



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

COUNTY COURT NAME: MAKUENI HIGH COURT

CASE NUMBER: HCCCMISC/E065/2025

EASTCON MULTIPLES LTD VS BENJAMIN KAMWALO KITHUKA AND IMANI SACCO LTD AND 1 OTHERS

RULING

REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
MISCELLANEOUS CIVIL APPLICATION NO. E065 OF 2025

EASTCON MULTIPLES LTD.....APPLICANT

-VERSUS-

BENJAMIN KAMWALO KITHUKA1ST RESPONDENT

IMANI SACCO LTD.....2ND RESPONDENT

NENO SACCO.....3RD RESPONDENT

RULING

1. The Applicants have moved the court vide an application brought 2 nd September 2025 under Order 51 Rules 1 & 3 of the Civil Procedure Rules,



Sections 1A, 1B, 3A, 63 (e), 79G and 95 of the Civil Procedure Act seeking for Orders: -

a. Spent.

b. Spent.

c. THAT pending the hearing and determination of this Application, this Honourable Court be pleased to issue a temporary order restraining Frontline Auctioneers or their agents from attaching the assets of the Applicant and if already attached from advertising the for sale, selling or in any other manner alienating the assets in execution of the judgement/decree/warrants of attachment/sale issued in Makindu CMCC No. E0 39 of 2022- Benjamin Kamwalo Kithuka vs. Imani Sacco Ltd, Neno Sacco & Eastcon Multiples Ltd

d. THAT this Honourable Court be pleased to enlarge time and grant leave to the Applicant to file an appeal out of time against the Judgment delivered by Hon. M.W. Kibe S.R.M on the 05th June 2025 in Makindu CMCC No. E039 of 2022

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

f. THAT this Honourable Court be pleased to issue such further orders as it may deem appropriate in the circumstances and interests of justice in this case.

2. The application is founded on the grounds that the 1st Respondent, who was the Plaintiff in Makindu CMCC E039 of 2022 has commenced execution proceedings of the Judgement/Decree issued in the suit pursuant to which, on 28th August 2025, Frontline Auctioneers proclaimed motor vehicles and other assets belonging to the Applicant, who was the 3rd Defendant in the suit, and unless the Application is considered the Applicant is apprehensive that the proclaimed assets will be attached on 04th September 2025 when the seven days' notice lapses.



3. That Applicant was represented in Makindu CMCC E039 of 2022 by the Advocates appointed by her insurers and no update on the outcome of the Judgement was made until when the execution proceedings were commenced.



4. The Applicant is aggrieved by the Judgement and intends to appeal against the whole of the judgement delivered on 05th June 2025 in Makindu CMCC E039 of 2022 but the statutory period of thirty (30) days have already lapsed and leave of this Honourable Court is required before the Appeal can be filed.

5. The Applicant has an arguable appeal for determination by this Honourable Court and unless the reliefs sought in the Application are granted, the entire object of the Application and the intended Appeal will be rendered nugatory and the Applicant subjected to substantial loss if the already commenced execution process is completed as the decretal sums are substantial and are unlikely to be recovered from the decree holder at the conclusion of the appeal proceedings.

6. The Applicant has good reason as to explain the delay or failure to file the appeal within the time prescribed in law and this Honourable Court should exercise discretion in his favour.

7. The Applicant is willing to comply with the conditions that this Honourable Court may consider to impose in granting the reliefs sought in this Application.

8. The application is supported by an affidavit sworn by DAVID KARIUKI, who avers that he is the Director of the Applicant herein.

9. He reiterates the grounds on the face of the application

10. He states that the Applicant is willing to comply with the conditions that this Honourable Court may consider to impose in granting the reliefs sought in this Application.

11. The application is opposed through a replying affidavit sworn by Benjamin Kamwalo Kithuka the 1st Respondent



herein.

12. He avers that the application dated 2 nd September,2025 is bad in law, incompetent and an afterthought and should be dismissed .



13. That the suit MCCC /E039/2022 was a fully defended suit by the defendants advocate Kimondo Gachoka & Co. Advocates up to the point of judgement on 5th June,2025 and the execution process rightly commenced after all necessary steps had been taken including payment of further court fees of Kshs 69,000/= after the advocates for the defendant Applicant asked to be supplied with the decree in order to pay the decretal amount.

14. That the period to appeal lapsed on the 4th July,2025 and there being a judgement no leave of the court was obtained for a new advocate to come on record for the defendants and the application dated 2nd September,2025 should be struck out.

15. He avers that a litigant has a right to appoint an advocate to represent him in court or represent himself in court but when he chooses to appoint an advocate, whatever the advocate does in the matter binds him.

16. That the Applicant admits he has been indolent and not bothering to follow up his case and hence delay defeats equity and no good reason has been offered as to why the change of heart after a delay of almost 60 days. The fact of execution having been levied is not a good reason for someone to rush to court and seek leave to Appeal out of time.

17. That a test suit on liability was agreed upon by consent of the parties and judgement was delivered on 5th June, 2025 and no Appeal was filed. He states that he was crushed by the defendant's bus from the rear for both bus and the motor cycle were heading to the same direction and independent eye witnesses testified to that effect.



18. The Application was canvassed by way of written submissions,

19. Applicants submits on whether the Applicant has established a case for the grant of the orders sought of leave to file an appeal out of time that the jurisdiction of this Honourable Court in granting leave to enlarge time and



allow for appeals to be filed out of time is conferred by Section 79G of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules.

20. They submit that the guiding principles applicable herein is well expositied in **Karny Zahrya & another v Shalom Levi [2018] KECA 300 (KLR)** where it was stated *`The discretion of a single judge under Rule 4 is wide and unfettered. (See **Leo Sila Mutiso v. Rose Wangari Mwangi, CA No. Nai. 255 of 1997**). However, it must be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim, or sentiment (See **Julius Kamau Kithaka v. Waruguru Kithaka Nyaga & 2 Others, CA. No. 14 of 2013**). Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal the need to protect a party's opportunity to fairly agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal,• and whether, prima facie, the intended appeal has chances of-success or is a mere frivolity"*

21. The Applicant's Submissions is that he has produced as annexure CK-2 in his Supporting Affidavit being the Statement of Defence and Submissions evidencing that the firm of Kimondo Gachoka was on record in Makindu CMCC E039 of 2022 and has further deponed that when he visited the offices of the insurers for follow up, they were informed that the acting firm was replaced by Kairu & McCourt Advocates who could also not provide the further information on the delivered judgment.

22. It is submitted that the 1st Respondent has opposed the Application on the basis that the Applicant is bound by the



actions and the conduct of their advocates on record. They cite **Bains Construction Co. Ltd. vs John Mizare Qgowe [2003] KEHC 752 (KLR)** that.... *mistakes of Counsel as is the present case should not be visited upon a party.* Furthermore, the Applicant does not deny the actions of her advocates while they were on record. Rather,



she claims to be dissatisfied with the Judgment in the matter and intends to appeal through her newly appointed advocates.

23. It is submitted that the applicant has demonstrated that the delay to act upon the judgment was an error by the insurer and the advocates appointed to represent him in the matter who failed to update him on the outcome of the judgment even after he took the onus of following up on the same from both.

Reliance is placed on **Patrick Mama Mwangi v Waweru Peter (2015] KEHC 1099 (KLR).**

24. **Relying on Mbayi v Kibos & Allied Industries Limited & another [2023] KEELRC 486 (KLR).** Where the court observed

'The instant application was received in court on December 7, 2022. The applicant stated he was informed by the court clerk on the November 22, 2022 that the judgment had been issued secondly the court finds the delay of 2 weeks after awareness of the judgment was not inordinate. The court is satisfied there was good and sufficient cause for not filing the appeal on time.'

25. The 1st Respondent argues that it only became aware of the judgment on 28th August 2025 upon receiving the proclamation notice from Frontline Auctioneers and without delay appointed the advocates on record to file the application herein, which was filed on 03th September 2025. That in the circumstances the delay is not 60 days as alleged.

26. On the issue of change of advocate, it is argued that an appeal is a new proceeding and the applicant can choose a new advocate. For this proposition

reliance is placed on **Tobias M. Wafubwa v Ben Butali (2017) eKLR** where

,the Court after reviewing various authorities supporting the position held as follows: *We are of the same view, and would adopt the same approach in its entirety in matters concerning appeal. Once a judgment*



is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where the rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to



choose whether to remain with the same counsellor to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate. As this dispute concerned an appeal from the Principal Magistrates Court to the High Court, it involved the commencement of new proceedings, and we are satisfied that the respondents counsel was entitled to commence them without filing a Notice of Change or seeking the leave of the court to be placed on record ".

27. That from the foregoing and by parity of reasoning, the matter before us, being a Miscellaneous Application, falls within the ambit of new proceedings as opposed to a continuation post-judgment. Consequently, no leave is required for the Applicant to instruct new advocates to represent him.

28. On the issue liability that there was no consent on liability at 90:10 .and that the appeal is meritorious and arguable as evidenced in the memorandum of

appeal produced as annexure CK-4 The applicant relies on

Samuel Mwaura

Muthumbi v Josephine Wanjiru Ngugi & another [2018] K HC S78S (KLR) where the court stated t\ "*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 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

29. It is submitted that the application has merit and has met the threshold required to permit the enlargement of time to enable the applicant file the appeal and the orders sought



30. The Respondents oppose the application vide the replying affidavit sworn on 8th September.2025 and which they rely on the facts therein mutatis mutandis



31. That the prayer 4 for leave to be granted to the applicant to appeal out of time is untenable because judgement was delivered on the 5th June 2025 in the presence of the advocates for the plaintiff and the defendant. That it would be a fallacy for a client to turn round later to say his chosen legal counsel did not tell him to do this or that.

32. The Respondent submits that this court cannot be called upon to speculate as to what counsel and client discussed in private and there is no complaint or a protest letter shown to this court by the applicant that he wrote to his former advocates that he never advised him of the judgement of 5th June,2025 and that tells the court that this application is purely an afterthought.

33. It is their submission that the applicant has only come to this court because he was proclaimed on 28th August,2024 to forestall any execution and decided to change advocates in order to get a reason to malign the name of the previous advocate in order to get a way out. There is no other reason given.

34. It is also their submission that a party has a right to act in person or to appoint an advocate and after doing so, he or she is bound by whatever his advocate does in prosecuting the case and filing an appeal or not is part and parcel of prosecution of the case.

35. They rely on **ABU'IHNOT EXPORT SERVICES LTD - VS- MANCHESTER OUTFITTERS SUITING DIVISION LTD, HCCC NO. 2252 OF 1998** and urge this court to reject the application dated 2 nd September,2025

36. They further rely on the court of appeal decision in **Maclean & Another - Vs- Kiago & Another (Misc Civil Appl.E070 of 2023 (2025) KEHC 357 (KLR) (W March 2025) (Ruling).**

37. On whether extension of time to appeal out of time is a right, they submit that the right to appeal to the application



lapsed on the 4th July,2025 for no appeal was filed by the applicant and the extension of time to file an appeal out of time is not a right but an equitable remedy that is only available to a deserving party at the discretion of the court.



38. They submit that a party who seeks extension of time has the burden of laying the basis whether there is a reasonable basis for the delay, the reason for the delay, the reason must be fully explained to the court, whether there will be any prejudice suffered by the Respondents if the extension is granted, whether the application has been made without undue delay etc.

39. It is their submission that the applicant has not told this court when he went to see his former advocate hence no explanation at all for the delay and change of heart after delay of 60 days.

40. The court is urged to hold that the applicant has come to a court of equity with dirty hands and does not deserve to be treated with equity. They submit that the Respondent sustained very serious injuries in the subject accident and had a legitimate expectation to be paid after lapse of the right to appeal and that is now being put in jeopardy.

41. That the applicant's motor vehicle crushed the plaintiff from the rear when heading same direction and the plaintiff called three eye witnesses who corroborated the plaintiff's evidence as to who was to blame and hence the applicant has no arguable appeal on merit and that is why he did not appeal.

42. it is submitted that this is not an application for stay of execution pending appeal for the court to consider whether or not there is an arguable appeal for non is prayed for and this court cannot grant what has not been prayed for and court is urged to dismiss the application dated 2nd September,2025 with costs to the respondent.



Analysis and determination

43. I have considered the application, the response and the submissions by the parties herein. The only issue for determination is whether the application to enlarge time to allow the Appellant appeal out of time has merit.



44. **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.

45. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were set out by the Court of Appeal in **THUITA MWANGI V KENYA AIRWAYS LTD [2003] eKLR**. They include the following:

- i) The period of delay;*
- ii) The reason for the delay;*
- iii) The arguability of the appeal;*
- iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;*
- v) The importance of compliance with time limits to the particular litigation or issue; and*
- vi) The effect if any on the administration of justice or public interest if any is involved.*

46. The judgment was delivered on 05th June 2025 in Makindu CMCC E039 of 2022 hence the statutory period of thirty (30) days have already lapsed and leave of this Honourable Court is required before the Appeal can be filed. The present application was filed on 5th September,2025, two (2) months after the lapse of the 30 days stay of execution granted by the trial court. The appellant has given an explanation , and



proceeded to changed advocates.

47. The respondent will not suffer any prejudice



48. The delay is not inordinate.

49. In the circumstances the application dated 2 nd September,2025 is allowed in the following terms:-

i) Leave is granted to the applicant to file appeal out of time against the judgment delivered in MAKINDU CMCC No. E039 of 2022- Benjamin Kamwalo Kithuka vs. Imani Sacco Ltd, Neno Sacco & Eastcon Multiples Ltd.

ii) The applicant to file and serve his Memorandum of Appeal within 7 days hereof.

iii) The respondent will have costs of this application.

RULING dated, signed and delivered on 8th May
2026 Mumbua T Matheka

Judge

Mr. Muindi for the Respondent

Ms. Karuiru for Karanja for the appellant

SIGNED BY/FOR:
LADY JUSTICE MATHEKA, TERESIA MUMBUA



★ THE JUDICIARY OF KENYA ★

LADY JUSTICE
MATHEKA TERESIA
MUMBUA

Makueni High Court

High Court Div Date: 2026-05-08

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