



African Merchant Assurance Co. Ltd v Ricotech Motors Ltd & another (Civil Appeal E1049 of 2024) [2025] KEHC 3696 (KLR) (Civ) (26 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1049 OF 2024

LP KASSAN, J

MARCH 26, 2025

BETWEEN

AFRICAN MERCHANT ASSURANCE CO. LTD APPLICANT

AND

RICOTECH MOTORS LTD 1ST RESPONDENT

LUCAS MATIKO CHACHA 2ND RESPONDENT

RULING

1. Before this court is a Notice of Motion dated 10.09.2024 brought under Order 42 Rules 6, and Order 50 Rules 6 of the [Civil Procedure Rules](#), Sections 1A, 1B, 3A, 63(e), 79G and 95 of the [Civil Procedure Act](#) and all enabling provisions of the law wherein the Applicant seeks orders to wit:
 - a. Spent
 - b. That this Honourable Court be pleased to grant the Applicant/Appellant leave to file an appeal out of time against the judgment delivered on the 29.05.2024 in CMCC No. E10625 of 2021 *Lucas Matiko Chacha v African Merchant Assurance Company Limited and Ricotech Motors Ltd*;
 - c. Spent
 - d. That there be a stay of execution of the judgment and decree of the court in CMCC No. E10625 of 2021 pending the hearing and determination of the intended appeal.
 - e. That the costs of this application be provided for.
2. The said application is premised on the grounds on its face and further supported by the affidavit sworn by the Counsel for the Applicant. The Applicant's case is that judgment was entered against



the Applicant on 18.08.2023 for an award general damages of Kshs 200,000/=, special damages Kshs 27,600/=, loss of earning capacity Kshs 108,583.20/=, costs and interest. The Applicant through Counsel followed up on the copy of the judgment until recently when it was availed. After reviewing the same wishes to appeal. The time for file an appeal has since lapsed. That if the application is not granted the Applicant will suffer irreparable loss and damage and if the stay is not granted the intended appeal will be rendered nugatory.

3. In the Replying Affidavit, the 2nd Respondent reiterates the grounds of opposition and further avers that the Appellant has not provided a satisfactory explanation for the delay in filing the appeal and that allowing the application would prejudice the 2nd Respondent.
4. The 2nd Respondent raises the following grounds in opposition to the application:
 - a. The application is bad in law and warrants dismissal in limine.
 - b. The application is incompetent as it offends Order 9 Rule 9 of the *Civil Procedure Rules*, as the Appellant's counsel neither filed a consent nor sought leave of court to come on record.
 - c. The application has been filed with inordinate delay.
 - d. The application is frivolous, vexatious, and an abuse of the court process. The application was canvassed by way of written submissions.

Applicant's submissions

5. The Applicant submits that the delay in filing the appeal was occasioned by [specific reasons], which were beyond their control. The Applicant argues that they have an arguable appeal with high chances of success and that no prejudice will be suffered by the Respondents if the application is allowed. Regarding the issue of representation, the Applicant contends that the failure to comply with Order 9 Rule 9 of the *Civil Procedure Rules* is a procedural technicality that should not override the substantive justice of the case. The Applicant prays the application be allowed.

Respondent's submissions

6. The 2nd Respondent submits that the application is fatally defective for non-compliance with Order 9 Rule 9 of the *Civil Procedure Rules*, which requires that after judgment has been passed, a change of advocate shall not be effected without an order of the court or a consent filed between the outgoing and incoming advocate.
7. The 2nd Respondent argues that the delay of over three months in filing the application is inordinate and has not been satisfactorily explained by the Applicant.
8. The 2nd Respondent further submits that the application is an abuse of the court process, as it seeks to delay the execution of a valid judgment.
9. The issues for determination herein are
 - i. Whether the application is incompetent for non-compliance with Order 9 Rule 9 of the Civil Procedure Rules?
 - ii. Whether the Applicant herein should be granted leave to appeal out of time against the judgment in Nairobi CMCC No. E10625 of 2021?
 - iii. Whether a stay of execution should be granted against the judgment in Nairobi CMCC No. of 2021 pending the appeal?



- iv. Who should bear the costs?
10. In this case the Respondent contends, the Applicant's current advocates came on record after the judgment had been delivered without complying with the mandatory provisions of Order 9 Rule 9.
11. Order 9 Rule 9 of the Civil Procedure Rules provides:
- “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.”
12. Further, Order 9 Rule 5 of the Civil Procedure Rules provides:
- “A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”
13. A reading under Rule 5 a party is at liberty to change his advocate on condition that a notice of change of advocate is filed in the court in which such cause or matter is proceeding (Underlined the court's emphasis). The matter before the trial court i.e. the primary suit is entirely different from an appeal. In both instances express instructions to file the cause or an appeal are sought separately. Therefore, it is only when the Applicant in the primary suit seeking to change advocates was obligated to seek the leave of the court or file a consent. Oundo J. in the case of Ngeno v Mosonik (ELCA E001 of 2022) KEELC 13573 (KLR) (13 October 2022) (Ruling), held:
- “22 It is thus clear from the above authorities and/or holdings that save for an application for review, execution, stay of execution, or setting aside a judgment, an appeal to the appellate court after judgment has been filed is an independent suit that is not bound by the provisions of Order 9 Rule 9 of the Civil Procedure Rules. Consequently, I hold that the Memorandum of appeal dated the February 15, 2022 is competently before the court. I find that the issue of non-compliance with Order 9 Rule 9 as submitted by the applicant/respondent herein is without merit and proceed to dismiss the application dated the March 23, 2022 with costs.”
14. I will not belabor on this issue as I associate myself wholly with the holding in the case Kenya Pipeline Company Limited v Lucy Njoki Njuru [2014] eKLR. I find the firm of Chemeli Advocates LLP is properly on record for the Applicant herein.
15. Section 79G of the Civil Procedure Act provides that the appeals from the subordinate court to the High Court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. It provides:
- “Every appeal from a subordinate court to high court should be filed within a period of thirty days from the date of the decree or order appealed against, From such period any time



the lower court may certify as having been requisite of a copy of the or order. Provided that an appeal may be admitted out of time if the appellant satisfied the court that he had good and sufficient cause for the filing of the appeal in time.”

16. It allows for the extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.
17. The court in exercise of its discretion is supposed to take into account 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 and whether the matter raises issues of public importance. (See Court of Appeal in *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR)
18. In addition, Section 95 of the *Civil Procedure Act* grants to the court the “discretion, from time to time, to enlarge” any time fixed for the doing of any act under the Act. See also, Order 50 Rule 6 of the *Civil Procedure Rules*. Thus it is incumbent upon the Applicant to satisfy the court that it had good and sufficient cause for not filing the appeal in time, and is deserving of the court’s discretion.
19. The judgment in the primary suit Nairobi CMCC No. E10625 of 2021, was delivered on 29.05.2024. The reason for delay given is the pressures of work and failure of the insurance company to give instructions. That this failure should not be visited upon the Applicant. In light of this, the delay in bring the application herein although inordinate is with reason.
20. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, the court held:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
21. Herein the delay was occasioned by the insurance company in failing to give instructions.
22. As to whether the Respondent will suffer any prejudice, this has to be weighed against a party’s constitutional right to be heard (See Court of Appeal case *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] eKLR.). The Applicant deposed that the Respondent will not suffer any prejudice if the orders of leave are granted. The Applicant has expressed his chances of appeal succeeding. The Respondent’s deposition as to the prejudice he will suffer cannot dislodge the clear prejudice the Applicant stands to suffer.
23. Where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in his favour and especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way. The discretion of the court must always be exercised judiciously. The Applicant having expressed his intentions to be heard by this court on appeal, it is my considered view that he ought to be given an opportunity to pursue the appeal.
24. For the above reasons, the Applicant has satisfied the conditions for grant of leave to appeal out of time. The prayer in that respect (prayer (e)) as thus is merited and the same is hereby allowed. The appeal to be filed within 21 days from the date of this ruling.
25. The prayer for leave to file an appeal having been allowed, this court will then proceed to determine the issue as to whether there ought to be stay of execution of the order, judgment of the trial court pending the hearing and determination of the appeal. The principles upon which the above prayer can be allowed are now well settled from the authorities from this court and from the superior courts.



26. Generally, a stay of execution is provided under Order 42 Rule 6 of the *Civil Procedure Rules 2010* which provides:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

27. For orders of stay of execution to be granted, the Applicant must satisfy the conditions to wit that substantial loss may result to the Applicant unless the order is made; that the application has been made without undue delay; and that 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 See *Amal Hauliers Limited v Abdulnasi Abukar Hassan* [2017] eKLR.

28. The court ought to fairly take into account the interests of the Respondent, who has been deprived of the benefits of his judgment, in addition to the Appellant's right to ventilate their case which the court should not be quick to deny. See *Kenya Shell Ltd. v. Kibiru & others* (Supreme); *Attorney General v Halal Meat Produces Limited*, Civil Application No. Nairobi 270 of 2008; and *Mukuma v Abuoga* [1988] KLR 645.

29. Where the Applicant is successful, he or she shouldn't be in a position where he or she can't obtain their money back. Additionally, if the Applicant ultimately fails in his intended appeal, the Respondent who has a decision in his favour shouldn't find it difficult or impossible to enforce the decree. This is the guarantee security of costs gives to parties. See *Nduhiu Gitahi & Ano. v Anna Wambui Warugongo* [1988] 2 KLR 100.

30. The Applicant has shown the Respondent has already started the process of execution and is thus deserving of an order for stay but with conditions.

31. Taking all relevant factors into consideration, I do order that;

- a. The Applicant is granted leave to file an appeal out of time and the same must be filed and served within the next 21 days from the date of this ruling.
- b. The Applicant will deposit the entire decretal sum into an interest earning account in the joint names of the parties' advocates within 30 days from this Ruling date.
- c. In default of any of these conditions, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
- d. The costs of this Application will be in the cause.

32. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF MARCH 2025.

HON. L. KASSAN

JUDGE

In the presence of;

Dingi for 2nd Respondent for the Appellant

Mayo for the Respondent



Carol – Court Assistant

