



REPUBLIC OF KENYA



**Matunda Fruits Bus Service Limited v Mueni (Miscellaneous Civil Suit
E003 of 2025) [2025] KEHC 751 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 751 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS CIVIL SUIT E003 OF 2025
JK SERGON, J
JANUARY 30, 2025**

BETWEEN

MATUNDA FRUITS BUS SERVICE LIMITED APPLICANT

AND

LEVINAH MUENI RESPONDENT

RULING

1. The application coming up for determination is a notice of motion dated 30th November, 2024 seeking the following orders;
 - i. Spent
 - ii. That the applicant herein be granted leave to appeal out of time against the whole judgement of honourable F.M Nyakundi (PM) delivered on 9th October, 2024 in Kericho Chief Magistrate's Civil Suit No. 178B of 2021.
 - iii. That the draft memorandum of appeal annexed to the application be deemed as duly filed and served upon payment of the requisite fees.
 - iv. That this honourable court be pleased to grant a stay of execution in Kericho CMCC No. 178B of 2021, pending hearing and determination of this application inter partes and the intended appeal.
 - v. That this honourable court be pleased to grant stay of assessment of costs in Kericho CMCC No. 178B of 2021, pending hearing and determination of the intended appeal.
 - vi. That upon grant of prayers No. (ii) and (iii) above, this honourable court be pleased to order that the applicants do provide sufficient security in the form of a suitable bank guarantee from a reputable financial institution to secure the judgment of Kshs. 400,000/=.



- v. That costs of this application be in the cause.
2. The application is supported by the grounds on the face of it and the supporting affidavit of Lydia Ongwacho, an advocate practicing in the name and style of Kimondo Gachoka and Company Advocates who are in conduct of the instant suit.
 3. She avers that Direct Line Insurance instructed the firm of Kimondo Gachoka and Company Advocates to enter appearance and defend the applicant in Kericho CMCC No. 178B of 2021 and that judgment was entered on 9th October, 2024 and the applicant condemned to pay Kshs. 400,000/= plus costs and interests.
 4. She avers that being dissatisfied with the judgment, the applicant is desirous of challenging the decision of the trial court, however, the time within which to file an appeal has lapsed.
 5. She avers that the delay in filing the appeal was occasioned by failure of the advocate to inform the applicant of the said judgment and therefore the mistake of an advocate should not be visited upon an innocent client.
 6. She avers that the appeal raises triable issues and has a high chance of success.
 7. She avers that the applicant is willing to furnish security by providing a bank guarantee security for Kshs. 400,000/=.
 8. She avers that the applicant will suffer substantial loss and damage if the orders sought herein are not granted and further that the intended appeal will be rendered nugatory. She further avers that the respondent will not be prejudiced in any way if the orders sought are not granted.
 9. She avers that the application has been done without unreasonable delay.
 10. Levinah Mueni Mwau the respondent herein filed a replying affidavit in response to the application.
 11. She avers that the judgment in Kericho CMCC No. 178B of 2021 was delivered on 9th October, 2024 where the applicant was found 100% liable for the accident and she was awarded Kshs. 400,000/= in damages plus party to party costs of the suit which are due for assessment in the trial court which amount the applicant has failed and/or refused to pay despite being aware of the judgment.
 12. She avers that the application herein is dated 30th November, 2024 and was filed on 7th January, 2025 which almost 3 months after the judgment in the lower court which was delivered on 9th October, 2024, thereby there has been inordinate delay in filing the application and the reasons given for the delay are wanting. She avers that when judgment was delivered both advocates were present in court and were therefore aware of the findings on liability and quantum. She further avers that the advocates participated in the assessment of the party and party costs of the proceedings in the lower court and therefore the delay in filing the instant application was unreasonable and/or inexcusable.
 13. She avers that the instant application lacks merit, is bad in law and fatally defective, as time to lapse an appeal lapsed on 9th November, 2024, therefore the delay is inordinate, the judgment appealed against has not been annexed and the annexed draft memorandum of appeal is defective as the same has not been signed.
 14. She avers that should the court be inclined to grant the applicant to file an appeal out of time, the court should give specific time lines.
 15. She avers that in reference to the prayer where the applicant seeks for a stay of the assessment of costs in the proceedings before the lower court in Kericho CMCC No. 178B of 2021 which are due for



assessment in the trial court, a stay of the assessment proceedings will be a grave injustice because costs were awarded by the trial court to the successful party in the suit being the plaintiff/respondent and no appeal, reference or review has been filed against the award of costs by the applicants.

16. She avers that a stay of execution of the judgement and decree in Kericho CMCC No. 178B of 2021, is not unconditional rather the applicant has to meet the conditions set out under order 42 rule 6 (2) of the Civil Procedure Rules, 2010 and further that stay of execution be allowed on conditions that the applicant is ordered to deposit the entire decretal sum Kshs. 400,000/= in a joint interest bearing account in the name of the counsel on record for both parties.
17. The matter came up for inter partes hearing, Miss Ongwacho counsel for the applicant reiterated that in the instant application they were seeking for stay of execution and leave to file an appeal out of time, whereas, Miss Mukhonyo the learned counsel for the respondent reiterated that they oppose the same and were relying on the replying affidavit.
18. I have considered the application, response and oral submissions by parties and I find that the issue (s) for determination are whether enlarge the time to file the intended appeal out of time, grant a stay execution and a stay of the assessment of the party to party costs in the proceedings before the lower court in Kericho CMCC No. 178B of 2021.
19. On the issue as to whether to enlarge time to lodge the appeal out of time, the operative section of the law is 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.” In the case of Paul Musili Wambua v Attorney General & 2 others [2015] eKLR, the Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated as follows: “...it is now well 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 whims or caprice. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the 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.” Regarding the length of delay, it is evident from the pleadings on record herein that the judgement that the applicant is seeking to appeal against was delivered on 9th October 2024. The instant application though dated 30th November, 2024 was filed on the 7th January 2025, occasioning a delay of two months and the applicant submitted that the delay in lodging the appeal was occasioned by failure of the advocate to inform the applicant of the said judgment and therefore the mistake of an advocate should not be visited upon an innocent client. In the circumstances, I am inclined to allow the applicant leave to file the intended appeal noting that the delay is not inordinate.
20. On the issue as to whether to grant a stay of execution, the judgment was delivered on 9th October, 2024 while the present application was filed on 7th January, 2025, over two months after the lapse of the 30 days stay of execution granted by the trial court. An application for stay invokes the discretionary powers of this court under Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010 that empowers the court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Order 42, Rule 6 (2) which states as follows: “No order for stay of execution shall be made under sub rule



(1) unless – a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.” This court notes that the instant application was not filed timeously, this notwithstanding, on one part, the applicant contended that they would suffer substantial loss and damage if stay is not granted and that the intended appeal will be rendered nugatory and they were willing to offer a bank guarantee of the entire decretal amount as security. On the other part, the respondent contended that a stay of execution is conditional and therefore the applicant should be ordered to deposit the entire decretal sum Kshs. 400,000/= in a joint interest bearing account in the name of the counsel on record for both parties. Having considered the submissions by the parties on the issue of stay and the circumstances of this case, it is the finding of this court that the applicant is entitled to a stay of execution as he ventilates his intended appeal.

21. On the issue as to whether to grant a stay of the assessment of party to party costs in the proceedings before the lower court in Kericho CMCC No. 178B of 2021 which are due for assessment, it is the view of this court that a stay of the assessment proceedings will be a travesty of justice because costs were awarded by the trial court to the successful party in the suit being the plaintiff/respondent and no appeal, reference or review has been filed against the award of the party to party costs by the applicants herein.
22. I find that the applicant is entitled to pursue the appeal. The Motion dated 30/11/2024 partially succeeds, giving rise to issuance of the following Orders:-
 - i. Leave is granted to the applicant to file an appeal out of time against the judgment delivered in Kericho CMCC No. 178B of 2021
 - ii. The applicant to file and serve his Memorandum of Appeal within fourteen (14) days hereof.
 - iii. Execution of the judgment/decreet in Kericho CMCC No. 178B of 2021 is hereby stayed pending the hearing and determination of the intended Appeal.
 - iv. The applicant to deposit the entire decretal sum Kshs. 400,000/= in a joint account of both advocates within forty five (45) days hereof.
 - v. In default of complying with order (iv) the orders staying execution shall lapse.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 30TH DAY OF JANUARY, 2025.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Miss Mukhongo for Respondent

No Appearance Miss Ongwacho for Applicant

