



**Uap Insurance Co Ltd v Wangai (Miscellaneous Civil Case  
E067 of 2022) [2025] KEHC 5492 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5492 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
MISCELLANEOUS CIVIL CASE E067 OF 2022  
DKN MAGARE, J  
APRIL 30, 2025**

**BETWEEN**

**UAP INSURANCE CO LTD ..... APPLICANT**

**AND**

**JACKSON WACHIRA WANGAI ..... RESPONDENT**

**RULING**

1. The application for determination is the Applicant's Notice of Motion dated 3<sup>rd</sup> October, 2022. It is brought under Sections 1A, 1B & 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, and under Order 51 Rule 1 and Order 42 Rule 6(2), of the Civil Procedure Rules and Article 159(2)(d) &(e) of *the Constitution*. It was placed before me by the Principal Judge of the High Court to conclude. The Applicant prayed for the following orders:
  - a. Spent...
  - b. That leave be granted to the Applicant to lodge an appeal out of time against the judgment and decree issued by Hon. Macharia in Nyeri CMCC No. 137 of 2017 on 23rd August 2022 pending the hearing and determination of this application.
  - c. That leave be granted to the Applicant to lodge and an appeal out of time against the judgment and decree issued by Hon. Macharia in Nyeri CMCC No. 137 of 2017 on 23rd August 2022 pending the hearing and determination of intended appeal.
  - d. That the application be served and heard interpartes at a hearing date to be granted by the court.
  - e. That cost be provided for.
2. The application is premised on the grounds that:-



- a. The Applicant, being aggrieved by the judgment delivered on 23rd August 2022, is desirous of appealing the same.
  - b. That the appeal raises triable issues and execution of the judgment decree will render the appeal nugatory.
  - c. That the Applicant is desirous of appealing the decision and seeks leave of the court to file out of time.
  - d. That the delay is not inordinate and is excusable.
  - e. That the Applicant will suffer substantial loss if the application is denied.
  - f. That the Applicant is ready and willing to provide security for due performance of such decree or order as may be determined by the Court.
  - g. That no prejudice shall be suffered by the Respondent.
3. This application was supported by the affidavit of Erick Onderi wherein he stated that:
- a. That he was the Legal Officer at UAP Insurance Company Limited.
  - b. That the cause of action arose from a contract of livestock insurance between the Applicant and Respondent where the former agreed to insure a Friesian cow.
  - c. That on 27.11.2016, the Respondent's cow died of natural causes and filed a claim of compensation for Ksh. 150,000/- plus costs and interests.
  - d. That the Applicant was granted a stay of execution for a period of 30 days which has since lapsed.
  - e. That once he knew judgment had been issued, he instructed their advocates on record to get a certified copy and proceedings which has been met with numerous challenges to date.
  - f. That the Applicant is desirous of appealing the judgment to which leave is sought to file out of time.
  - g. That the delay is not deliberate and is inexcusable.
  - h. That the record of appeal shall be served once certified copies of the lower court proceedings are provided.
  - i. That the Applicant is ready to deposit such security as the court orders for due performance of such decree in Nyeri CMCC No. 137 of 2017.
  - j. That the appeal has a high chance of success and if leave is not granted, the Applicant's insurer risks suffering substantial loss.
  - k. That if the Respondent continues with the execution and the outcome of the appeal is a success, the Applicant will suffer substantial loss and the appeal rendered an academic exercise.
  - l. That the Applicant is ready and willing to provide such security for due performance of such decree.
4. The Respondent put in a Replying Affidavit wherein he stated:
- a. That the judgment was indeed entered in his favour.



- b. That there is no record of a letter seeking typed proceedings and judgment to demonstrate the keenness of the Applicant to pursue an appeal.
  - c. That the Applicant has not attached typed proceedings to the application which is needed to file an appeal.
  - d. That the judgment is a monetary appeal and no substantial loss shall be visited on the Applicant and that the Applicant is a man of means who can refund the same if the appeal is successful.
  - e. That the Applicant has not evidenced proof of execution and thus the claim that execution is imminent is unfounded.
  - f. That the application is an abuse of the court process and is meant to deny him fruits of the judgment.
  - g. That the Applicant has not indicated what substantial loss will be suffered.
5. The Applicant filed submissions dated 16.01.2023 stating that despite being out of time as provided for under Section 79(G) and 95 of the *Civil Procedure Act*, the principles of granting leave ought to be considered. They cited the case of Zacheaus Omla Juma vs Nicholas Kirangi [2021] eKLR. The Applicant stated that the threshold of granting stay of execution is espoused under Order 42 Rule 6 of the Civil Procedure Rules. They stated that they are willing to supply necessary security for execution of the decree and that they shall suffer substantial loss. They stated that the delay was not inordinate as there was a lapse of two weeks from when time expired. They urged the court to consider Butt vs Rent Restriction Tribunal [1979]. The Applicant stated that it would suffer substantial loss and supplied the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR. The Applicant further stated that they were ready to provide for security for costs and cited the authority of Re Estate of John Ndungu Mubia (Deceased) [2021] eKLR.
  6. The Respondent filed submissions dated 11<sup>th</sup> January 2023, stating that no reason had been tendered why the appeal was not filed in time. The Respondent cited the case of Malindi Misc. Civil Application No. 23 of 2017 Moses Muriithi Njagi vs Priscilla Lewa which saw a similar application dismissed. The Respondent relied on the Supreme Court authority of Nicholas Kiptoo Korir Arap Salat vs Independent Electoral Boundaries Commission & 7 Others [2014] eKLR. The Respondent further cited the authority of Meru Misc. Civil Application No. 12 of 2015 Morrison M'tetu vs James Ileri Njagi & Grace Wanjiku Kanyiba (2016) eKLR.
  7. The Respondent contended that the time provided for under Section 95 of the *Civil Procedure Act* is fixed. The Respondent relied on the authority of High Court in Eldoret Misc. Civil Application No.18 of 2014 Nandi Tea Estate Ltd vs George Ochieng [2015] eKLR. He stated that the Applicant's conduct in not seeking typed proceedings is an abuse of the court process and cited the authority of Machakos Misc. Civil Application No. 94 of 2014 Jolly Muema Kathuka vs Francis Ngao Dominic & Reuben Sila Kititu (2017) eKLR.
  8. The Respondent stated that the delay by the Applicant has not been explained and thus the court ought not to indulge the Applicant. The Respondent cited the authority of Nairobi Civil Appeal No. 37 of 20015 Simon Wahome Wachihii versus Iriaini Tea Factory & 2 others (2016) eKLR. The Respondent stated that it is misplaced to allege that a monetary decree can be rendered nugatory if paid to a successful litigant and cited the authority of Muranga Civil Appeal No. 107 of 2015 Masisi Mwita vs Damaris Wanjiku Njeri (2016) eKLR.



## Analysis

9. An Applicant for extension of time must show good and substantial reasons for the delay, and, prima facie good cause why the intended appeal should be heard. Whilst the first leg requires a satisfactory justification, the second leg only requires one to show that the grounds of appeal are arguable. It is upon satisfaction of both the above that the court will use its discretion to grant the application. The principles guiding this Court in exercising that discretion are set out in *Leo Sila Mutiso v Rose Wangari Mwangi Civil Appeal No. Nai. 255 of 1997*:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary...”

10. There has to be a plausible and satisfactory explanation for delay in order to invoke the court’s discretion in the Applicant’s favour. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR*, the Court of Appeal, [J. Mohammed, JA] stated as hereunder in respect of the court’s discretion:

(12) 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.

11. The principles for extension of time were set out by the Supreme Court of Kenya (*M.K. Ibrahim & S.C. Wanjala SCJJ*) in the case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others*, where they distilled the following seven principles:

- “(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
- (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
- (3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
- (4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
- (5) Whether there will be any prejudice suffered by the Respondent of the extension is granted.
- (6) Whether the application has been brought without undue delay; and
- (7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

12. Under Order 50, Rule 6 of the Civil Procedure Rules, the courts have the power to enlarge the time required for the performance of any acts stipulated in the Rules, notwithstanding the fact that such time has expired. Therefore, whether to extend time is a matter of judicial discretion. The period of delay is not substantial. In the case of *Joseph Schmaderer v Serah Njeri Ngene [2021] eKLR*, the delay was for four months, yet the court granted it. The reason provided by the Applicant is that they have faced challenges in sourcing proceedings from the concerned registry.



13. The Applicant was expected to file its appeal within thirty (30) days of the judgment; it did not do so. However, they gave an explanation for the delay as aforementioned. The question as to whether there was inordinate delay is answered by the authority of the Court of Appeal case of Cecilia Wanja Wamwira Kerugoya Civil Appeal No.211 of 2013 (2018) eKLR, where the court held:

“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the appellant’s conduct from the time the appeal was filed up to the date the application for reinstatement was filed..... we have to ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or delay in filling the application for reinstatement constitute an excusable mistake or was it meant to deliberately delay the cause of justice.”

14. The first and second principles concern the length and reason for the delay, respectively. It’s been established that the impugned judgment was delivered on 23.08.2022. This application was filed on 3.10.2022. This was a delay of about 40 days after the lapse of the 30 days for filing an appeal. In the case of Phillip Chemwolo & Another –vs- Augustine Kubede [1982-88] KLR 103 at 1040 Apaloo J/A as he then was stated thus:-

“Blunders will continue to be made from time to time, and it does not follow that because a mistake has been made, that a party should suffer the penalty of not having his case heard on merit”. [own emphasis]

15. The second issue is whether there has to be an arguable appeal. Whether an arguable appeal exists, the Court of Appeal in the case of Kenya Railways Corporation v Erdemann Property Limited [2012] eKLR, succinctly stated that an arguable appeal is not one which will necessarily succeed but raises arguable grounds. The memorandum of appeal raises a question of the validity of the cover. It is not an idle question.

16. The fourth principle concerns the prejudice that will befall the Respondent should leave be granted for the Applicant to file an appeal out of time, which, from the foregoing, I have not seen the prejudice that will be suffered that will not be ameliorated with an order of costs.

17. I hold that the application for extension of time is merited and is accordingly allowed.

18. The next question is stay of execution pending appeal. The power to grant stay of execution is provided under Order 42, rule 6 of the Civil Procedure Rules which provide as follows:

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 order set aside.

(2) No order for stay of execution shall be made under subrule (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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) 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.
19. The first question is whether there will be irreparable loss if the decree is executed. The Respondent does not appear to provide any evidence of means to refund the decretal sum if the same is paid to them. I find that there will be irreparable harm in case execution proceeds.
20. The next issue is whether the Applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on it. The issue of adequacy of security was addressed by the court of appeal in *Nduhiu Gitahi vs. Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100, where the Court of Appeal expressed itself as follows:
- “The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it”.
21. The Applicants did state that, regarding the issue of security, they were ready to abide by any conditions that the court may impose. The court will thus impose such security as may be necessary for due



performance of the lease of time, and there may never be time to know the costs as assessed or interests per the decree. Therefore, a global sum of Ksh. 220,000/= will suffice as security.

### **Determination**

22. In the circumstances, the court makes the following orders:
- a. Leave is granted to the Applicant to file an appeal out of time from the judgment and decree in Nyeri CMCC No. 137 of 2017. The memorandum of appeal shall be filed within 21 days of the ruling hereof.
  - b. There be stay of execution of the judgment and decree in Nyeri CMCC No. 137 of 2017, pending the hearing and determination of the Appeal.
  - c. The Applicant to deposit a sum of Ksh. 220,000/= in court within 45 days from the date hereof. In default, execution do issue.
  - d. Costs of Ksh. 7,500/= to the Respondent payable within 45 days.
  - e. This file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30<sup>TH</sup> DAY OF APRIL, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

Represented by:-

J. K. Kibicho & Co. Advocates for the Applicant

Keli & Mwaura Associates for the Respondent

Court Assistant – Michael

**M. D. KIZITO, J.**

