



REPUBLIC OF KENYA



**Kang'ethe & another v Ndungu (Miscellaneous Civil Application
E019 of 2026) [2026] KEHC 5924 (KLR) (30 April 2026) (Ruling)**

Neutral citation: [2026] KEHC 5924 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL APPLICATION E019 OF 2026**

FN MUCHEMI, J

APRIL 30, 2026

BETWEEN

PATRICK NGUGI KANG'ETHE 1ST APPLICANT

GEORGE KANIARU KANYUTU 2ND APPLICANT

AND

LUCIA NYAMBURA NDUNGU RESPONDENT

RULING

Brief facts

1. The application dated 29th January 2026 seeks for orders of leave to file an appeal out of time against the judgment in Thika CM Court Civil Case No. E528 of 2022 delivered on 19th November 2025. The applicants further seek for orders of stay of execution of the said judgment pending the hearing and determination of the intended appeal.
2. The respondent opposed the application and filed a Replying Affidavit dated 18th February 2026.

Applicants' Case

3. The applicants state that judgment in the lower court was delivered on 19th November 2025 finding them 100% liable and awarded the respondent general damages for pain and suffering at Kshs. 2,984,030/-. Being dissatisfied with the judgment, the applicants instructed their advocates to lodge an appeal. The applicants further state that before the advocate on record could act on those instructions, the insurance company instructed a different firm of advocates that is KRK Advocates in place of the previous advocates, Kimondo Gachoka & Co. Advocates to come on record on their behalf. The applicants aver that due to the transitioning, there was delay in filing the appeal with the time prescribed by the law.



4. The applicants argue that the failure to file the appeal within the statutory period was not their making but the change in representation and they should not be punished for the mistakes of their counsel.
5. The applicants argue that the respondent has obtained warrants of attachment and sale against their motor vehicle registration number KAN 034B, KCR 990V and KCM 938C and other moveable properties claiming the judgment award together with costs and interest in the sum of Kshs. 3,228,141/-. Thus, their moveable properties are currently on the verge of attachment, alienation and sale.
6. The applicants state that the decretal amount is substantial in nature hence there is a need to have an order of stay of execution in place in order to safeguard their interests. The applicants aver that they are ready and willing to provide security for the deposit of a quarter of the decretal sum in a joint account of both advocates within 60 days.

The applicants aver that the respondent shall not suffer any damage that cannot be compensated by way of costs.

The Respondent's Case

7. The respondent states that the applicants have approached the court with dirty hands and falsehoods that they instructed counsel to file an appeal but there was a change of advocates which is factually untrue as at the time of the judgment, the applicants' counsel on record was M/s KRK Advocates, the same counsel herein having engaged her advocates on the issue of costs on 20/11/2025. The respondent states that the applicants are desirous of delaying the matter as even in the trial court, they participated through counsel but did not file any defence, statement or submissions despite being granted a period of more than one (1) year. The respondent argues that the applicants are only purporting to interchange the names of their counsel between M/s Kimondo Gchoka & Co. Advocates and KRK Advocates which is actually the same firm but utilized with an aim to mislead the court.
8. The respondent argues that even if the applicants were to be believed, her advocates wrote to the applicants' counsel on the impending execution through their new counsel and no response was forthcoming forcing her advocates to commence execution whereby the applicants filed an application for stay of execution.
9. The respondent states that the applicants aim to frustrate her from accessing the fruits of her judgment yet she is an old lady and living with the consequences of the negligence of the applicants. The respondent states that although the decretal sum is substantial, but so are her ravaging injuries and the damages awarded in the lower court are conservative in light of her injuries and age. The respondent further states that the intended appeal does not raise any issues warranting any interference nor do they point to any errors by the trial court. The respondent avers that no irreparable harm can be suffered where a legitimate decree of a court of law is being executed and she urges the court to allow execution to proceed to a logical conclusion.
10. Parties put in written submissions.

The Applicants' Submissions

11. The applicants submit that the intended appeal was not filed within the required statutory timelines due to the transition in the advocate's representation. The applicants submit that the delay is not inordinate to warrant this court to fail to exercise its discretion in their favour. The applicants refer to



- the decision in *Kenya Power & Lighting Company Ltd vs Rose Anyango & Another* [2020] eKLR and submit that they should not be punished for the mistakes of their advocates.
12. The applicants rely on the case of *Nicholas Kipto arap Korir Salat vs Independent Electoral and Boundaries Commission & Others* (2013) eKLR and argue that the respondent has not established that she has been prejudiced in any manner by the said delay. The applicants further argue that their right to access to justice and fair hearing under Articles 48, 50 and 159 of *the Constitution* should be protected and not to be watered down by a mere technicality of failure to file the memorandum of appeal within the prescribed timeline.
 13. Relying on the case of *Kenya Revenue Authority vs Sidney Keitany Changole & 3 Others* (2015) eKLR, the applicants submit that their intended appeal is arguable and raises serious issues that warrant this court's intervention on appeal. The applicants submit that in their affidavit they have specifically stated that the respondent's means are unknown and it is highly unlikely that the respondent will be capable of refunding the decretal amount in the event the intended appeal succeeds since the respondent has not disclosed or furnished the court with any documentary evidence to prove her financial standing. To support their contentions, the applicants rely on the case of *Edward Kamau & Another vs Hannah Mukui Gichuki & Another* (2015) eKLR and submit that the absence of an affidavit of means as to the respondent's financial status is still unknown and has not been proven.

The Respondents' Submissions

14. The respondent submits that judgment was read in the presence of both advocates and immediately after the judgment, the advocates M/s KRK Advocates LLP sought for tabulation of costs from her counsels. The respondent further submits that the excuse of the change of advocates blamed for the delay in filing the application in time was misleading as the advocates said to have been changed is actually one and the same and in any event was the one that handled the judgment. the excuse is made in bad faith and meant to mislead the court.
15. The respondent relies on Section 79G of the *Civil Procedure Act* and the case of *James Njai Githui vs Equity Bank Limited* (2020) eKLR and submits that the applicants have not filed their appeal yet and thus the application is premature. Relying on the case of *Thuita Mwangi vs Kenya Airways* [2003] eKLR, the respondent submits that the applicant took two months to file the intended appeal which is inordinate. The respondent further argues that she is 77 years and it is very unfair to subject her to another round of delay in keeping her from the fruits of her judgment.
16. The respondent submits that the intended appeal is not arguable as the applicants complain that the award of damages was excessive yet the award is Kshs. 2,500,000/- and not Kshs. 2,984,030/- as alluded by the applicants. The respondent further submits that the entire intended appeal cannot stand as the applicants cannot make submissions that were not made at the trial court where they simply refused to file submissions on quantum.
17. The respondent refers to the case of *Kenya Shell Ltd vs Kibiru & Another* [1986] KLR and argues that the applicants have not demonstrated any substantial loss they are likely to suffer if the decree is satisfied. The respondent further argues that a decree remains valid and should be executed unless substantial loss can be discerned. The respondent submits that by pleading irreparable damage if execution proceeds, the applicants overlook the obvious prejudice on her part in having a judgment for which she cannot get paid or be allowed to execute thus reducing the entire judgment into a mere piece of paper.



18. The respondent relies on the case of *M/s Port Reitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1997* and submits that the applicants have not given the court any reason to base its discretion upon.

The Law

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

19. 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.

20. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicants must satisfy the court that they have 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.
21. 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.



22. 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.”
23. Applying the above principles to the present case, the judgment herein was delivered on 19th November 2025 and the applicants filed the current application on 30th January 2026. This is about one month and a couple of days outside the time limited for filing an appeal. The applicants have attributed the delay in filing their appeal on the ground that the insurance company instructed new advocates KRK to come on record in place of M/s Kimondo Gachoka who was on record earlier. As such, the transitioning caused a delay in filing this appeal.
24. On perusal of the record, judgment in the lower court was delivered in the presence of both parties’ advocates and the applicants were granted stay of 30 days. On 20th November 2025, one day after the judgment, the firm of KRK Advocates LLP wrote to the respondent’s counsel seeking to be furnished with her bill of costs for further dealing and onward transmission to their client. The respondent’s counsel wrote back to the applicants’ counsel on the same day outlining the judgment and tabulating their costs. The said correspondence was sent via email to the email addresses maurice.murigi@dac-law.co.ke virginia.mwangi@dac-law.co.ke . The said email addresses are similar to the ones the applicants sent the current application and copied info@dac-law.co.ke. It is evident from the record that the applicants advocates were well aware of the judgment having written to the respondent’s counsel on the following day after judgment was delivered. Furthermore, the applicants have mischievously filed a consent depicting a change of advocates but the said consent is not dated which raises doubt on the genuineness of the contents of the supporting affidavit. The applicants do not seem to be acting in good faith.
25. It is therefore my considered view that the applicants have not given any plausible explanation on the reason for the delay. The delay of one month and a couple of days may not be inordinate but the applicants have failed to give any plausible reasons for the delay.
26. On the perusal of the intended Memorandum of Appeal and the judgment of the trial court, it is my considered view that the appeal does not raise pertinent issues of law thereby reducing the chances of success.
27. In the circumstances it is my considered view that the applicants have not established to the satisfaction of the court that time should be enlarged to enable them file their appeal.
28. Having declined to grant the prayer for admitting the appeal out of time, the prayer for stay of execution of the trial court’s judgment and decree automatically fails since there is no existent appeal on which orders of stay can stand.
29. It is thus my considered view that the application dated 29th January 2026 lacks merit and is hereby dismissed with costs to the respondent.



30. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 30TH DAY OF
APRIL 2026.**

F. MUCHEMI

JUDGE

