



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

COUNTY COURT NAME: MAKUENI HIGH COURT

CASE NUMBER: HCCCMISC/E030/2025

EMMANUEL NZIOKI AND ANTHONY MWANGI NGUNDO VS JOSEPH NGUI MUNYAO

RULING

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MAKUENI**  
**MISC. CIVIL APPLICATION NO. E030**  
**OF 2025**

**EMMANUEL NZIOKI.....1ST APPLICANT**  
**ANTHONY MWANGI NGUNDO.....2ND APPLICANT**

**-VERSUS-**

**JOSEPH NGUI MUNYAO.....RESPONDENT**

**RULING**

**Introduction**

1. What is before me is that Application dated 27/05/2025 filed under certificate of urgency under Order 50 Rule 6 & Order 51 Rules 1 of the Civil Procedure Rules, Sections 3A & 79G of the Civil Procedure Act. Article 159 (2)(d) of the Constitution of Kenya It seeks the following orders;



a) *Spent.*

b) **THAT** this honorable Court be pleased to extend time and grant leave to the Applicants to lodge an appeal out of time against the entire judgment delivered on 03/09/2024 by Hon. Jepkosgei Elizabeth Kemei (Ms), RM in Makueni CMCC No. E095 of 2022; Joseph Ngui Munyao -vs-Emmanuel Nzioki & Anthony Mwangi Ngundo.

c) **THAT** there be a stay of the execution of the judgment and decree in Makueni CMCC No. E095 of 2022; **Joseph Ngui Munyao -vs- Emmanuel Nzioki & Anthony Mwangi Ngundo** pending the hearing *inter partes* and determination of this Application and Appeal.

d) **THAT** the Memorandum of Appeal annexed hereto be deemed as duly filed and served upon payment of requisite fees.

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

2. The Application is supported by the grounds on its face and the Supporting Affidavits sworn by Moses Barasa and Michael Maweu on the same day.
3. Mr. Barasa deponed that he is a Legal Officer at Madison General Insurance Kenya Ltd (Madison)-the Insurers of the Applicants' suit motor vehicle registration No. KCC 533M which was involved in the subject accident in which the Respondent suffered bodily injuries. Copies of plaint and judgment are exhibited as 'A'.
4. That the impugned judgment was duly brought to the attention of Madison by the Applicants' counsel on record and he obtained the green light to appeal on 09/12/2024 after some regrettable internal delay which was due to pressure of work on the part of the Legal Manager. That, he instructed counsel through an email of 09/12/2024 and reminder of 24/03/2025 and after a conversation with counsel

Maweu, he was advised that counsel had retrieved the earlier email which was hidden in the spam mail section of their computers.



5. That the Applicants are aggrieved by the judgment and have sought to obtain certified typed copies thereof together with proceedings and decree towards compiling a record of appeal. That, the intended appeal raises weighty and triable issues as per the draft memorandum.
  
6. He deponed that according to the Judiciary e-filing system, the Respondent's counsel paid further court fees on 04/03/2025 towards extracting a decree and followed it up with correspondence filed on 24/03/2025 as per the receipt and letter. That failure to file an appeal is regrettable and was caused by the need to consult and obtain mandatory approvals at Madison, coupled with unforeseen technological challenges on the part of counsel's office which ought to be excused in the interests of substantial justice. That, until a stay and *or status quo* is maintained, the Respondent who is of unknown means will be unable to refund the decretal award of kshs 220,260/= plus costs and interest, should the need arise thus rendering the Application/Appeal moot to the irreparable loss of the Applicants.
  
7. That, the Respondent will suffer no irreparable prejudice since Madison is ready and willing to secure the judgment amount in an escrow in an escrow account of counsels pending the appeal.
  
8. Mr. Maweu deponed that he is an Advocate practicing as such in the firm of M/S Adera & Co. Advocates and is on record for the Applicants and has their authority to swear the affidavit. That, on 25/03/2025, his office received an email from the instructing client- Madison-being a 'polite reminder' about an unspecified matter in this file. That, he engaged the writer, Moses Barasa, on phone and was alerted about an earlier email dated 09/12/2024 which he was unaware of but managed to retrieve from the 'spam' mail option of their office computers.

9. That, the client's email of 09/12/2024 entailed instructions to appeal out of time against the judgment of 03/09/2024 in Makueni CMCC E095 of 2022. Copies of the two emails are exhibited as 'B'. That, the failure and delay to act timeously on the instructions was due to the unforeseen, inexplicable and latent lodgment of the relevant email on the spam section

of their computer system and the mistake of his office in failing to see and retrieve it. That, he verily believes that the said technological mishaps and human error of counsel are excusable and ought not to be adversely visited upon the innocent Applicants.

10. The Application is opposed through the Replying Affidavit of Faith Mutio Mutuku sworn on 23/05/2025 wherein She deponed that she is an advocate of the high court of Kenya in conduct of the suit hence well conversant with the facts and competent to swear the affidavit.
11. She deponed that the Appellants do not have an arguable appeal and have not met the pre conditions for granting stay as set out in Order 42 Rule 6. She has exhibited copies of the Appellants' submissions and judgment (FMM 1) as well as the amended statement of defense & letter dated 09/10/2024 (FMM 2).
12. She deponed that the Appellants are dishonest as the reasons advanced for delay are not true and they have come to court with dirty hands hence not deserving of this court's discretion. That, there are no explanations as to why the insured did not follow up with the Advocate between December 2024 and March 2025. That there has been an inordinate delay of more than 6 months in bringing this Application. That, the Applicants have failed to show how they will suffer substantial loss if the order is not made. That, it is not enough to put forward assertions of loss without documentary evidence.
13. She deponed that execution is a lawful process and no reason has been put before court to warrant stay of execution. That, the Respondent is entitled to enjoy fruits of the judgment and the present Application is a delaying tactic and afterthought brought in bad faith. That, the Respondent is a person of means and is able to refund the decretal amount in the unlikely event that the present Application succeeds.

14. She deponed that if the court is inclined to grant stay of execution, the same should be conditional upon the Applicants paying  $\frac{3}{4}$  of the decretal amount and depositing the balance in an interest earning account in the names of both Advocates.



15. Directions were given that the Application be canvassed through written submissions. Consequently, the parties complied and filed their respective submissions.

### **Submissions by the Applicants**

16. It was submitted that the reason given for the delay was not rebutted hence it constitutes a good and sufficient cause within the meaning of section 79G of the Civil Procedure Act. That the 6-month delay is not inordinate owing to the peculiar circumstances and the fact that the trial court pronounced a judgment premised on factual matters not featured on record and the fact that any prejudice to the Respondent will be mitigated by accrual of

interest on the judgment sum. Reliance was placed on **NAMAK SACO -vs- Mutungi (Civil Misc. E002 of 2023) (2024) KEHC 3211 (KLR) (11 March 2024) (Ruling)** where the court granted an extension of time to file an appeal where the request was made 3 months after pronouncement of judgment sought to be impugned.

17. With regard to the payer for stay of execution, it was submitted that the court is enjoined to balance the interests of the parties and to see to it that an appeal is not rendered nugatory/academic due to hardship or inability of restitution of a successful Appellant. That, the Applicants have expressed considerable reservations and genuine well-founded apprehensions about the Respondent's ability to refund any payments in the event of a successful appeal since his ways and means are unknown.

18. That, the Respondent has opted not to respond to this grave issue save for his Advocate's general vague and hearsay statement. That, the components that comprise the alleged 'means' are not given but are

left to speculation and there is no affidavit of means. That, the appeal would clearly be dead on arrival if any decretal sums or part thereof are paid. That, the Applicants' apprehensions are thus validated by the Respondent's failure to discharge the burden as his circumstances are peculiarly within his knowledge.

19. It was submitted that the Applicants have expressed their readiness and willingness to

deposit the judgment sum in escrow in an interest earning bank account in the names of the two law firms for the parties.

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

20. Relying on **Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**, it was submitted that in determining whether to grant leave to appeal out of time, the court looks at several aspects including;

Whether the appellant has an arguable appeal, Whether there is a reasonable reason for the delay, Whether there will be any prejudice suffered by the respondents if the extension is granted, Whether the application has been brought without undue delay and public interest consideration in certain cases like election petitions.

21. On whether the Applicants have an arguable appeal, it was submitted that in their amended statement of defence, the Applicants did not plead that the motorcycle subject matter was joining the road when the accident happened and/or that the accident herein happened when the motor cycle herein suddenly joined the road and as such, an appeal on a ground not pleaded before the trial court is frivolous and is not arguable.

22. As to whether there is unreasonable delay, it was submitted that the delay in bringing this application is 6 months and that courts have previously held that even a delay of one day is inordinate and inexcusable when not sufficiently explained. Reliance was placed on **Jaber Mohsen Ali & Anor -vs- Priscillah Boit & Another [2012] eKLR** where the court stated;

*“The question that arises is whether this application has been filed after*



*unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of*

*2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied.”*

23. It was submitted that no supporting documents have been availed to support the contents of paragraph 3 of the Supporting Affidavit and that the deponent is vague on when the depositions in paragraph 3 happened. Reliance was placed on **Kenya Council of Employment & Migration Agencies -vs- National Police Service Commission & 8 Others (Civil Application 35 of 2019) [2021] KECA 360 (KLR) (17 December 2021) (Ruling)** where the court stated;

*“[15] The applicant explains that the delay in filing the record of appeal arose from loss of proceedings arising from a robbery. However, the reason given for the delay has not been satisfactorily explained in the application as well as in the supporting affidavit sworn by the applicant’s Chairman. Further, the applicant has not explained when the proceedings were collected, when the robbery occurred and the steps that were taken thereafter to obtain copies of the proceedings or to file the instant application. It is upon the applicant to place sufficient material before the court which would explain the delay in filing the record of appeal. There have to be valid and clear reasons upon which discretion can be favorably exercised.... The application is accordingly dismissed.”*

24. It was submitted that the Applicants want this court to believe that there was a hitch in the correspondence with the insurer and the same is very different from what they are telling court in paragraph 9 of the supporting affidavit i.e., that the delay was because of the need to consult and obtain mandatory approvals. That, if indeed the email instructing counsel to appeal went to the spam section of emails, nothing would have been easier than for the said counsel to swear an affidavit confirming the same. Reliance was placed on

**Moses -vs- Kilonzo & Another (Civil Appeal e130 of 2023) [2023] KEHC 27223 (KLR) (14 December 2023) (Ruling)** where the court stated;



*“26. Further, this Application was filed about 6 months after the delivery of the impugned Judgment. The Applicant was under duty to show the reasons for delay.*



*However short the period of delay, it must be explained. The court was not given a satisfactory explanation for the delay. There was no evidence of the need for the copy of judgment and the request for the same. A copy of judgment cannot be supplied through magic. The same ought to have been paid for. I note the judgment was not typed. The reason given that the former advocates had not acted within the Appeal time is not plausible. It has not been explained when the change of advocates took effect.....*

*29.....I am thus not satisfied that there is explainable delay. The Applicant delayed for over 6 months. The delay is inordinate and has not been explained. There is absolutely no evidence that judgment was applied for. Further, the issue of lack of instructions cannot be true. The advocate has not indicated when they sought the instructions they were waiting for. A delay over proceedings can only occur where the same have been applied for. A delay of over months has not been explained and as such a delay is unexplained, inexcusable and inordinate.”*

25. It was submitted that the Applicants have not demonstrated sufficient reason for the delay in filing an appeal and have instead chosen to come to court with a lie hence leaving the court and the Respondent with questions unanswered on what really was the reason for filing an appeal out of time.

26. As to whether the Respondent will suffer prejudice if extension is granted, it was submitted that there will be serious prejudice as judgment was delivered on 03/09/2024 and the Respondent has been unable to enjoy the fruits of that judgment. That, allowing the Applicants to reopen the matter long after the statutory timelines have lapsed without any compelling justification would not only undermine the principle of finality in litigation but also result in prolonged uncertainty and delay for the Respondent. **Moses - vs- Kilonzo & Another (supra)** where the court stated;

*“38. Given the circumstances of the case, I have also to consider both parties. The*



*Respondent is entitled to the fruits of the judgment. The injustice to the Respondent if the Application were to be allowed exceeds the prejudice to the Applicant is the Application is disallowed...”*



27. As to whether the Applicants have met the conditions for grant of stay of execution, it was submitted that the insurer has, to date, not paid the decretal sum hence the doctrine of subrogation has not arisen. Consequently, it was submitted that the offer for security coming from the insurance is not sufficient security for the due performance of the decree in this matter. It was contended that the Applicants have not offered any security and as such,

the Application must fail. Reliance was placed *inter alia* on **Yegon - vs- Rono (Environment & Land Case 5 of 2016) [2023] KEELC 20880 (KLR) (19 October 2023) (Ruling)** where the court held that;

*“On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulates in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Applicant has not offered to furnish security for due performance of such decree or order as may ultimately be binding on him.”*

28. As to whether substantial loss will occur if the Application is not allowed, it was submitted that mere speculation that the Respondent is of ‘unknown means’ is insufficient to establish substantial loss. Reliance was placed on **Kenya Power & Lighting Co. Ltd -vs- Esther Wanjiru Wokabi [2014] eKLR** where the Court held;

*“It has not also been demonstrated that the Respondent is a person of straw who has no means whatsoever of compensating or refunding the said money to the Applicant should the appeal be determined in its favour.”*

29. Further reliance was placed on **National Industrial Credit Bank Limited -vs- Aquinas Francis Wasike & Anor [2006] eKLR** where the Court of Appeal emphasized;



*“That an Applicant must go beyond generalized fears and demonstrate with credible material that the Respondent cannot repay the decretal sum. The Respondent, in this case, is not a man of straw and no effort has been made by the*



*Applicants to establish or inquire into the Respondent's financial standing before drawing conclusions. Courts have consistently discouraged parties from stalling execution based on conjecture or unfounded fears."*

30. It was submitted that if the court is inclined to allow the Application, then it should order the release of at least  $\frac{3}{4}$  of the decretal sum *via* the Respondents Advocate and the balance decretal sum be held in an interest earning account with a reputable bank held in the name of the parties Advocates herein.
31. I have considered the application, the , response and rival submissions, the only issue for determination is whether the application is merited.

### **Analysis & Determination**

32. 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.*

33. 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

**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.”*



34. In this matter the Applicants have attached a draft Memorandum of Appeal to this miscellaneous Application which qualifies as an intended appeal for purposes of guiding the court on whether to grant the orders sought.
35. It is now well settled that the extension of time or its denial is an exercise of discretion by the court as enunciated by the Court of Appeal in **Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)** where the Court of Appeal stated as follows;

*“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 the 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”.*

36. The judgment was delivered on **03/09/2024** and this Application was filed on **27/03/2025**, approximately 204 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 174 days or approximately 6 months.

37. The Applicants explained that the delay was caused by mistake of counsel and technological hitches. The very first time that the issue of appeal was brought up by the

Applicants’ insurer was **09/12/2024** through an email addressed to their external counsel,

Michael Maweu, with instructions to file appeal out of time. The date of

09/12/2024 was still way out of time and the Insurer's Legal Officer explained that the regrettable internal delay was caused by pressure of work on the part of the Legal Manager.

38. I note that the email of 24/03/2024 from the Insurer to the external counsel was indeed a

'polite reminder' hence making it plausible that indeed the earlier email may have escaped the attention of counsel. In my view, the genuineness of the explanation is buttressed by the fact that shortly after the polite reminder, the external counsel moved with speed to obtain certified copies of proceedings, judgment and decree as evidenced by the letters dated 26/03/2024 -addressed to the Executive Officer of the court. The current Application was subsequently filed on 27/03/2024.

39. Further and contrary to the Respondent's submissions, the external counsel actually swore an affidavit to confirm that the email of 09/12/2024 escaped his attention because it went to the spam section. Consequently, it is my view that technological hitches in the email system have satisfactorily explained the delay.

40. According to the Memorandum of Appeal, the trial magistrate is being faulted for mistaking the Plaintiff to be a pillion passenger instead of a rider hence arriving at a wrong finding on liability. In my view, that is an arguable point which warrants to be canvassed on appeal. Courts have repeatedly held that all what is needed to be demonstrated at this

stage is the arguability of the appeal. In **Samuel Mwaura Muthumbi - vs- Josephine Wanjiru Ngugi & Another [2018] KEHC 8788 (KLR)**, the court (Joel Ngugi J) as he then was stated;

*"16. Lastly, looking at the Draft Memorandum of Appeal filed, I am unable to say that the intended appeal is in-arguable. Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is **not** required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the*

*original verdict. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden.”*

41. The Respondent will have an opportunity to oppose the appeal and any inconvenience caused can always be taken care of by award of costs and accrual of interest on the

- decretal sum.
42. 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.
  43. As for substantial loss, the Applicants are apprehensive that if the decretal amount is released to the Respondent, they may not recover the same if the appeal succeeds. The trial court awarded kshs 200,000/= as general damages and kshs 20,260/= as special damages plus interest and costs. In their submissions in the subordinate court the respondent submitted that the applicant be found 80% liable and them, 20% liable if the court found in favour of the plaintiff.
  44. As for security, the Applicants stated that the insurer is ready and willing to secure the judgment amount in an escrow account of counsels pending the appeal.
  45. 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. However, the draft memorandum of appeal shows that the Applicants are contesting apportionment of liability and have called for dismissal of the Respondent's (Plaintiff's) suit.
  46. In the circumstances, it is my view that a quarter of the decretal sum be released to the respondent and three quarters be deposited in a joint interest earning account in the names of both Advocates on record, both actions within 30 days hereof.
  47. In default the stay will lapse

48. Costs of this application to abide the appeal.

Dated , signed and delivered in open court this 4th

March 2026 Mumbua T Matheka

Judge



SIGNED BY/FOR:  
LADY JUSTICE MATHEKA, TERESIA MUMBUA

