



Madison Insurance Company Limited v Kibe (Civil Miscellaneous E129 of 2024) [2025] KEHC 2722 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2722 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL MISCELLANEOUS E129 OF 2024
HM NYAGA, J
FEBRUARY 27, 2025**

BETWEEN

MADISON INSURANCE COMPANY LIMITED APPLICANT

AND

ELIJAH NYOIKE KIBE RESPONDENT

RULING

1. The Application for determination is the Notice of Motion dated 12th November 2024, which seeks the following orders:-
 - a. That the applicant be granted leave to file appeal out of time against the judgement/decree of Hon L.N. Juma PM dated 22/04/2024 and delivered on 16/08/2024 by Hon S. Ndegwa, SPM in Meru CMCC No. 294 of 2019.
 - b. That this Honorable Court be pleased to stay any proceedings in Meru CMCC No. 259 and 260 of 2019 and Nairobi CMCC 7630 of 2019 or any other claim or claims which might have arisen from the road traffic accident that occurred on 16/02/2019 along the Meru-Nanyuki road from usage of motor vehicle KCK 318v Toyota together with all consequential orders pending the hearing and determination of the application and the intended/proposed appeal herein.
 - c. That the costs of this Application abide the outcome of the intended Appeal.
2. The application is propped by the grounds set out on its face and is supported by the affidavit of Moses Barasa Sworn on even date.
3. In a nutshell, the Applicant avers that it is aggrieved by the Judgement of Hon L.N. Juma Principal Magistrate in Meru CMCC No. 294 of 2019 delivered on 22nd April 2024 and is desirous of appealing to this court. That the statutory period of filing appeal has lapsed. That the delay in filing the appeal



was occasioned and attributed to internal deliberations among the Applicants advocates and its legal representatives. The applicant annexed a bundle of emails exchanged between this said parties.

4. The applicant avers that unless the orders are granted it will be subjected to grave injustice which is not quantifiable and the intended appeal will be rendered nugatory. That the intended appeal is arguable and meritorious with overwhelming chances of success.
5. The Respondent opposed the application through an affidavit sworn by one Veronica Mana, advocate. It is averred that the application has been overtaken by events as the suit has been determined by a judgement of the lower court. That the application is an attempt to buy time and to unreasonably delay or otherwise avoid responsibility to deny the Respondent the fruits of his judgement.
6. It is further averred that there is no possible explanation for the delay in filing the application which was filed after 3 months after the Judgment. That the Applicant only acted on being requested to indemnify the claims arising from the suit subject matter. That equity favours the vigilant and not indolent.

Applicant's submissions

7. The Applicant framed two issues for determination namely:-
 - a. Whether the applicant has met the threshold to warrant issue of order of stay of proceedings.
 - b. Whether to give leave to file appeal out of time.
8. It is submitted that the matter emanates from a contract of insurance between the parties herein involving motor vehicle registration number KCK 318 U which was involved in an accident on 16th February 2019, along Meru – Nanyuki Road. That upon investigations it was found that the Respondent had bracket the express clauses of the insurance policy and thus the Applicant was not liable to compensate the respondent. That the outcome of the intended appeal shall affect several matters filed in the lower courts namely:-
 - a. Meru CMCC 259 of 2019
 - b. Meru CMCC 260 of 2019
 - c. Nairobi CMCC 7630 of 2019
9. The applicant submits that the test for stay of proceedings is as set out in Global routes and Travels Ltd; Nairobi High court Winding up service No. 43 of 2000.
10. Also cited was the case of Nduhiu Gitahi and Anor vs Anna Wambui Waruganga [1988] 2 KAR which ruled the decision in the English case of Rosengers vs Safe Deposit Centers Ltd 1984/ 3 ALL ER 198, Republic vs Isaac Theuri Githae and Anor Civil Appeal No. 11 of 2002, DJ, Christopher Ndarathi Murungaru vs Kenya Anti-corruption Commission and Another, and Yagnesh Devki and 4 thers vs Joseph Ngidae and 3 others Nairobi Civil Application No. 136 of 2004.
11. Citing section 79 E of the *Civil procedure Act*, it is submitted that sufficient cause has been shown to explain the delay hence grant the orders cited in exparte of this submission was the decision of the Court of Appeal in Susan Ogutu Oloo and 2 others vs Doris Odindo Omolo [2019]eKLR. Also cited were the following authorities.Munji and Another vs Diamond Trust Kenya Limited and Another Civil Appeal No. E160 of 2024 [2024] KEHC 4597 /KLR/MRM aka RLM VS SARM. Civil Appeal No. 124 of 2022 (2024) KEHC 446 (KLR)



Respondent's submissions.

12. The Respondent invited the court to breathe life into the principle that litigation must come to an end at a certain point, no matter what the parties think of the decision in question. Cited was the case of Jabir Singh Rai and 3 others vs Tarlocha Singh Rai and 4 others [2007] eKLR.
13. It is further submitted that the application is defective and an abuse of the court process and the applicant has not met the threshold under section 79G of the *Civil Procedure Act*, cited were the following case. Mombasa County Government vs Kenya Ferry services and Another [2019]eKLR Thuita Mwangi vs Kenya Airways Ltd [2003] eKLR.
14. It is submitted that the Applicant was indolent, having come to court 2 months after the lapse of the 30 days period for filing an appeal. That the emails referred to by the applicant show that it only started acting after request of the letter requesting them to settle the claim.
15. It is further submitted that there must be an appeal already filed for the court to be moved under order 42 Rule 6 of the Civil Procedure Rules. That in the instant case there is no such appeal, hence the orders of stay cannot issue. Cited in support of this submission, was the case of Mugo and others vs Wanjiru and Another [1970] EA 482.
16. The Respondent urged the court to dismiss the application.

Analysis and determination

17. The issues for determination is whether the application seeking leave to appeal out of time is merited, and whether the court ought to grant a stay of the suits in the lower court.
18. There is no doubt that the court is clothed with the jurisdiction to extend time to file an appeal or do any act which is time bound, either by a statute (unless specifically prohibited), rules or an order of the court.
19. 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.”
20. Section 95 of the *Civil Procedure Act* provides thus: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
21. The applicant approaching the Court under the said section 79G CPA must demonstrate “good and sufficient cause” for not filing the appeal in time.



22. In *Thuita Mwangi v Kenya Airways* [2003] eKLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

23. While the discretion of the court is unfettered, the applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor.
24. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 others* [2014] eKLR set out the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

The underlying principles a court should consider in exercise of such discretion 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 a case- to-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.
25. These principles were also considered in the earlier case of *Leo Sila Mutiso vs Rose Hellen Wangeri Mwangi Civil Appeal 255/ 1997*, where the court held as follows: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

26. Lastly, in *First American Bank of Kenya Ltd -vs- Gulab P. Shah & Others HCC 2255/2000* [2002] IEA 65 the court summed up the factors to be considered to be : - The explanation if any, for the delay; The merits of the contemplated action, whether the appeal is arguable; Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.



27. I will therefore proceed to determine whether the Applicant has advanced plausible grounds for delay in filing the appeal.
28. The explanation given is that the applicant took time to liaise with its advocates.
29. I have perused the emails exchanged between the applicant and its advocates. In my view that explanation is acceptable. Although the judgment was dated on 22nd April 2024, it was actually delivered on 16th August 2024, from the annexed letters addressed to the lower court dated 17th October 2024 and 5th November 2024, seeking a copy of the judgment. It is not clear if the judgment was read in the presence of the parties and when it was supplied to the applicant. It goes without saying that the applicant needed to study the judgment and consider its options.
30. The application was filed a few days after the request for the judgment was made. This, in my view cannot be termed as unreasonable delay, given the circumstances under which the judgment was delivered.
31. On the question of the appeal itself, I have looked at the memorandum of appeal and the context of the suit in the lower court. There are questions on how the motor vehicle was being utilized at the time of the accident.
32. I am of the view that the same is arguable. The applicant has a right to appeal, and it is only in cases of an unexplained and inordinate delay, coupled by an appeal which is evidently frivolous, that they should be denied that opportunity. To that extent I am of the view that the applicant should be allowed to exercise its right to appeal.
33. On whether the respondent can be adequately compensated by way of costs the answer is in the affirmative. I find that no prejudice will be caused to the Respondent that cannot be compensated by an award of costs if the Application is allowed.
34. The extension of time is an equitable remedy and considering the Applicant has an arguable appeal, I hold that it is entitled to the order sought, so that he can ventilate his appeal.
35. I will now deal on the issue of whether the primary suits should be stayed as sought.
36. Section 10 (1) of the Insurance (Third Party Risk) Act provides as follows

“Duty of insurer to satisfy judgments against persons insured

(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.”
37. It is pursuant to this provision that the applicant insured the respondent under the policy between them.



38. In my opinion, the law provides for the requirement that such a cover be taken out. The cover, once issued, becomes a contractual agreement between the insurer and the insured. Therefore, third parties have no role to play in a dispute between them.

39. On this issue, Justice F. Gikonyo in *Britam Insurance Co Ltd v Jane Muthoni Mwangi; Kevin Ouma Ochieng & 3 others (Interested Parties)* [2021] eKLR, cited the Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, and held that:

"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."

"This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

"It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."

40. In *Mua Insurance Kenya Limited v Ileri; Muriungi (Interested Party) (Civil Suit E015 of 2022)* [2023] KEHC 26539 (KLR) it was held that;

The court must carefully distinguish between stay of execution and proceedings post judgment and the situation as here where the dispute is pending hearing and determination. The present situation is one of stay of prosecution of a suit which must depend on clearest evidence of abuse of process of court if it were not to run afoul of the constitutional right to access to justice under Article 48 of the *Constitution*. The victim of negligence has a constitutional right to sue and recover compensation for the wrong committed against him by the tortfeasor, and any statutory or contractual insurance arrangement between the tortfeasor and an insurance company is irrelevant to his right of recovery of damages for his injury.'

41. The dispute herein is between an insurer and its client. Such dispute should not affect the rights of third parties.

42. From the foregoing I am of the opinion that this prayer for stay of proceedings in the primary suits is not tenable.

43. In sum, the following orders do issue;

- a. The intended appellant/applicant's application to appeal out of time is allowed.
- b. The Memorandum of Appeal is to be filed and served within the next 14 days from the date of this ruling.
- c. The appellant/applicant to file and serve the record of appeal within the next 45 days.
- d. The prayer for stay of the primary suits is dismissed.
- e. Costs of this Application to abide the outcome of the Appeal.



DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF FEBRUARY 2025.

H. M. NYAGA

JUDGE

