Applicant and find that 10 days delay is not inordinate.
25. 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.
26. 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 awarded kshs 700,000/= as general damages and kshs 14,767/= as special damages. The exhibited warrant shows a decretal amount of kshs 835,448/=. The amount is quite substantial and without an affidavit of means from the Applicant, the court can only speculate about the Respondent's ability to refund. The information of the Respondent's financial status is exclusively and

peculiarly within his knowledge.

27. As for security, the Applicant has expressed willingness to comply with the orders of the court and from the exhibited memorandum of appeal, it is evident that the intended appeal is purely on quantum. That, means that the Respondent will not go home empty handed once the appeal is determined. 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 winning the first round.

28. In the circumstances I find that the application has merit and is allowed in the following terms;

1. **THAT** leave be and is hereby granted to the Applicant to appeal out of time against the judgment delivered on 06/02/2025 by Hon. Stephen Jalang'o in TAWA CMCC E131 of 2023; Pius Kawinzi Kiiro -vs- Benard Wanjohi Ndirangu. The Record of Appeal be filed and served within 30 days hereof.
2. **THAT** an order a stay of execution of the judgment in TAWA CMCC E131 of 2023; Pius Kawinzi Kiiro -vs- Benard Wanjohi Ndirangu be and is hereby issued pending the hearing and determination of the intended appeal on condition that half the decretal sum be released to the respondent and the other half be deposited in a joint interest earning account in the names of both Advocates on record within 45 days hereof.
3. **THAT** the costs of the Application abide the appeal.
4. **THAT** the matter be mentioned before the DR within 30 days for compliance on the Record of Appeal

**DATED signed and delivered virtually this 27<sup>th</sup> March**

**2026**

**Mumbua T**  
**Matheka Judge**

SIGNED BY/FOR:  
LADY JUSTICE MATHEKA, TERESIA MUMBUA





★ THE JUDICIARY OF KENYA ★

**LADY JUSTICE  
MATHEKA, TERESIA  
MUMBUA**

Makueni High Court  
High Court Div

Date: 2026-03-27  
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