



**Nicholas v Mulundi (Civil Appeal E007 of 2024)
[2025] KEHC 2433 (KLR) (28 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 2433 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E007 OF 2024
NIO ADAGI, J
JANUARY 28, 2025**

BETWEEN

FELISTA KAVEKE NICHOLAS APPELLANT

AND

DESMOND MUMO MULUNDI RESPONDENT

RULING

1. This ruling is on the Appellant/Applicant's application dated 28th June 2024 and filed under Certificate of Urgency of the same date. It is brought under the provisions of Section 1A, 1B,3A and 79G of the *Civil Procedure Act*, Order 42 Rule 6 of the Civil Procedure Rules, Section 38 of the *Small Claims Court Act* and all other enabling provisions of the Law. The application is supported by the affidavit of the Applicant sworn on the even date.
2. The Applicant seeks the following prayers:
 - a. Spent.
 - b. That the firm of B. Maitha & Company Advocates be granted leave to come on record for the Appellant herein.
 - c. That this Honorable Court be pleased to grant the Applicant leave to appeal out of time against the judgment of Hon. B.A Luoya Magistrate/Adjudicator in Machakos SCCCOMM E062 of 2024 delivered on 11th April 2024.
 - d. That this Honorable Court be pleased to issue an order for stay of execution of the aforesaid judgment pending the hearing and determination of the intended appeal.
 - e. That the Memorandum of Appeal against the judgment of the Honorable Magistrate/Adjudicator in Machakos SCCCOMM E062 of 2024 annexed hereto, be deemed as duly filed and served.



- f. That the Honorable Court be pleased to make such further Orders as are necessary for the ends of justice.
- g. That costs be provided for
3. Applicant's Case The Applicant in the grounds to the application contends that the Respondent instituted the proceedings before Machakos SCCCOMM 062 of 2024 through the Claim dated 11th January 2024, as against Applicant seeking to recover Kshs.581,900.00. Consequently, the Small Claims Court delivered its judgment on 11th April 2024. That the whole judgment is in favour of the Respondent who has already proceeded to extract the decree and is now seeking to enforce it through the arrest of the Applicant. That immediately after the hearing of the Claim, the Applicant lost her phone thereby losing contact with her previous counsel. There was therefore a breakdown in communication between the Respondent and her Counsel. Resultantly, the Applicant was not aware of the said judgment or the consequential decree that ensued therefrom. That the Applicant only came to learn of the judgment and decree when she was served in person, with the Notices to Show Cause dated 21st May 2024 and 15th June 2024 whereupon she immediately reached out to the previous Advocate who then informed her of the several unsuccessful attempts to contact her. That immediately thereafter, the Applicant sought alternative legal counsel to enable her appeal against the judgment of the Court in Machakos SCCCOMM E062 of 2024. That the Respondent's application for Notice to Show Cause why the Applicant herein should not be committed to civil jail came up for Mention on the 26th day of June 2024 wherein the Applicant herein was granted a week to have her house in order. The same was slated for a Mention for further directions on 3rd July 2024 before the Small Claims Court at Machakos and the Applicant was likely to be committed to civil jail hence the urgency of this matter. That the Applicant's failure to file the appeal within the prescribed time was not due to indolence but rather due to the aforementioned circumstances beyond her control. That the Applicant is desirous of appealing against the said judgment and has a strong, arguable and meritorious appeal that would further be rendered nugatory if stay of execution of the judgment and decree of the Small Claims Court in Machakos SCCCOMM E062 of 2024 is not granted.
4. The Respondents' Case The Respondent has filed a Replying Affidavit sworn on 22nd August 2024 in opposition to the application on the premise that it is misconceived, vexatious, an afterthought and an abuse of the court process. The Respondent contend that the Applicant ought to have sought the leave and stay of execution in the lower court which heard the matter and pronounced judgment. That the appeal is a delay tactic to frustrate the Respondent from enjoying the fruits of the judgment. The Applicant only waited until she was served with the Notices to Show Cause that she moved the court under certificate of urgency on the instant application. It is the Respondent's proposal that the Applicant's application be allowed on condition that she pays half the decretal amount and the balance to be deposited into a joint interest earning account in the names of advocates on record for both parties or in the alternative it be deposited in court.
5. The parties were directed to canvas the application through written submissions. The Applicant's submissions are dated 31st October 2024 while the Respondent's submissions are dated 15th November 2024.

The Applicant's Submissions

6. The Applicant in her submissions highlighted three issues for consideration that: - i) whether the firm of B. Maitha & Co. Advocates is properly on record for the Applicant; ii) whether the Applicant is entitled to grant of leave to prefer an appeal out of time and; iii) whether the Applicant's prayer to stay execution of the lower court judgment is merited.



7. On whether the firm of B. Maitha & Co. Advocates was properly on record for the Applicant, the Applicant submitted that the requirement under Order 9 Rule 9 of the Civil Procedure Rules is that leave has to be granted for a new firm of advocates to come on record post judgment. Nothing in the aforesaid provision requires that such leave be sought in the trial court.
8. On whether the Applicant is entitled to grant of leave to prefer an appeal out of time, the Applicant submitted that it wished to imprint upon this court that the issue of compliance with statutory deadlines and timelines is one of procedural justice and not substantive justice and for this reason, the courts have in a catena of judicial authorities, held the decision to enlarge and or extend the statutory prescribed timelines to be discretionary. The Applicant attributes her failure to file the appeal within timetoea breakdown in communication between her and her previous counsel on record and which breakdown was occasioned by the Applicant's loss of her mobile phone which made it impossible for the previous advocates to contact her and notify her of the impending judgment. The Applicant cited several decisions and invoked the discretionary power of this court to enlarge time within which to file an appeal against the decision of the trial court.
9. On whether the Applicant's prayer for stay of execution of the judgment of the subordinate court is merited, the Applicant equally invoked the discretion of this court under Order 42 Rule 6 of the Civil Procedure Rules which empowers this court to stay execution of its judgment or that of the subordinate court pending appeal. The Applicant contends that the execution of the impugned judgment which is already underway as evidenced by the Notices to show cause served upon her, will condemn her to pay to the Respondent more than he is entitled to thereby unjustly enriching the Respondent. This will negate the essence of the intended appeal which seeks to challenge the decision to the extent of the amount awarded to the Respondent.
10. On the condition of security for costs for grant of stay of execution of the impugned judgment, the Applicant submits that she is willing to deposit Kshs.239,100.00 being the rightful amount due to the Respondent.
11. The Applicant submits that the Respondent will not be prejudiced and, in any event, he shall be compensated by way of costs. Furthermore, the Applicant submits that the intended appeal has a high probability of success as the issues raised are arguable. The Applicant thus beseeches this court to exercise its discretion in such a way as not to prevent her from ventilating issues by way of appeal.

The Respondents' Submissions

12. The Respondent has in his submissions highlighted two issues for consideration which include: i) whether the Applicant's appeal should be admitted out of time and ii) whether the orders of stay of execution should be granted as sought.
13. Onwhether the Applicant's appeal should be admitted out of time, the Respondent cited the provisions of Section 79G of the Civil Procedure Act on what the court ought to consider before it considers the extension of time.
14. It is the Respondent's submission that the Applicant filed the instant application two months after the judgment had been delivered without giving any reasonable explanation for the delay. That the Applicant has not shown any attempts she made to find out from her advocates the position of the case or follow up on the judgment. The alleged loss of the Applicant's mobile phone did not hinder her from physically visiting her previous advocates in their chambers and that assertion should fail.
15. The Respondent further submitted that the draft Memorandum of Appeal does not raise any pertinent issue of law but pertain to points of fact and the same contravenes the provisions of Section 38 of the



Small Claims Court Act. Thus, it is evident that chances of the intended appeal succeeding in the event the application is allowed are quite limited.

16. The Respondent submitted that this court should conclude that the Applicant has not established to the satisfaction of the court the reasons for enlargement of time to file an appeal consequently the Applicant's application should be dismissed with costs.

Analysis and determination

17. I have considered the application, the supporting affidavit, the Replying Affidavit, and the rival submissions filed by the parties' counsel as well as the judicial decisions relied upon. It is clear that the Respondent has not contested representation of the Applicant's present advocates on record and have not made any submissions on the same. In my view, the issues for determination are as follows:

- a. Whether the court should exercise its discretion to grant the applicant leave to file her appeal out of time;
- b. Whether the applicant has met the prerequisite for grant of stay of execution pending appeal;
 - a. Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;

18. Section 79G of the Civil Procedure Act 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 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.

19. It is clear from the wording of Section 79G of the Civil Procedure Act that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018] eKLR that an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

20. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;



- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
 - f. Whether the application has been brought without undue delay.
21. Similarly in the case of Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-
- “.....it is now 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 whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of 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.”
22. Applying the above principles to the present case, the judgment herein was delivered on 11th April 2024 and the appeal ought to have been filed by 11th May 2024. The Applicant filed the current application together with the annexed Memorandum of Appeal on 1st July 2024. This is about one month and twenty days outside the time limited for filing an appeal. The Applicant has attributed the delay in filing her appeal to breakdown in communication with her previous advocates due to the loss of her phone. The Applicant did not disclose when she exactly lost her phone and what attempts she made to reach her previous advocates or follow up on the case considering that in the circumstances it was impossible for her previous advocates to reach her and update her on the outcome of the judgment. The Applicant’s previous advocates cannot be faulted at all. The Applicant would have been expected to reach her previous advocates in the same manner she reached them upon being served with the Notices to Show Cause. It is trite law that parties have the responsibility to show interest in and to follow up on their cases even when they are represented by counsel.
23. Considering one month and twenty days delay cannot really be termed as an inordinate delay, however the reasons for the delay have not been satisfactorily explained to the court as required by the law. In my view, the Applicant has not given any plausible reasons for the delay in filing the appeal.
29. I have perused the intended Memorandum of Appeal and the judgment of the trial court and noted that the appeal does not raise pertinent issues of law as required by the provisions of Section 38 of the *Small Claims Court Act*. As such, the appeal cannot be said to be arguable although at this juncture, I will restrain from delving into the merits of the appeal.

b. Whether the applicant has met the prerequisite for grant of stay of execution pending appeal;

30. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
- 1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 orders set aside.

2. 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 1st 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.

31. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

32. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”.

33. The Applicant is silent in her affidavit on how she stands to suffer substantial loss. She only states at paragraph 13 of the supporting affidavit that she has an arguable and meritorious appeal which will be rendered nugatory in the event the impugned judgment and ensuing execution is not stayed pending determination of the intended appeal.

34. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The Applicant is required to show the manner in which execution will irreparably affect her or will alter the status quo to her detriment therefore rendering the appeal nugatory. The Appellant has failed to demonstrate substantial loss in my considered view.

35. On whether the application has been made without unreasonable delay. Judgment at the trial court was delivered on 11th April 2024 and the appeal ought to have been filed by 11th May 2024. The Applicant



filed the current application together with the annexed Memorandum of Appeal on 1st July 2024. This is about one month and twenty days outside the time limited for the application. This period is not inordinate and inexcusable, however as already observed herein above the reason for the delay has not been explained to the satisfaction of the court.

36. On the issue of security for costs, the purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

40. Evidently, the issue of security is discretionary and it is upon the court to determine it and set its terms. The trial court entered judgment for Kshs.581,900.00 for the Respondent as against the Appellant. The Applicant has at ground 4 of the Memorandum of appeal admitted that the amount outstanding and due to the Respondent is Kshs.240,000.00. The Applicant has also submitted that she is willing to deposit Kshs.239,100 being the rightful amount due to the Respondent.

41. It is imperative that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff/claimant to enjoy the fruits of the judgment delivered in his/her favour. In the case of Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

42. What I am able to gather from the application is that the Applicant does not dispute that the Respondent is entitled to the Kshs.240,000.00 as stated in her Memorandum of Appeal. It is my view then that the Applicant cannot consider the said amount as security in fact she should pay that amount to the Respondent and base the security for costs on the balance that remains on the decretal award of Kshs.581,900.00 upon that payment being Kshs.341,900.00. I notice that the Applicant has not offered any security for costs on the disputed amount or on the performance of the decree.

43. The Applicant cannot have a blanket stay of execution without providing reasonable security for the performance of the decree particularly on the amount she disputes in the appeal. The Applicant admits that the amount outstanding and due to the Respondent is Kshs.240,000.00. The Applicant has also submitted that she is willing to deposit Kshs.239,100.00 being the rightful amount due to the Respondent. Considering that submissions are not pleadings, I will be guided by the amount admitted by the Applicant in the Memorandum of Appeal which is a pleading to be what is to be paid to the Respondent pending the determination of the appeal and thereafter proceed to determine the issue of security for costs in the circumstances of this matter. See Erastus Wade Opande vs. Kenya Revenue



Authority & Another Kisumu HCCA No. 46 of 2007: where Mwera, J (as he then was) held that, in legal proceedings, evidence ought not to be introduced by way of submissions as follows:

“Submissions simply concretise and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”

44. Consequently, I do find that the Applicant is entitled to pursue her appeal on merit. I do allow the application dated 28th June 2024 in the following terms:

1. Leave is granted to the Applicant to file appeal out of time against the judgment delivered in Machakos SCCCOMM E062 of 2024.
2. The Applicant to file and serve her Memorandum of Appeal within Fourteen (14) days hereof and thereafter to compile, file and serve the Record of Appeal within Thirty (30) days considering that the Trial Lower Court’s typed proceedings are in the court file.
3. Execution of the Judgment/decree in Machakos SCCCOMM E062 of 2024 is hereby stayed pending the hearing and determination of the appeal on condition that :
 - a) The Applicant shall pay to the Respondent Kenya Shillings Two Hundred and Forty Thousand (Kshs.240,000.00) within Thirty (30) days hereof.
 - b) The Applicant shall deposit a sum of Kenya Shillings Two Hundred and Thirty Nine Thousand One Hundred (Kshs.239,100.00) in a joint interest earning account of both parties’ advocates within sixty (60) days hereof.
4. In default of complying with Order number 3 (a) and (b) above, the Orders staying execution herein shall lapse and the Respondent shall be at liberty to execute.

45. It is hereby so ordered.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 28TH JANUARY 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 28TH JANUARY 2025

