

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**HIGH COURT MISC APPLICATION NO. E183 OF 2025**

**BETWEEN**

**PETER MUHIA WANJIKU..... APPLICANT/ INTENDED  
APPELLANT**

**AND**

**JOHN MUISYO KABAYA (Suing as the Personal  
Representative of the Estate of JAMES MUISYO KIBAYA-  
Deceased)**

.....**RESPONDENT**

**RULING**

1. The applicant moved this court by way of a Notice of Motion application dated 11<sup>th</sup> June 2025 and supported by an affidavit of even date. The application is brought under Order 22 rule 22, Order 50 Rule 6, Order 42 Rule 6, Order 51 rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3A, 79G & 95 of the Civil Procedure Act, Article 159 (2) (a) & (d) of the Constitution of Kenya, 2010 and all other enabling provisions of law.

2. The applicant seeks the following orders:

**1. ...spent.**

**2. spent**

**3. THAT this Honourable Court be pleased to  
order the release of the applicant's attached**

*property pending the determination of the application and subsequent intended appeal herein.*

*4. THAT this Honourable Court be pleased to extend time and grant leave to the applicant/Intended Appellant to lodge his Memorandum of Appeal out of time against the Judgment entered against him by the Honourable Daffine N. Sure, Principal Magistrate in Kangundo MCCC E048 of 2024.*

*5. THAT this Honourable Court be pleased to grant stay of execution of the Judgment and/or Decree issued by Honourable Daffine N. Sure, Principal Magistrate in Kangundo MCCC E048 of 2024 pending the full hearing and determination of the intended Appeal herein.*

*6. THAT the application be heard inter partes on such date and time as this Honourable Court may direct.*

*7. THAT this Honourable Court be pleased to give favourable terms as to the depositing of security for the appeal while considering the financial status of the applicant.*

*8. THAT the costs of this application abide the outcome of the Intended Appeal*

***9. THAT this Honourable Court be pleased to issue any other order and/ or direction it deem fit to grant in the circumstances.***

3. It is the applicant's case that he is aggrieved by the judgment of the trial court, both on liability and quantum and that he intends to challenge the same on appeal. He avers that the learned magistrate erred in finding him 100% liable for the accident, in adopting a dependency ratio of 2/3 and in awarding damages that were inordinately high and not comparable with awards made in similar circumstances.
4. The applicant contends that the delay in filing the appeal was neither deliberate nor inordinate, but was occasioned by circumstances beyond his control. He depones that he was under the impression that the matter was being handled a by his insurer and only became aware that no appeal had been lodged upon being served with a proclamation notice following execution proceedings.
5. He further avers that that upon receipt of the judgment and subsequent review by his insurer, instructions were issued to Kimondo Gachoka & Co. Advocates who had represented him in the trial court, to file an appeal in the matter.
6. The applicant explains that during the statutory 30-day period for lodging an appeal, his insurer underwent restructuring within its management which resulted in the transfer of its litigation portfolio from the 3firm then on record to the present advocates Kairu & McCourt Advocates.

7. According to the applicant, the transition process took time and by the time the new advocates received the file together with the relevant instructions, the statutory period for filing the appeal under section 79G of the Civil Procedure Act had already lapsed.
8. He further depones that the transition from one file management system to another led to temporal misplacement of the digital court file, thereby occasioning additional delay in filing the present application.
9. The Applicant maintains that the Respondent will not suffer any prejudice should the orders sought be granted. He asserts that the application has been brought in good faith and in the interests of justice, so as to ensure that the intended appeal is not rendered nugatory.
10. On the prayer for stay of execution, the Applicant contends that unless stay is granted, execution will proceed and the appeal, if successful, will be rendered an academic exercise. He therefore urges the Court to exercise its discretion in his favour.
11. The respondent opposes the application through a replying affidavit sworn on 9<sup>th</sup> July 2025 and written submissions.
12. It is the Respondent's case that the Applicant has failed to demonstrate sufficient, credible, and satisfactory reasons to warrant the grant of leave to appeal out of time. He further contends that the Applicant has equally failed to meet the

threshold required for the grant of an order of stay of execution pending the intended appeal.

13. The Respondent submits that leave to appeal out of time is a discretionary remedy and is not granted as of right. He urges that Sections 79G and 95 of the Civil Procedure Act impose an obligation on an applicant to satisfactorily explain the delay, which burden, in his view, the Applicant has failed to discharge.
14. It is further the Respondent's position that the Applicant's attempt to attribute the delay to his insurer, an entity that is not a party to the suit, cannot avail him. The Respondent contends that a litigant bears a personal and non-delegable duty to diligently protect and pursue his legal rights. The conduct, omissions, or alleged inefficiency of an insurer, whether negligent or otherwise, cannot constitute a legally sufficient justification for inaction by a party to litigation. In that regard, the Respondent urges that the Applicant cannot seek refuge behind internal arrangements between himself and his insurer.
15. The respondent further argues that no tangible evidence has been placed before the court to demonstrate that either the outgoing or incoming advocates were incapacitated unable or otherwise prevented from advising the applicant or lodging an appeal within the prescribed statutory period. He maintains that the allegations relating to transitions, restructuring and file misplacement are vague, unsupported

by documentary evidence, and do not amount to sufficient cause.

16. With respect to prayer for stay of execution, the respondents submit that the applicant has failed to satisfy the mandatory requirements set out under Order 42 Rule 6 of the Civil Procedure Rules.

17. In the circumstances, the Respondent urges the Court to find that the application is devoid of merit and to dismiss it with costs.

### **Analysis and determination**

18. I have carefully considered the application the supporting affidavit and the respective submissions of parties. From the pleadings and argument advanced the 2 following issues arise for determination;

- a) Whether the Applicant has demonstrated good and sufficient cause to warrant the grant of leave to appeal out of time; and
- b) Whether the Applicant has satisfied the requirements for the grant of an order of stay of execution pending the hearing and determination of the intended appeal.

### **Whether leave to appeal out of time should be granted**

19. The applicable legal framework is Section 79G of the Civil Procedure Act which provides as follows:

**“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 therefore clear that an appeal filed outside the prescribed thirty-day period can only be admitted with leave of the Court, and upon the Applicant demonstrating good and sufficient cause for the delay. Extension of time is a discretionary and equitable remedy, not a right.

21. The guiding principles applicable in considering extension of time were authoritatively stated by the Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] eKLR**, where the court identified inter alia the following considerations;

***a) Extension of time is not a right of a party.***

***b) the applicant bears the burden of laying a basis to the satisfaction of the court***

- c) each case must be considered on its own circumstances;***
- d) the delay must be satisfactorily explained;***
- e) the court must consider whether the respondent will suffer prejudice and***
- f) the application should be brought without undue delay.”***

22. Applying the above principles to the present case, it is not in disputed that judgment in Kangundo CMCC E048 of 2024 was delivered on 29<sup>th</sup> March 2025. The statutory period of 30 days within which to lodge an appeal lapsed on or about 29<sup>th</sup> April 2025. The present application was filed 11<sup>th</sup> June 2025 slightly over six weeks after the lapse of time.

23. The Applicant has attributed the delay to several factors, principal among them being his reliance on his insurer to deal with the matter, internal restructuring within the insurer, transfer of the matter from one firm of advocates to another, and challenges encountered during the transition of file management systems. He contends that the delay was inadvertent and not deliberate.

24. While it is true that a litigant bears primary responsibility to pursue his case with diligence, courts have consistently held that mistakes or lapses attributable to advocates or third parties, including insurers, should not automatically be

visited upon an otherwise deserving litigant, provided the explanation given is reasonable, plausible, and made in good faith. The court's overriding duty remains the administration of substantive justice.

25. In the present case, I am satisfied that the delay, though not insignificant, has been sufficiently explained. The Applicant has set out a chronology of events explaining how the lapse occurred, and there is no material placed before the Court to suggest that the delay was deliberate, calculated, or meant to obstruct the course of justice. Importantly, once the Applicant became aware of the execution process, he moved the Court without inordinate delay.

26. I have also considered whether the Respondent will suffer prejudice if leave is granted. Other than the delay occasioned, no specific prejudice has been demonstrated that cannot be compensated by costs or mitigated through appropriate conditions.

27. In the circumstances, and guided by the principle that disputes should, as far as possible, be determined on their merits, I am persuaded that the Applicant has established good and sufficient cause to warrant the exercise of this Court's discretion in his favour. Leave to appeal out of time is therefore justified.

**Whether stay of execution pending appeal should be granted**

28. Having found that leave to appeal out of time ought to be granted, I now turn to the prayer for stay of execution. The applicable provision is, which sets out three mandatory requirements that must be satisfied namely; the application must be brought without delay; the applicant must demonstrate that he will suffer substantial loss unless stay is granted; and must be willing to provide such security for the due performance of the decree.

29. On delay, and in the circumstance of this case, I have already found that the Applicant moved the Court within a reasonable time upon learning of the impending execution. On substantial loss, the Applicant has deponed that execution has commenced through attachment of his property and that if execution proceeds, the intended appeal may be rendered nugatory. Where execution is imminent and no safeguards are in place, the court may intervene to preserve the subject matter of the appeal.

30. With regard to security, it is meant to balance the competing interests of both parties, by ensuring that the Respondent's decree is not rendered illusory while preserving the Applicant's right of appeal. In the interest of justice, and to strike an appropriate balance between the parties, I find

that an order of stay of execution is warranted, subject to the provision of reasonable security.

31. As a result of the above analysis, I find that the applicant has satisfied the threshold for the grant of leave to appeal out of time and for stay of execution pending appeal. Thus, the Notice of Motion dated 11th June 2025 succeeds on the following terms:

- a. The Applicant is granted leave to file and serve Memorandum of Appeal against the judgment delivered on 29<sup>th</sup> March 2025 in Kangundo Civil Suit No E048 of 2024.
- b. The memorandum of appeal shall be filed within 14 days of this ruling;
- c. Stay of execution in respect of the Judgment in Kangundo Civil Suit No E048 of 2024 is granted pending the hearing and determination of the appeal, on condition that the Applicant deposits half the decretal sum in an interest earning account held jointly by Counsels for both parties within 45 days of this Ruling; in the alternative the said amount be deposited in court within the same period, failure of which execution to issue without any reference to this court.

d. The costs of the Application shall be granted to the respondent.

It is so ordered.

Dated, signed and delivered at Machakos this 7<sup>th</sup> day of May 2026

**RHODA RUTTO**  
**JUDGE**

**In the presence of;**

.....Applicant

.....Respondent

Selina Court Assistant