

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
MISC. CIVIL APPLN. NO. E042 OF 2025

-between-

**MADISON GENERAL INSURANCE
COMPANY LIMITED..... APPLICANT**

-versus-

**1. ANTHONY KIMANI MURAGUMI
2. TATA AFRICA HOLDINGS LIMITED
3. WALTERS TRADING LIMITED.....
RESPONDENTS**

RULING

Background:

1. *Anthony Kimani Murugami*, the 1st Respondent herein, filed a suit against *Tata Africa Holdings (Kenya) Ltd* and *Walters Trading Limited*, the 2nd & 3rd Respondents herein being *Milimani Chief Magistrates Commercial Court Case No. 2127 of 2020* (hereinafter referred to as '**the suit**'). The Applicant herein, *Madison General Insurance Company Ltd*, was enjoined in the suit as a Third Party. The Applicant subsequently filed a Chamber Summons dated 28th May 2024, seeking to be struck out of the suit.
2. In its ruling of 12th November 2024, the trial Court dismissed the Applicant's request to be struck out. Being dissatisfied with the Ruling, the Applicant approached this Court to appeal the decision out of time, hence filing the instant application under consideration.
3. The application was only opposed to by the 3rd Respondent herein.

The Application:

4. Through a Notice of Motion dated 27th May 2025, the Applicant sought the following orders: -
 1. *Spent.*
 2. *THAT this Honourable Court be pleased to grant leave to the Applicant to file Appeal out of time against the Ruling delivered by Hon. Becky Cheloti Mulemia, PM, on 12/11/2024 in Milimani CMCC No. 2127 of 2020.*
 3. *THAT pending the hearing and determination of this Application and Appeal there be a stay of further proceedings in Milimani CMCC No. 2127 of 2020.*
 4. *THAT costs of this Application be in the Appeal.*
5. The application is supported by the Affidavits of *Moses Barasa*, the Applicant's Legal Officer, and *Ese Catherine Achitsa*, Advocate for the Applicant; both deposed to on 27th May 2025. The Applicant stated that following the trial Court's impugned ruling, internal consultations took time, leading to a delay in issuing instructions to external Counsel. It was its case that instructions to appeal were eventually sent *via* email on 4th February 2025. However, it asserted that the email latently lodged in the spam folder of the Counsel's computer and was not discovered until 24th March 2025, when the Legal Officer called to follow up on the matter.
6. The Applicant claimed that the delay was an inadvertent human oversight and that it has an arguable appeal with high chances of success. It argued that unless the stay is granted, it will be compelled to irregularly participate in a trial on tortious negligence slated for 8th September 2025, yet it is only an insurer that has disclaimed its contractual liability to indemnify.

The 3rd Respondent's case:

7. *Walters Trading Limited*, the 3rd Respondent herein, opposed the application through a Replying Affidavit sworn by its Managing Director, *Joseph Kamau Muongi*, on 9th June 2025. He deposed

that that the application is misconceived, bad in law, and an abuse of the Court process. It was his case that that the application for stay and leave to appeal is time-barred and merely an afterthought. He asserted that the delay in seeking to appeal is inexcusable and lacks justification.

8. The Respondent further argued that it should not be denied the fruits of its victory in the trial Court simply due to the Applicant's failure to act within the allowed timelines. Finally, the Respondent asserted that the prayers sought are contrary to the oxygen principles, a requirement of *Article 159* of the *Constitution* and *Sections 1A and 1B* of the *Civil Procedure Rules*.
9. Neither party filed written submissions despite directions to that end.

Analysis:

10. Based on the pleadings and affidavits on record, the core issues for determination are as follows: -
 - i. *Whether the application meets the threshold for extension of time to appeal.*
 - ii. *Depending on (i) above, whether the Court should stay the proceedings in the trial Court.*
11. A consideration of the above issues now follows.

[a] Whether the application meets the threshold for extension of time to appeal:

12. The power to grant leave to appeal out of time involves the exercise of judicial discretion since the time within which a party must institute an appeal is provided for in Section 79G of the Civil Procedure Act. That period is 30 days from the date of the decree or order appealed against, excluding from such period any time which the Court appealed from may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. There is as well the liberty for extension of said period.

13. In **Nick Salat -vs- Independent Electoral and Boundaries Commission & 7 others** (Application 16 of 2014) [2014] KESC 12 (KLR), the Supreme Court approvingly made reference to the decision of the Supreme Court of California in *Silverbrand -vs- County of Los Angeles* [2009] 46 Cal. 4th 106 where jurisdictional significance of timeous filing of an appeal was discussed as under: -

As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite.

.... Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal.

..... The purpose of this requirement is to promote the finality of judgements by forcing the losing party to take an appeal expeditiously or not at all.

14. In the **Nick Salat case** [supra], the Learned Judges of the Apex Court identified the principles applied by a Court in exercising discretion. They observed;

... Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.

15. Further, the Supreme Court referred to the Court of Appeal decision in **Paul Wanjohi Mathenge -vs- Duncan Gichane Mathenge** [2013] eKLR which laid out the principles to be satisfied in the following terms;

... I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance

For instance, in Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported), the Court expressed itself thus: -

.... 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.** (emphasis added)

16. The Apex Court then crystallized the applicable principles as follows: -

..... Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court **Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; 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 Whether in certain cases, like election petitions, public interest should be a consideration for extending time...** [emphasis added].

17. With the foregoing, the Court now takes a tour of the factual circumstances of the case. Whereas the ruling subject of the instant application was rendered on 12th November 2024, the application was filed in Court on 28th May 2025. By taking into account the 30 days grace period for filing appeals, the Applicant was to file such an appeal by 13th December 2024. As such, the period of delay is 5 months and 12 days.
18. This Court has keenly perused the Applicant's affidavits. It was their explanation that extensive internal consultations, coupled with its e-mail of instructions of 4th February 2025, which went unnoticed due to the fact that it was spammed in its Advocates' mail resulted, in the delay. The evidence to that end was not majorly controverted thereby settling the position that it took the Applicant slightly less than 2 months post the lapse of the appeal window to give instructions to Counsel. Further, it took about 3½ months for the Applicant's Counsel to act on the instructions for the reason that the Applicant's email was spammed.

19. To resolve whether the above two-tier delay was unreasonable, this Court will seek guidance from the Apex Court decision in **Nick Salat case** (supra) where it was observed: -

....it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default.

20. In this Court's assessment, the delay is borderline protracted. Without making a blanket observation and finding, and in reference to the specific circumstances in this matter, the delay on the part of the Applicant in giving instructions to Counsel can be regarded as inordinate, it is excusable given the alleged Applicant's internal working structures. On the other hand, the delay on the Counsel's part is mostly attributable to a technological mishap where the instruction email instead sat in the Advocate's spam folder. This Court, therefore, finds that the cumulative twin-delay is satisfactorily explained and is excusable.
21. On the question of arguability of the intended appeal, and the potential prejudice to the opposing party, this Court has appreciated the grounds raised in the Memorandum of Appeal. The grounds raise substantive questions of law, including, and primarily, regarding whether an insurer's liability should be tried within the main negligence suit or *via* a separate declaratory suit. That is, hence, a jurisdictional issue, which goes to the heart of the suit rendering the appeal arguable.
22. Having said so, it is noteworthy that whereas the 3rd Respondent will suffer delay in the determination of the suit, that prejudice can be cured by an award of costs. In the end, this Court finds and holds that the Applicant's quest for extension of time is merited.

[b] Whether the proceedings in the trial Court should be stayed:

23. The ***Halsbury's Laws of England***, 4th Edition Vol. 37 at pages 330 and 332, articulates stay of proceedings in the following manner;

.... The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case".

24. Order 42 Rule 6[1] of the Civil Procedure Rules provides for stay of execution or proceedings in the following terms: -

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

25. In distinguishing stay of execution from stay of proceedings, the Court in ***Kenya Wildlife Service -vs- James Mutembei*** (2019) eKLR stated as follows: -

.... Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a

litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.

26. Drawing from the above discussion, there is no doubt that this Court must act with extreme care and caution while dealing with a request to stay proceedings. In this matter, the Applicant's appeal raises inter alia a fundamental issue of jurisdiction of the trial Court. Despite that, if the proceedings are to continue, then the appeal will definitely be rendered nugatory with the further likelihood of undoing so much in the event the appeal is successful; being fruits of a fundamentally-flawed process. By placing the two possibilities side by side, this Court finds that the nature of the matters raised in the suit and on appeal favours a stay of the proceedings.
27. In buttressing the above finding, this Court gives credence to the fact that the aspect of delay has already been resolved in favour of the Applicant and that security orders may not be that necessary at the moment since the suit is still pending trial. The totality of it is that an order staying the proceedings in the suit will preserve the integrity of the appellate process and also prevent the wastage of scarce judicial time and resources. Further, in the wider interest of justice and to allow the substantive legal questions to be determined on their merits, the Court is inclined to allow the application.

Disposition:

28. As I come to the end of this ruling, I wish to apologize to the parties for the late delivery of this decision which was to be 26th February 2026. The delay was occasioned by my engagement at the Judicial Service Commission where I serve as a Commissioner given that the Commission has been running interviews since December 2025 to date. Once again, galore apologies.
29. In light of the foregoing, this Court finds the Notice of Motion dated 27th May 2025 merited and hereby issues the following orders: -

- [a] Leave is hereby granted to the Applicant to lodge an appeal out of time against the ruling dated 12th November 2024 in Nairobi MCCC No. E2127 of 2020.**
- [b] The Applicant shall file a Memorandum of Appeal in a substantive appeal file and serve it within 14 days of this order.**
- [c] An order of Stay of proceedings in Nairobi MCCC No. E2127 of 2020 is hereby granted pending the hearing and determination of the intended Appeal.**
- [d] In the event of non-compliance with order [b] above, the order for stay of proceedings shall stand automatically vacated and the Nairobi MCCC No. E2127 of 2020 shall proceed for determination.**
- [e] The Applicant shall pay costs of the application to the 3rd Respondent assessed at Kshs. 20,000/= [Twenty Thousand Only] within 21 days and in default execution thereof to issue.**
- [f] This file is hereby marked as CLOSED.**

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 30th day of April, 2026.

**A.C. MRIMA
JUDGE**

Ruling virtually delivered in the presence of:

Ms Mutuku, Learned Counsel for the 3rd Respondent.

No appearance for the Applicant.

Michael/Amina – Court Assistants.