



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Moiz Motors Limited & another v Ombuyi (Miscellaneous Civil Cause
E004 of 2025) [2025] KEHC 3928 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3928 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS CIVIL CAUSE E004 OF 2025
JK SERGON, J
MARCH 27, 2025**

BETWEEN

MOIZ MOTORS LIMITED 1ST APPLICANT

DANIEL OMARI 2ND APPLICANT

AND

PHILIPS MOSIOMA OMBUYI 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 Charles Obulutsa (CM) delivered on the 15th day of October 2024 in Kericho Chief Magistrate's Civil Suit No. 8 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 8 of 2020, pending the hearing and determination of the intended appeal.
 - vi. That upon grant of prayers No. 2 and 3 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 based on grounds on the face of it and the supporting affidavit of Daniel Omari, the 1st applicant herein and the insured of motor vehicle registration no. KCN 414R 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. 8 of 2020, which they did.
4. He avers that Judgment in Kericho CMCC No. 8 of 2020 was delivered on the 15th day of October 2024 whereby he and the co-applicant were condemned to pay Kshs. 3,023,050/- plus costs and interest.
5. He avers that their advocates on record were not a position to access a copy of the said judgment on time that he had equally travelled outside the country and as such advocates were not at a position to trace him.
6. He avers that when he came back to the country at the end of December 2024 and upon receipt of a copy of the said judgment, he issued them with instructions to appeal against the whole judgment.
7. 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.
8. He avers he and the co-applicant contend that the delay in filing the appeal was not deliberate and that the mistake of an advocate should not be visited upon an innocent litigant.
9. He avers that the intended appeal raises triable issues and has high chances of success.
10. He avers that they are willing 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*
11. 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.
12. He 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 a stay of execution of judgment and stay of assessment of costs in Kericho CMCC number 8 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.
14. He reiterates that the Applicants are ready, willing and able to furnish such reasonable security as this Honourable Court may deem fit and in particular, the Applicants are willing and able to furnish security by providing a bank guarantee as security for Kshs. 3,000,000/=.
15. He avers that the Application has been done without any unreasonable delay and that unless this Application is heard and stay of execution of judgment and stay of assessment of costs in Kericho CMCC NO. 8 of 2020 are granted this Application together with the intended appeal will be rendered nugatory and greatly prejudicing the Applicants.
16. The matter came up for inter partes hearing, the learned counsel for the stated applicant stated that they served the application upon the respondent, however, there was no response on the part of the respondent. There was no representation on the part of the respondent.
17. 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. 8 of 2020 and grant stay of



assessment of costs in Kericho CMCC number 8 of 2020, pending the hearing and determination of the intended appeal.

18. 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 8th January, 2025, occasioning a delay of slightly under two months and the applicant submitted that the delay in lodging the appeal was occasioned because the advocate was not in a position to access a copy of the said judgment on time that he had equally travelled outside the country and as such advocates were not at a position to trace him for further instructions. The applicants were adamant that the delay in filing the appeal was not deliberate and that the mistake of an advocate should not be visited upon an innocent litigant. The applicant contended that the intended appeal raises triable issues and has high chances of success. In the circumstances, I am inclined to allow the applicant leave to file the intended appeal noting that the delay is not inordinate.

19. 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 8th January, 2025, slightly under 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 Applicants contended that they would suffer substantial loss and damage if orders sought herein are not granted and further that the intended appeal will be rendered nugatory. The applicants were willing 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. The applicants contended that the Respondent will not be prejudiced in any way if the orders sought herein are granted. Having considered the submissions by the applicants 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 he ventilates his intended appeal.

20. 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 8 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.
21. 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 8 of 2020 within 15 days
 - ii. An order for stay of execution of the judgment/decreed in Kericho CMCC number 8 of 2020 is granted pending the hearing and determination of the intended appeal on condition that the applicant deposits half the decretal sum of Kshs. 1, 511, 525/= in an interest earning account in the joint names of Advocates or Firms of Advocates appearing in this matter within forty five (45) days hereof. In default the order of stay shall automatically lapse.
 - iii. Costs to abide in the outcome of the intended appeal.

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

.....

J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Miss Ongwacho for Applicant

No Appearance for the Respondent

