



REPUBLIC OF KENYA



**Henry & another v Nicholas (Civil Miscellaneous E013 of 2025)  
[2025] KEHC 3917 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3917 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL MISCELLANEOUS E013 OF 2025  
JK SERGON, J  
MARCH 27, 2025**

**BETWEEN**

**MURAYA HENRY ..... 1<sup>ST</sup> APPLICANT**

**ANN WANGUI WAIRIMU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**KIPRONO NICHOLAS ..... RESPONDENT**

**RULING**

1. The application coming up for determination is a notice of motion dated 27th February, 2025 seeking the following orders;
  - (i) Spent.
  - (ii) That leave be granted for the firm of Kairu & McCourt Advocates to come on record for the Applicants.
  - (iii) Spent
  - (iv) That this Honourable Court be pleased to grant a stay of execution of Judgement, Costs and interest Kericho CMCC 231 of 2022, pending the hearing and determination of the intended Appeal.
  - (v) The Applicants herein be granted leave to Appeal out of time against the whole Judgment of Honourable Charles Obulutsa (CM) delivered on the 28th May, 2024 in Kericho CMCC 231 of 2022
  - (vi) That upon grant of prayers no. ii, iii, iv and v above, this Honourable Court be pleased to order that as security of the Appeal, the Applicant to deposit the entire Decretal sum in a joint interest earning account.



- (vii) That costs of this application to abide by the outcome of the intended Appeal.
2. The application is based on grounds on the face of it and the supporting affidavit of Muraya Henry the 1st Applicant herein with the consent of the 2nd Applicant herein, to swear the affidavit herein.
  3. He avers that under the principle of Subrogation that the Applicants' insurer Directline insurance instructed the firm of Kimondo Gachoka & Company Advocates to enter appearance and defend them in Kericho CMCC 231 of 2022, which they did. He avers that THAT neither himself nor the 2nd Applicant knew that Judgement in Kericho CMCC E231 of 2022 was delivered on 28th May 2024.
  4. He avers that his current advocates Kairu & McCourt Advocates inform him which information he verily believes to be true that they were also unaware that judgment had been delivered on 28th May 2024 as the advocate handling the matter, one Mr Nyambane from the firm of Kimondo Gachoka Advocates who was in personal conduct of the matter and attended to the judgement, suddenly resigned without notifying the applicants nor the previous advocates on record at that time.
  5. He avers that they knew that judgment had been delivered upon being served with warrants of attachment and that he immediately informed his insurer.
  6. He avers that his insurer i.e Directline Assurance Company appointed Kairu & McCourt Advocates and Ms Ongwacho from the current firm engaged the Respondent with a view to negotiate the file and she was hopeful that they could agree on the same, which unfortunately they did not agree.
  7. He avers that he is desirous of challenging the decision of the trial court, however, the statutory time within which to file an appeal has lapsed.
  8. He avers that the mistake of an advocate should not be visited on an innocent litigant.
  9. He avers that he was served with Proclamation from Hegeon Auctioneer's who have proclaimed his motor vehicles registration numbers KCX 561X Toyota Hiace, household goods, assorted stock of clothes and/ or any other moveable properties and further that Hegeon Auctioneers have attached his motor vehicle Registration number KCX 561X and the same is slated for sale on 29/02/2025 and the same is his tool of trade and source of livelihood.
  10. He avers that unless orders of stay are issued pending hearing and determination of the appeal, his motor vehicle will be sold on 29/02/2025 and that the intended Appeal will be nugatory.
  11. He avers that the intended appeal raises triable issues and has high chances of success and that the applicants are willing to deposit the decretal sum in a joint interest earning account held by his advocate and the respondent.
  12. He avers that the Applicants will suffer substantial loss and damage if orders sought herein are not granted and further that the intended appeal will be rendered nugatory and 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 in Kericho CMCC E231 of 2022 and leave to file an appeal out of time be granted pending the hearing and determination of the application and the intended appeal.
  14. The Respondent filed a replying affidavit in response to the said application sworn by Kiprono Nicholas the Respondent herein.



15. He avers that instant application to wit the notice of motion and supporting affidavit dated 27th day of February 2025 is frivolous, vexatious, fatally defective and an abuse of court process and that section 27 of the Limitations of Actions Act does not contemplate the orders sought.
16. He avers that the application has been brought almost a year after judgement was delivered on the 5th day of May 2024 in KERICHO CMCC NO.231 OF 2022 without any reasonable explanation and that on the 5th day of May 2024, when judgement was being delivered, counsel for the Applicants were present in court and therefore they ought to have notified the Applicants on the orders of the honourable trial Court.
17. He avers that the Applicants having been served with Summons to Enter Appearance in the trial suit, they were aware of the existence of the suit against them in KERICHO CMCC NO.231 OF 2022 and ought to have been contacting their advocates to find out the status of the suit.
18. He avers that Directline Insurance has always retained the services of both Kimondo Gachoka Advocates and Kairu & McCourt Advocates but the Advocates appearing in this matters are the same. Their explanation of change of firms on record in their matters is pedestrian and an attempt to mislead the court to issue orders in circumstances they do not deserve.
19. He avers that he is a civil servant and it is common knowledge that when an employee resigns from the workplace, another employee is immediately assigned to take over their work. The Applicants intentionally avoided mentioning when the employee resigned to avoid the court from analyzing the time they have taken to organize their house vis a vis filling the present application which clearly shows unexplained inadvertence on their part.
20. He avers that if the Advocates stated that Advocate Nyambane resigned after delivery of judgement on or about May 2024, there is explanation given for the matter being unattended from May 2024 until and when execution was issued on 17th day of December 2024.
21. He avers that the Applicants admitted that they were served with proclamation notices on 17th day of December 2024. However, they did not take any action until 27th day February 2025 without any good reason and/or explanation, the nature of delay is unexplained, it is therefore pure inaction by both the Applicants and their Advocates and it cannot amount to a mistake which ought not to be visited to the Applicants and/or Clients as averred.
22. He avers that goods once attached, the Auctioneer must issue a Notification of Sale and before Sale an advertisement for Sale and that the same is not annexed their Application. The allegations alluded to are just meant to mislead this Honourable court and therefore any orders issued herein will be in vain.
23. He avers that the Memorandum of Appeal annexed to the Application does not raise any triable issues. The Defendants did not call any Witness nor file Witness Statements / Documents to controvert the evidence on record at the trial court. Therefore, the request to Appeal will be an academic exercise for this Honourable Court.
24. He avers that the delay in filling this application and/or intended appeal is only meant to delay justice. The Applicants cannot have their cake and eat it. He faulted the applicants for failing to disclose the substantial loss they will suffer if the orders sought are not granted and failing to propose reasonable security for the decree.
25. The matter came up for inter partes hearing for inter partes hearing, the advocate for the applicants stated that she would rely on the grounds in support of the application whereas the advocate for the respondent stated she would rely on the averments in the replying affidavit.



26. Having considered the pleadings by the parties this court finds that the issue (s) for determination are whether to grant leave for the firm of Kairu & McCourt Advocates to come on record for the Applicants, enlarge the time to file the intended appeal out of time and grant stay execution pending appeal.
27. On the issue as to whether to grant leave for the firm of Kairu & McCourt Advocates to come on record for the Applicants in place of Kimondo, Gachoka & Company Advocates, the said prayer is hereby allowed, the relevant legal provision being Order 9 Rule 9 of the Civil Procedure Rules, 2010 Civil Procedure Rules which provides that: “When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court— (a) upon an application with notice to all the parties; or (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
28. 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 28th May, 2024. The instant application was filed on the 27th February, 2025, occasioning a delay slightly over 8 months. The applicants submitted that the delay in lodging the appeal was occasioned the fact that the applicants’ current advocates Kairu & McCourt Advocates were unaware that judgment had been delivered on 28th May 2024 as the advocate handling the matter, one Mr Nyambane from the firm of Kimondo, Gachoka & Co Advocates who was in personal conduct of the matter and attended to the judgement, suddenly resigned without notifying the applicants nor the previous advocates on record at that time, the applicants only become aware that judgment was delivered upon being served with warrants of attachment. In the circumstances, I am inclined to allow the applicants leave to lodge an appeal against the judgment/ decree of the trial Court in Kericho CMCC 231 of 2022.
29. On the issue as to whether to grant a stay of execution, the judgment was delivered on 28th May 2024 while the present application was filed on 27th February, 2025, slightly over 8 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 the execution of the trial court's judgment in Kericho CMCC 231 of 2022 is in motion as they had been served with warrants of attachment as there is no stay of execution in place and that execution will not only destroy the substratum of the appeal but it will occasion substantial loss to the Applicant. The applicant was willing to deposit the entire decretal sum in a joint interest earning account as security. On the other part, the respondent contended that the delay in filling this application and/or intended appeal is inexcusable and was only meant to delay justice. The respondent faulted the applicants for failing to demonstrate the substantial loss they will suffer if the orders sought are not granted and failing to propose reasonable security for the decree. 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 applicants are entitled to a stay of execution as they ventilate the intended appeal.

30. In the end, the notice of motion dated 27th February, 2025 has merit. It is allowed giving rise to issuance of the following Orders:-

- (i) Leave is hereby granted to the firm of Kairu & McCourt Advocates to come on record for the Applicants in place of the Firm of Kimondo, Gachoka & Company Advocates.
- (ii) Leave is hereby granted to the applicants to file an appeal out of time against the judgment delivered in Kericho CMCC 231 of 2022 within 14 days.
- (iii) An order for stay of execution of the judgment/decreet in Kericho CMCC 231 of 2022 is granted pending the hearing and determination of the intended appeal.
- (iv) The applicants to deposit the entire decretal sum in an interest earning account in the joint names of the Advocates and or firms of Advocates appearing in this matter within 30 days from the date hereon. In default the Orders for stay shall automatically lapse. Costs to abide the outcome of the intended Appeal.

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 27TH DAY OF MARCH, 2025.**

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**J.K. SERGON**

**JUDGE**

In the Presence of:-

C/Assistant – Rutoh

Miss Ogwacho for the Applicant

Miss Cherono holding brief for Ngeno for Respondent

