Owino v Ngonyi & another (Civil Miscellaneous Application E305 of 2025) [2026] KEHC 5863 (KLR) (30 April 2026) (Ruling)

Neutral citation: [2026] KEHC 5863 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL MISCELLANEOUS APPLICATION E305 OF 2025

EN MAINA, J

APRIL 30, 2026

BETWEEN

BENJAMIN OYODA OWINO ..... APPLICANT

AND

BONIFACE MAKAU NGONYI ..... 1ST RESPONDENT

PETER MUTUKU MULEVU ..... 2ND RESPONDENT

RULING

1. By the Notice of Motion dated 2nd September 2025, the Applicant seeks orders that:

> " 1. (spent)
>
> 2. (spent)
>
> 3. (spent)
>
> 4. That this honourable court to extend time and grant leave to the Applicant/ Intended Appellant to lodge his Memorandum of Appeals out of time against the judgment entered against him by the Hon. P. Wechuli, Principal Magistrate in Kithimani MCCC E241 & 242 of 2022 and the files be consolidated to be heard together as they raise the same issues and were heard and determined together in the trial court.
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> 5. That this honourable court to grant stay of execution of the judgment and/or Decree issued by Hon. P. Wechuli, Principal Magistrate in Kithimani MCCC E241 & 242 of 2022 pending the full hearing and determination of the intended appeal herein.

6. That the application be heard interpartes on such date and time as this honourable court may direct.

7. That this honourable court to give favourable terms as to the depositing of security for the appeals while considering the financial status of the applicant and the high quantum which is challenged.

8. That the costs of this application abide the outcome of the intended appeal.

9. That this honourable court to issue any other order and/or direction it deem fit to grant in the circumstances."

2. The application is supported by the affidavit of Benjamin Oyoda Owino sworn on 22nd September 2025. As can be seen from that affidavit and the grounds on the face of the application the gravamen of the application is that the delay in filing the appeal was not intentional or deliberate; that it was caused by circumstances beyond the Applicant's control as he was of the mistaken belief that the decree had been settled by his Insurer; that the Respondent has begun the process of execution and unless the decree is stayed, the Applicant stands to suffer irreparable loss. It is also argued that the Applicant has an arguable appeal with high chances of success and that this application was filed without undue delay.

3. The application was opposed through Grounds of Opposition dated 1st October 2025 which state as follows:-

"(1)

(a) that the application is frivolous, incompetent and vexatious

(b) Bad in law

(c) Incurably defective

(d) An abuse of the court process

(e) An afterthought and brought in bad faith

(f) Brought after inordinate delay.

(2) That the application herein is brought with unclean hands as judgments herein were delivered on 6th March 2025 which is almost six (6) months ago yet the Intended Appellant/Applicant had never made any single effort to settle the claim.

(3) That the Intended Appellant/Applicant has not given any good reasons to warrant the granting of the orders sought.

(4) That this application is not brought in good faith as the Applicant's sole interest seems to perpetually seek and obtain stay of execution to frustrate the Respondents from enjoying the fruits of a lawfully obtained judgment.

(5) That the provisions of Section 79G of the Civil Procedure rules are clear on the time for lodging of appeal.

(6) That the delay of over six (6) months before bringing this application is clearly inordinate and inexcusable.

(7) That the Intended Appellant has not offered a reasonable security for costs and should be ordered to release to the Respondents half of the principal sum and costs amounting to Kshs.3,125,1311.50/- in both matters and deposit the remaining half of Kshs.3,125,131.50/- in court within fourteen (14) days to demonstrate his seriousness as is the normal practice of courts to make sure the interests of both parties are taken care of.

(8) That the Intended Appellant's application lacks merit, is an afterthought and an abuse of the court process and improperly before this court."

4. The application was canvassed by way of written submissions which I have fully considered. I have also considered the cases cited thereat and the law. The power of this court to extend the time for filing an appeal or for granting leave to appeal out of time stems from Section 79G of the *Civil Procedure Act* which 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 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."(underlying mine).

5. This application comes six months after time for filing an appeal had lapsed. For time to be enlarged, all the Applicant requires is to satisfy this court that there was good and sufficient cause for not filing the appeal in time. The decision whether or not to enlarge time is discretionary. As was stated by Odunga J, as he then was, in the case of Ainushamsi Multiple Hauliers Agencies Limited v Francis Ndegwa Karanja & Another (Suing as the Administrators of the Estate of John Muya Ndegwa-Deceased) [2020] KEHC 4093 (KLR). "The court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the Applicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633, there is no difference between the words "sufficient cause" and "good cause". It was therefore held in Daphne Parry vs. Murray Alexander Carson [1963] EA 546 that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant." (emphasis mine).

6. I must therefore caution myself against being led away by sympathy or benevolence. The gist of the application is that the Insurer gave instructions to the Advocates to appeal but in the period of 30 days the appeal should have been filed, the insurer underwent structural changes in its management which subsequently led to all their matters being forwarded to another firm of advocates. Further that the file disappeared in the digital system and by the time it was found, time had lapsed. It is my finding that while a delay of 30 days would be reasonable and excusable, the delay in this case extended to about 180 days and no plausible explanation is given for such a prolonged delay. What is being appealed is an award of damages for injuries sustained in a road accident and it is instructive that the only reason

the intended Appellant woke up was when the decree holder started the process of execution. To grant this application would be certainly prejudicial to the Respondents more so as no plausible explanation has been given as would satisfy this court that the Applicant was prevented from filing the appeal for good cause. Clearly the application has no merit and it is dismissed. The order staying execution of the decree in the court below is vacated and the costs of this appeal are awarded to the Respondents.

It is so ordered.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 30TH DAY OF APRIL 2026.

E. N. MAINA

JUDGE

In the presence of:

Mr. Gichumu for Respondent

Mr. Letit for the Applicant

Mary - Court Assistant/Interpreter