



**Kagiri v Nyaga (Miscellaneous Civil Application E017 of 2024)  
[2025] KEHC 5745 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5745 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
MISCELLANEOUS CIVIL APPLICATION E017 OF 2024**

**RL KORIR, J  
APRIL 30, 2025**

**BETWEEN**

**JAMES GACAH KAGIRI ..... APPLICANT**

**AND**

**DAVIES MUCHANGI NYAGA ..... RESPONDENT**

**RULING**

1. The Applicant James Gacahi Kagiri filed the present Notice of Motion dated 7<sup>th</sup> October, 2024 seeking orders reproduced verbatim as follows:-
  - i. That the matter herein be certified urgent and be heard ex-parte in the first instance. (spent)
  - ii. That pending hearing and determination of this application this court be pleased to issue an order to stay execution of the Judgment delivered on 26<sup>th</sup> May 2022 in Chuka Civil Suit No E120 of 2021; Davies Muchangi Nyaga v James Gacahi Kagiri.
  - iii. That pending hearing and determination of the intended appeal this court be pleased to issue an order of stay of execution of the Judgement delivered on 26<sup>th</sup> May 2022 in Chuka Civil Case No E120 of 2021; Davies Muchangi Nyaga v James Gacahi Kagiri.
  - iv. That this honourable court be pleased to enlarge time for filing an appeal and grant leave to the Applicant to lodge an appeal out of time against the Judgement delivered on 26<sup>th</sup> May 2022 in Chief Magistrate's Court Civil Case No E120 of 2021 by Honourable Njoki Kahara- Senior Resident Magistrate.
  - v. That this court stays execution of the ruling delivered in Chuka Miscellaneous Application E012 of 2022 on 5<sup>th</sup> April 2024.
  - vi. That this honourable court be pleased to issue any Order it deems mete and just in the circumstances.



- vii. That the costs of and incidental to this application be provided for.
2. The Application was premised on the following lengthy grounds, reproduced verbatim below:-
- i. That on 26<sup>th</sup> May 2022 Honorable Njoki Kahara Senior Resident Magistrate delivered Judgement in Chuka Civil Case No E120 of 2021 in favour of the Respondent awarding him Kshs 2,801,760/- together with costs against the Applicant.
  - ii. That the Applicant, being dissatisfied with the afore-stated Judgement, intended to Appeal the entire decision albeit he acknowledged he was out of time and filed a Miscellaneous E012 of 2022 seeking the court to enlarge time.
  - iii. That the Application was dismissed by Lady Justice Lucy Gitari, in the absence of the Applicant's counsel, due to the fact the substantive application was not in court file.
  - iv. That the dismissal of the Application was purely administrative which arose due to confusion at the time due to the rolling out of the E-filing system all over the Country.
  - v. That the Applicant was intent on proceeding to lodge the Appeal and accordingly paid the Respondent's Counsel half of the decretal sum which is Kshs 1,400,000/- as security for the appeal.
  - vi. That the Respondent's Counsel, despite receiving half the decretal sum has, in bad faith, instructed auctioneers to execute the judgment in its fullness.
  - vii. That the proclamation notice issued by the Respondent's Counsel was served on 4<sup>th</sup> October 2024 despite it being dated 30<sup>th</sup> September 2024.
  - viii. That the notice expired on 7<sup>th</sup> October, 2024 and the Applicant is exposed to lose approximately Kshs 3,534,717 or its equivalent yet he already paid half the decretal sum.
  - ix. That this application was not filed promptly due to the fact that the Applicant's counsel has been battling some critical illness.
  - x. That if the Stay of Execution Orders are not issued the intended appeal could be rendered nugatory and the applicant will suffer substantial loss.
  - xi. That the appeal is arguable and has overwhelming chances of success as per the draft Memorandum of Appeal in the annexed supporting Affidavit to this application.
  - xii. That the application is brought in good faith and no prejudice shall be suffered by the Respondent if the application is allowed.
  - xiii. That it is in the interest of justice that this application is allowed.
  - xiv. That it is only in the interest of justice and fairness that the Application herein be certified urgent, and the prayers sought in the Application be granted.
3. The Application was further supported by the sworn affidavit of one Peter Ngola Makau, a legal officer at Britam General Insurance Company. The averments in the lengthy supporting affidavit mirror the lengthy grounds already produced above.

### **The Response**

4. The Application is opposed by the Respondent through the Replying Affidavit sworn by Davies Muchangi Nyaga dated 19<sup>th</sup> November, 2024. In the lengthy affidavit, the Respondent has deposed



inter alia that the Notice of Motion was grossly misconceived, baseless and frivolous and was an abuse of the process of court. That the Applicant's desire to appeal was an afterthought as Judgment was in 2022. That the Applicant went into a deep slumber after Judgment and was only woken up by warrants of attachment and proclamation notices.

5. The Respondent stated that the Applicant has been indolent and was not deserving the discretion of the court to extend time as he had not advanced good reason for the 2-year delay.
6. The Respondent further averred that he would be prejudiced if the orders were granted. That if the court was inclined to grant the stay, then the Applicant should be ordered to deposit half the decretal sum with the respondent's advocates and half in a joint interest earning account
7. Parties took directions on 7<sup>th</sup> November, 2024 to canvass the Application through written submissions which I have read and considered. The Applicant's written submissions are dated 31<sup>st</sup> January 2025.

### **The Applicant's Submissions**

8. The Applicant submitted that he was the Defendant in Chuka Chief Magistrate's Case No E120 of 2021 where the Respondent was the Plaintiff. That the matter was heard on merits and in a Judgment delivered on 26<sup>th</sup> May 2022, the Defendant (now Applicant) was adjudged 100% liable and the Plaintiff (now Respondent) awarded Kshs 2,801,760/- and costs.
9. The Applicant stated that he had not filed the appeal within 30 days due to delay by the registry personnel to avail him a copy of the Judgment. That thereafter, the Applicant's Counsel fell ill for an extended period between mid-2023 and mid 2024 leaving the file unattended. He urged that in the circumstances of the case, the delay was not inordinate. He relied on *Mwangi S. Kimenyi v Attorney General and another* [2014] eKLR on the measure of delay.
10. The Applicant urged the position that he should not be driven out of the seat of justice.
11. With respect to the prayer for stay of execution pending appeal, the Applicant submitted that he had an arguable appeal and that he would be prejudiced if he succeeded on appeal after paying out the decretal sum if the Respondent was not able to refund the same. He relied on the case of the *National Industrial Credit Bank Ltd v Aquina Francis Wasike & another* [2006] eKLR.
12. The Respondent did not file any submissions in opposition.

### **Analysis and Determination**

13. There are two issues in this Application. The first is whether the Applicant should be granted time extension to file his appeal; and the second is whether the Applicant merits an order for stay of execution.

#### **i). Whether the Applicant deserves an order to appeal out of time**

12. 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.



14. The power to extend time for the filing of an appeal is discretionary. The Court of Appeal affirmed this position and set out the applicable principles in the case of *Omar Shurie v Marian Rashe Yafar* (Civil Application No 107 of 2020) UR where it held as follows:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.” (Emphasis mine.)

15. Further, in the case of *Susan Ogutu Oloo & 2 others v Doris Odindo Omolo* (2019) eKLR the Court of Appeal held that:-

“In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC [2014]* eKLR Sup. CT. Application No 16 of 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted”.

16. The Applicant stated that he was aggrieved with the Judgement and sought time extension to file an appeal vide Miscellaneous Application E102 of 2022 which application was dismissed by the court for reason that the substantive application was not in the court file. That thereafter the Applicant’s Counsel fell ill and was out of office for an extended period of time.
17. I have considered the Applicant’s explanation for the delay. Judgement in the trial court was delivered on 26<sup>th</sup> May 2022. The Applicant’s first Application, the body of which seems not to have been placed before the court, was filed on 18<sup>th</sup> October 2022, a period of 3 months after delivery of Judgement, which also translated to a 2 month delay. No explanation has been given for the initial 2 month delay.
18. The explanation given for the delay relates to the period between 18<sup>th</sup> October 2022 and the date of the present application being 7<sup>th</sup> October 2024. The explanation was that the Applicant’s Counsel was taken ill for an extended period. However, no supporting document was attached. The reason or the delay is therefore not satisfactorily explained.
19. With respect to whether the delay was inordinate, prima facie I find the period of two years inordinate. I agree with the Respondent that the Applicant’s intention to appeal was an afterthought. The Applicant’s explanation that there was delay in obtaining the trial court’s Judgement from the registry has not been supported with a Certificate of delay as required by law.
20. As earlier stated, the power to extend time was discretionary. In exercising discretion, I have taken into consideration the right of the Applicant to appeal vis-à-vis the right of the successful party to access and enjoy the fruit of his Judgement. In this case the Applicant has urged that they have deposited half of the decretal sum being Kshs 1,400,000/- in the Respondent’s Counsel’s account as security for



the appeal. He has however not disclosed the terms of the deposit and in particular whether the actual party would access the said deposit.

21. The Respondent stated in his replying affidavit that he would be prejudiced if he did not execute the decree. He was silent on the amount that the Applicant's Counsel said had been deposited with the Respondent's Counsel. In the view of the court, the prejudice to the Respondent can be cured by an order that the half decretal sum be released to the Respondent party.
22. In the end, though I have not found the delay satisfactorily explained, I exercise discretion to grant the Applicant time extension to file his appeal

**ii) Whether the Applicant merits an order for stay of execution.**

23. Order 42 Rule 6 of the [Civil Procedure Rules](#) stipulates: -
  1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
  2. 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.
24. A reading of Order 42 Rule 6(2) of the [Civil Procedure Rules](#), shows that an Applicant should satisfy the court that substantial loss may result to him unless the order is made; that the application has been made without unreasonable delay; and the Applicant must give such security as the court orders for the due performance of such decree.
25. The Court of Appeal aptly discussed the applicable principles in the case of [Butt v Rent Restriction Tribunal](#) [1979] cited by Muchemi J in the case of [Jamii Bora Bank Limited & another v Samuel Wambugu Ndirangu](#) [2022] eKLR, as follows: -
  - a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
  - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
  - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.



d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order to lapse.”

26. The Applicant’s case is that he would suffer substantial loss unless stay was granted. He argues that his appeal would be rendered nugatory if he were to succeed after paying out the decretal sum. That he may not recover the sum already paid out to the Respondent.
27. As earlier stated, the Respondent did not submit therefore failed to controvert the Applicant’s arguments on substantial loss. Applying the principles set out in *Butt v Rent Restriction Tribunal* (supra), I exercise discretion to grant stay of execution. The Applicant has already mitigated any prejudice that the Respondent would suffer if kept out of the fruit of his Judgement by depositing half the decretal sum.
28. I observe that the Applicant has stated that the above sum was security for the appeal. If that was the case, then the Respondent would continue to suffer prejudice particularly because he has stated that he was in dire need of the decretal sum owing to failing health.
29. Balancing the interests of both parties, I am persuaded to order the release of half the decretal sum being Kshs 1,400,000 already with the Respondent’s Advocates to the Respondent.
30. In the end, I make orders as follows:-
- (i) The prayer to appeal out of time is granted. The Applicant has 14 days to file their Memorandum of Appeal.
  - (ii) The Applicant is granted 30 days to file the Record of Appeal.
  - (ii). Stay of Execution is granted on condition that the part decretal sum of Kshs 1,400,000 already deposited by the Applicant with the Respondent’s advocates be released to the Respondent party within 30 days of today.
  - (iv) The Applicant shall deposit into court three hundred thousand shillings (Kshs 300,000) being security for costs.
  - (v) The Applicant, though successful, shall bear the costs of this Application.

Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED AT CHUKA THIS 30<sup>TH</sup> DAY OF APRIL , 2025.**

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**R. LAGAT-KORIR**

**JUDGE**

Ruling delivered virtually in the presence of Mr. Gichangi holding brief for Mr. Odio for the Applicant and N/A Kijaru for Respondent. Muriuki (Court Assistant).

