



Africa Merchant Assurance Company Limited v Njuguna (Civil Miscellaneous Application E930 of 2024) [2025] KEHC 2526 (KLR) (Civ) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2526 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL MISCELLANEOUS APPLICATION E930 OF 2024
TW CHERERE, J
FEBRUARY 27, 2025**

**BETWEEN
AFRICA MERCHANT ASSURANCE COMPANY LIMITED APPLICANT
AND
PETER GAKUNGA NJUGUNA RESPONDENT**

RULING

1. By notice of motion dated 04th October 2024, the Applicant seeks the following orders for:
 1. Leave to appeal out of time against the judgment in CMCC E149 of 2022 delivered on 22nd August 2024
 2. An order for stay of execution the judgment in CMCC E149 of 2022 pending the hearing and determination of the intended appeal
 3. An order awarding costs.
2. The application is based on the grounds that:
 1. The Applicant is aggrieved by the judgment in CMCC E149 of 2022 delivered on 22nd August 2024
 2. The statutory time for filing the appeal has lapsed
 3. The Respondent will not be unduly prejudiced by the reliefs sought.
3. The application is further supported by an affidavit sworn on 03rd October 2024 by Winnie Gikenyi, the Applicant's Legal Manager, who reiterates the grounds set out in the notice of motion. The deponent explains that the Applicant's heavy workload caused the delay. It is also averred that the



- Applicant has been condemned to pay an amount exceeding the statutory limit and that, as its goods have been proclaimed in satisfaction of the decree, the Applicant may be precluded from recovering the decretal sum if it is paid to the Respondent resulting in substantial loss.
4. The applicant has offered to provide a bank guarantee as security for the due performance of the decree in issue.
 5. Annexed to the affidavit is the proclamation notice, and warrants of attachment of Applicant's goods (marked WG-1), and a draft memorandum of appeal (marked WG-2).
 6. In a relying affidavit sworn on 25th November 2024, the Respondent opposes the application, arguing that it has a valid judgment and decree against it (in its capacity as insurer) and that the Applicant moved the court only after its goods were proclaimed.
 7. In its submission dated 29th January 2025, the Applicant contends that it has met the necessary threshold set under Section 79G of the *Civil Procedure Act* and Order 42 rule 6(2) of the Civil Procedure Rules since it has shown "sufficient cause" and urged the court to exercise discretion to grant the stay order in its favour.
 8. Applicant argues that the 12-day delay is excusable and cited *Agip (Kenya) Limited v Highlands Tyres Ltd [2001] eKLR* and *Sagoo v Bharij [1990] KEHC 56 (KLR)*.
 9. The Applicant further argued that the appeal has high prospects of success and that denying it the right to be heard will result in substantial loss and relied on *Century Oil Trading Company Ltd v Kenya Shell Ltd Nairobi [2008] eKLR* and *Shabbir Ali Jusab v Annar Osman Gamrai & Anor [2014] eKLR*.
 10. The Applicant urged the court to find that the delay has been explained and urged that discretion be exercised in its favour and in support thereof cited *Paul Misili Wambua v Attorney General & 2 Others (Supra)*.
 11. In his submission dated 21st February 2025, the Respondent argues that whereas the court has the discretion to grant the orders sought, the Applicant has not explained the delay, or the reasons for the delay and has therefore not satisfied the threshold set out in Section 79G of the *Civil Procedure Act* and Order 42 Rule 6(2) of the Civil Procedure Rules as enunciated in *Edith Gichunga Koine v Stephen Njagi Thoithi [2014] eKLR*.
 12. On the issue of proof of delay before the court can exercise its discretion, the Respondent cited *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2015] eKLR* and *Paul Musili Wambua v Attorney General & 2 others (Supra)*.
 13. On the matter of sufficient reason, the Respondent asserts that the Applicant's claim of being overburdened by work is inadequate citing *Susan Oguto Oloo v Doris Odindo [2019] eKLR*.
 14. Concerning the 12-day delay, the Respondent contends that although the delay may not be inordinate, the Applicant has not provided a plausible explanation. The Respondent relies on *Githau v Kagiri & another (Civil Appeal 314 of 2023) [2024] KEHC 6320 (KLR) (6 June 2024) (Ruling)*.
 15. On the issue of prejudice, the Respondent submits that its vehicle has been attached and a warrant of arrest issued against him, and he is likely to suffer significant prejudice if a stay of execution is granted.
 16. Concerning substantial loss, the Respondent maintains that, as a successful party, it is entitled to the fruits of its judgment and cites *James Wangalwa v Agnes Naliaka [2012] eKLR* .
 17. I have considered the application in the light of affidavits on record and annexures thereto and I have identified the following issues for determination.



1. Whether the Applicant has demonstrated sufficient cause for the enlargement of time to appeal the judgment of the trial court.
 2. Whether the Applicant has met the legal threshold for the grant of a stay of execution pending appeal under Order 42 Rule 6(2) of the Civil Procedure Rules
18. The statutory framework for the enlargement of time is well settled. Section 79G of the [Civil Procedure Act](#) provides:
- “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.”
19. Order 50 Rule 6 of the Civil Procedure Rules grants the Court discretion to extend time where sufficient cause is demonstrated. It states:
- “Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require.”
20. The legal threshold for stay of execution under Order 42 Rule 6(2) of the Civil Procedure Rules which was reaffirmed in *Butt v Rent Restriction Tribunal* [1979] eKLR provides that in considering an application for a stay of execution, the court must be satisfied that:
- a) The application has been made without unreasonable delay;
 - b) The appeal is arguable with a probability of success;
 - c) The applicant will suffer substantial loss if the stay is not granted; and
 - d) Security for the due performance of the decree has been provided.
21. The foregoing principles were enunciated in the case of *Dilpack 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.
22. In the case of *Paul Musili Wambua v Attorney General & 2 others* (Supra), the Court of Appeal while considering an application for extension of time and leave to file a Notice of Appeal out of time stated the following:
- “.....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.”



23. In *Edith Gichugu Koine vs. Stephen Njagi Thoithi* (Supra), the Court of Appeal set out the principles fundamental to an application for leave to file an appeal out of time as follows:
- “Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others...”
24. This discretion to enlarge time must be exercised judiciously and not arbitrarily, as was held in *Susan Oguto Oloo v Doris Odindo* (Supra) and *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others* (Supra), In the latter case, Supreme Court outlined guiding principles for enlargement of time, including the length of delay, the reason for delay, the degree of prejudice to the other party, and the chances of the appeal succeeding.
25. The Court has examined whether the Applicant provided a sufficient explanation for the 12-day delay in filing the appeal. The Applicant’s affidavit attributes the delay to an overwhelming workload which in my considered is not sufficient justification for the delay.
26. The foregoing notwithstanding, this application was filed on 04th October 2024 which was two months from 22nd August 2024 when the impugned judgment was delivered and 12 days from 22nd September 2024 which was the last date that the appeal ought to have been filed.
27. In *Century Oil Trading Company Ltd v Kenya Shell Ltd Nairobi* (Supra), *Shabbir Ali Jusab v Annar Osman Gamrai & Anor* (Supra) and *Githau v Kagiri & another* (Civil Appeal 314 of 2023) (Supra), Applicants who moved the court to file appeal out of time after 12 days, 8 months and 13 days respectively were excused on the ground that the circumstances revealed that the delay was not inordinate.
28. Article 159(2)(d) of *the Constitution* of Kenya, dictates that this Court shall not sacrifice substantial justice at the altar of procedural technicalities and I therefore find that the delay in this matter is not inordinate. (See *M’Imunya v Muroko* (Suing on behalf of the Estate of Alex Muriki Kaiyongi) (Civil Appeal E198 of 2023) [2024] KEHC 327 (KLR) (25 January 2024) (Ruling)).
29. On the issue of whether the appeal is arguable, the Appellant contends that the trial court’s judgment orders the Respondent to pay more than its statutory limit a fact that the Respondent has not contested. This court takes judicial notice of the provisions of section 5(b)(iv) of Insurance (Motor Vehicle Third Party Risks), Cap 405 Laws of Kenya, that the amount payable by the insurer is limited to KES. 3,000,000/-. The impugned judgment is for a sum of KES. 5,363,470/- and I therefore find that the extent of Applicant’s liability to the Respondent is a triable issue.
30. The burden of proving substantial loss lies with the Applicant as was held by the Court of Appeal in *Mukuma V Abuoga* (1988) KLR 645 that:
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
31. The Applicant having demonstrated an arguable appeal and the likelihood of execution of more than its statutory limit has in my considered view demonstrated the likelihood of substantial loss if execution proceeds before the appeal is heard.



32. On the issue of prejudice to the Respondent, there is a claim that Respondent's vehicle has been attached and a warrant of arrest issued against him. I however note that these orders were issued in 2022 and there is no evidence of their execution.
33. It is nevertheless not disputed that the Respondent has a valid judgment in his favour. In *James Wangalwa v Agnes Naliaka* (Supra), the Court held that "a party to a valid decree is entitled to enforce the judgment and recover the decretal sum and that any delay in appealing does not diminish this right."
34. I have weighed the Applicant's right to prosecute its arguable appeal vis a vis the right of the Respondent successful party to the fruits of its judgment and flowing from section 5(b)(iv) of Insurance (Motor Vehicle Third Party Risks), Cap 405 Laws of Kenya, there is no reasonable cause why the Respondent should be denied the KES. 3,000,000/- which is not contested by the Applicant.
35. The Applicant has conceded that he is willing to deposit security in the form of a bank guarantee for the due performance of the decree. The provision of security is a mandatory requirement under Order 42 Rule 6(2)(b) was articulated in *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates* [2014] eKLR, where the Court held that:
- "The security needed under Order 42 guarantees the due performance of such decree or order as may ultimately be binding on the Applicant."
36. In balancing the rights of the parties, the Notice of Motion dated 04th October 2024, is allowed on the following terms:
1. Leave is granted to the Applicant to file its intended appeal within 14 days from today's date
 2. There shall be a stay of execution pending the appeal of the judgment CMCC E149 OF 2022 on the following conditions
 - i. The Applicant shall pay the Respondent KES. 3,000,000/- within 7 days from today
 - ii. The Applicant shall deposit the balance of the decretal sum with the court within 14 days from today.
 - iii. The Applicant shall file the intended appeal within 14 days from today's date
 3. The Applicant shall bear the costs of this application

DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Applicant - Ms. Maya for L.A.Chemeli LLP Advocates

For Respondent - Mrs. Kariuki for Njui Kariuki & Co. Advocates

