



REPUBLIC OF KENYA



Muleti v Ogaro (Widow Suing as Legal Representative of the Estate of Albanus Nyabuto Omwamba - Deceased) & another (Miscellaneous Civil Application E007 of 2025) [2025] KEHC 1064 (KLR) (26 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1064 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS CIVIL APPLICATION E007 OF 2025
JK SERGON, J
FEBRUARY 26, 2025**

BETWEEN

PAUL MOCHOGE MULETI APPLICANT

AND

JOYCE MWANGO OGWARO (WIDOW SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF ALBANUS NYABUTO OMWAMBA - DECEASED) 1ST RESPONDENT

SIMON NGIGI KIMANI 2ND RESPONDENT

RULING

1. The application coming up for determination is a notice of motion dated 11th January, 2025 seeking the following orders;
 - (i) Spent
 - (ii) The Applicant herein be granted leave to appeal out of time against the whole judgment of Honourable F. Nekesa (SRM) delivered on the 15th day of October 2024 in Kericho Chief Magistrate's Civil Suit No. E066 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) Spent
 - (v) That this Honourable Court be pleased to grant a stay of execution of judgment in Kericho CMCC number E066 of 2021, pending the hearing and determination of the intended appeal.
 - (vi) Spent.



- (vii) That this Honourable Court be pleased to grant a stay of taxation of costs in Kericho CMCC number E066 of 2021, pending the hearing and determination of the intended appeal.
- (viii) That upon grant of prayers No. (ii) and (iii) above, this Honourable Court be pleased to order that the Applicant do provide sufficient security in the form of a suitable Bank Guarantee from a reputable financial institution to secure the Judgment herein to a tune of Kshs. 3,000,000/=.
- (ix) 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 Paul Mochoge Muleti, the applicant herein and the insured of motor vehicle registration no. KBS 447W which forms the subject matter of the Application herein, hence competent to swear the affidavit.
 3. He avers that direct line insurance instructed the firm of Kimondo Gachoka & Company Advocates to enter appearance and defend him in Kericho CMCC No. E066 of 2021, which they did.
 4. He avers that judgment in Kericho CMCC No. E066 of 2021 was delivered on the 15th day of October 2024 whereby he was condemned to pay Kshs. 4,458,280/- plus costs and interest of the suit.
 5. He avers that he had travelled out of the country to seek medical attention and as such advocates were not at a position to trace him after delivery of judgment.
 6. He avers that upon notification of the particulars of judgment, he issued instructions to his advocates to appeal on quantum, however, he was advised by his advocates that time within which to file the appeal had lapsed.
 7. He avers that being dissatisfied with the judgment, he is desirous of challenging the decision of the trial court, however, the time within which to file an appeal has lapsed.
 8. He avers that the delay in filing the appeal was not deliberate.
 9. He avers that the intended appeal raises triable issues and has high chances of success.
 10. He avers that he is willing to furnish security by providing a bank guarantee as security for Kshs. 3,000,000/= which is the statutory capping under the Insurance (Motor Vehicle Third Party Risks) Act.
 11. He avers that he will suffer substantial loss and damage if orders sought herein are not granted and further that the intended appeal will be rendered nugatory.
 12. He further avers that the Respondent will not be prejudiced in any way if the orders sought herein are granted.
 13. He avers that it is in the interest of justice that stay of execution of judgment and decree and taxation of costs in Kericho CMCC number E066 of 2021 and leave to file an appeal out of time is granted pending the hearing and determination of the application and the intended appeal and that the instant application has been filed timeously and without any unreasonable delay.
 14. The matter came up for inter partes hearing and Miss Ongwacho, the advocate for the applicant, stated that the application was served upon the respondents, however, there was no response. There was no representation on the part of the respondents.
 15. Having considered the instant application the following issues are ripe for determination whether to order a stay of execution of judgment and decree and taxation of costs in Kericho CMCC number



E066 of 2021 pending the hearing and determination of the intended appeal and to grant leave to file an appeal out of time.

16. 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 15th October 2024. The instant application was filed on the 11th January 2025, occasioning a delay of about two months and the applicant submitted that the delay in lodging the appeal was occasioned by the failure to give instructions to the advocate to file an appeal as he was out of the country seeking medical treatment. In the circumstances, I am inclined to allow the applicant leave to file the intended appeal noting that the delay is not inordinate.

17. On the issue as to whether to grant a stay of execution, the judgment was delivered on 15th October, 2024 while the present application was filed on 11th 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, 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 to the tune of Kshs. 3,000,000/= which is the statutory capping under the Insurance (Motor Vehicle Third Party Risks) Act. There was no response filed by the respondents at the time of writing this



ruling, therefore, this court having considered the applicant's averments on the issue of stay and the circumstances of this case, finds that the applicant is entitled to a stay of execution as he ventilates his intended appeal.

18. 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 number E066 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.
19. I find that the applicant is entitled to pursue an appeal. The Application dated 11th January, 2025 partially succeeds.
20. Consequently, it is allowed giving rise to issuance of the following Orders:-
 - (i) Leave 14 days is granted to the applicant to file appeal out of time against the judgment delivered on 15/10/2024 vide Kericho CMCC number E066 of 2021
 - (ii) Execution of the judgment/decreed in Kericho CMCC number E066 of 2021 is hereby stayed pending the hearing and determination of the intended appeal.
 - (iii) The applicant to deposit of Kshs.3,000,000 in a joint interest earning account in the names of both advocates within forty five (45) days hereof.
 - (iv) In default of complying with order (iv) the orders staying execution shall lapse.
 - (v) Costs to abide in the outcome of the appeal.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 26TH DAY OF FEBRUARY, 2025.

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J.K. SERGON

JUDGE

In the Presence of:

C/Assistant – Rutoh

Ongwacho for the Applicant

Nyatundo for the 1st Respondent

