



**Kimani & another v Tanui & another (Civil Miscellaneous Application
E005 of 2025) [2025] KEHC 3846 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3846 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL MISCELLANEOUS APPLICATION E005 OF 2025**

**JK SERGON, J
MARCH 27, 2025**

BETWEEN

SIMON NGIGI KIMANI 1ST APPLICANT

PAUL MACHOGE MULETI 2ND APPLICANT

AND

ALFRED KIMUTAI TANUI 1ST RESPONDENT

ABEL MANTIKA ONKOBA 2ND RESPONDENT

RULING

1. The application coming up for determination is a notice of motion dated 8th January, 2025 seeking the following orders;
 - (i) Spent
 - (ii) The Applicants herein be granted leave to appeal out of time against the whole judgment of Honourable F.M. Nyakundi (CM) delivered on the 18th day of September 2024 in Kericho Chief Magistrate's Civil Suit No. 80 of 2020.
 - (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 assessment of costs in Kericho CMCC number 80 of 2020, pending the hearing and determination of the intended appeal.
 - (vi) That upon grant of prayers no. ii and iii above, this Honourable Court be pleased to order that the Applicants 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/=.



- (vii) 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 Machoge Muleti the 2nd applicant herein and the insured of motor vehicle registration no. KBS 447W which forms the subject matter of the Application herein.
 3. He avers that directline insurance instructed the firm of Kimondo Gachoka & Company Advocates to enter appearance and defend him in Kericho CMCC No. 80 of 2020, which they did and that judgment in Kericho CMCC No. 80 of 2020 was delivered on the 18th day of September 2024 whereby he and the co-applicant were condemned to pay Kshs. 3,828,250/- plus costs and interest.
 4. He avers that their advocates on record were not present when the judgment was delivered and therefore not at a position to get a copy of the judgment on time.
 5. He avers that the delay in filing the appeal is due to failure of their advocates to inform them of the said judgment on time which was equally beyond the advocates control as the judgment was to be delivered on notice and the notice was never served upon them and that the advocates became aware of the judgment through the CTS.
 6. He avers that being dissatisfied with the judgment, he and the co-applicant are desirous of challenging the decision of the trial court however the time within which to file an appeal has lapsed and that the delay in filing the appeal is due to failure of their advocate to inform them of the said judgment.
 7. He avers that a mistake of an advocate should not be visited upon an innocent litigant and that the intended appeal raises triable issues and has high chances of success.
 8. He avers that they are willing through the insurer to furnish security by providing a bank guarantee as security for Kshs. 3,000,000/= which is the statutory capping under the third party motor vehicle *insurance act*.
 9. He avers that they will suffer substantial loss and damage if orders sought herein are not granted and further that the intended appeal will be rendered nugatory.
 10. He avers that the Respondent will not be prejudiced in any way if the orders sought herein are granted and that it is in the interest of Justice that stay of execution of judgment and stay of assessment of costs in Kericho CMCC number 80 of 2020, and leave to file an appeal out of time be granted pending the hearing and determination of the application and the intended appeal.
 11. He reiterated that they are ready, willing and able to furnish such reasonable security as this Honourable Court may deem fit and in particular, we are willing and able to furnish security by providing a bank guarantee as security for Kshs. 3,000,000/= and the Application has been done without any unreasonable delay.
 12. He avers that unless this Application is heard and stay of execution of judgment and stay of assessment of costs in Kericho CMCC NO. 80 of 2020 granted this Application together with the intended appeal will be rendered nugatory.
 13. John Ndung'u Njuguna an advocate of The High Court of Kenya filed a replying affidavit, he avers that his firm is on record for the 1st Respondent herein.
 14. He avers that the lower court judgement was delivered way back on 18/9/2024, and that they duly notified the Applicants advocates of the same on 3/10/2024 (way before stay of execution and period to appeal lapsed) thorough a letter of costs and affidavit of service thereof attached hereto as JNN - 1 and also through a letter to their insurance on 25/10/2024 whose copy is attached hereto as JNN - 2.



15. He avers that in view of the foregoing, it goes without saying that the gist of the Application herein to the effect that the delay in filing the Appeal herein arose from the Applicants Advocates not being aware that the lower court judgement had been read on time is untrue and blatant/well-connived misrepresentation/concoction of facts aimed at misleading this honourable court and hence unworthy of the equitable orders sought herein since this honourable cannot act or exercise its discretionary powers in favour of the Applicants in the circumstances.
16. He avers that it is trite law that a case belongs to a litigant and not the advocate and that it is the duty of the litigant (or his representatives) to follow up on the progress of the suit and ensure it is being conducted according to their instructions and failure to do so cannot be visited upon anyone else apart from the litigant himself.
17. He avers that the Applicants herein are for all intents and purposes indolent parties and therefore undeserving to have discretion of this honourable court exercised in their favour, he therefore urged the court to decline to extend time for filing the Appeal herein.
18. He avers it is trite law that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security which must be met simultaneously/conjunctively.
19. He avers that the Intended Appeal herein does not raise any trial issues, is unmerited and the intended appeal on liability, the same is totally unmeritorious, the Applicants never instituted third party proceedings against the owner/driver of the other vehicle or call any evidence to controvert the 1st Respondent's evidence on liability and therefore, there was no way the 1st Respondent herein would have been held contributory negligent or the other motor vehicle held liable and hence it was inevitable for the Applicants to be held 100% liable for the accident herein.
20. He avers that the Applicants have just made bare allegations of substantial loss without any empirical basis or evidence in support thereof and hence this honourable court cannot be called upon to act on such unsubstantiated allegations since the mere fact that the process of execution may ensue does not amount to substantial loss as execution is a lawful process and that in itself cannot create a state of affairs that will irreparably affect or render the Appeal herein nugatory.
21. He avers that the nature of security being offered by the Applicants.i.e. Bank guarantee between Directline Assurance and the Guaranteeing bank (Family Bank) attached to the affidavit in support of the Application does not suffice as adequate security for the following reasons among others:- a) The bank guarantee herein is a general one and there is no way of telling how many claims the guarantee is to cover and if the same is sufficient since it is well known that there are thousands of claims involving Directline insurance and therefore the guarantee herein being a general one is not of much assistance more so given that it is in the interest of justice that each case must be dealt with individually and security given must also be sufficient for each individual case and which condition the general guarantee herein does not meet. b) The Bank guarantee herein is for one year only as per Clause 2 which has already expired and hence it goes without saying that it is unable to cover/secure the indefinite period that the Appeal herein will take to be heard and concluded. c) The Bank guarantee herein is a private contract strictly between Directline Assurance and the respective bank (both of whom are actually not parties to this case and hence not bound by orders given) and does not recognize any other third/interested party. d) No reason(s) have been advanced as to why cash/monetary security should not be provided for the entire decretal sum more so the decree herein being for a monetary award and the 1st Respondent having been awarded the said sum. e) The proposed bank guarantee is oppressive as it will leave the 1st Respondent herein worse off and does not recognize that he is the successful party



with a judgement in his favour and hence it does not accord with the principle of proportionality and equality before the law which makes it inappropriate.

22. The matter came up for inter partes hearing, the advocate for the applicant stated that she would be relying on the application and the affidavit in support of the application, whereas, the advocate for the respondent would be relying on the replying affidavit.
23. Having considered the pleadings by the parties this court finds that the issue (s) for determination are whether to enlarge the time to file the intended appeal out of time and grant stay execution against the judgment and decree in Kericho Chief Magistrate's Civil Suit No. 80 of 2020 and grant stay of assessment of costs in Kericho CMCC number 80 of 2020, pending the hearing and determination of the intended appeal.
24. 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 18th September 2024. The instant application was filed on the 8th January, 2025, occasioning a delay slightly under three months and the applicants submitted that the delay in lodging the appeal was due to failure of their advocates to inform them of the said judgment on time which was equally beyond the advocates control as the judgment was to be delivered on notice and the notice was never served upon them and that the advocates became aware of the judgment through the CTS. The respondents contended that the lower court judgement was delivered way back on 18/9/2024, and that they duly notified the Applicants advocates of the same on 3/10/2024 (way before stay of execution and period to appeal lapsed) through a letter of costs. In the circumstances, I am inclined to allow the applicants leave to file the intended appeal noting that the delay is not inordinate.

25. On the issue as to whether to grant a stay of execution, the judgment was delivered on 18th September, 2024 while the present application was filed on 8th January, 2025, slightly under three 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 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 of the entire decretal amount as security. On the other part, the respondent contended that the applicant had merely made bare allegations of substantial loss without any empirical basis or evidence in support thereof and hence this honourable court cannot be called upon to act on such unsubstantiated allegations since the mere fact that the process of execution may ensue does not amount to substantial loss as execution is a lawful process and that in itself cannot create a state of affairs that will irreparably affect or render the Appeal herein nugatory. The respondents were vehemently opposed to a bank guarantee as security. The respondent argued that the proposed bank guarantee is oppressive as it will leave the 1st Respondent herein worse off and does not recognize that he is the successful party with a judgement in his favour and hence it does not accord with the principle of proportionality and equality before the law which makes it inappropriate. 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 applicant is entitled to a stay of execution as he ventilates his intended appeal.

26. 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 80 of 2020 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.
27. In the end, the notice of motion dated 8th January, 2025 partially succeeds giving rise to issuance of the following Orders:-
- (i) Leave is granted to the applicant to file appeal out of time against the judgment delivered in Kericho CMCC number 80 of 2020 within 15 days.
 - (ii) An order for stay of execution of the judgment/decreet in Kericho CMCC number 80 of 2020 is granted pending the hearing and determination of the intended appeal.
 - (iii) The applicant to deposit half decretal sum of Kshs. 1,914, 125/= in an interest earning account in the joint names of both advocates and or firms of Advocates appearing in this matter within forty five (45) days hereof. In default the order of stay shall automatically lapse.
 - (iv) Costs to abide in the outcome of the 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

Kurere holding brief for Njuguna for Respondent

Miss Ongwacho for Applicant

