



**Nyambura v Waruingi (Miscellaneous Civil Application  
E182 of 2024) [2025] KEHC 5053 (KLR) (25 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5053 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
MISCELLANEOUS CIVIL APPLICATION E182 OF 2024**

**FN MUCHEMI, J**

**APRIL 25, 2025**

**BETWEEN**

**SAMUEL MBOGO NYAMBURA ..... APPLICANT**

**AND**

**JOHN MAMBO WARUINGI ..... RESPONDENT**

**RULING**

**Brief facts**

1. The application dated 4<sup>th</sup> December 2024 seeks for orders of leave to file an appeal out of time against the judgment in Ruiru CMCC No. E317 of 2023 delivered on 30<sup>th</sup> October 2024. The applicant further seeks for orders of stay of execution in respect of the judgment in Ruiru CMCC No. E317 of 2023 delivered on 30<sup>th</sup> October 2024 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 7<sup>th</sup> February 2025.

**Applicant's Case**

3. The applicant states that the judgment in Ruiru CMCC No. E317 of 2023 was delivered on 30<sup>th</sup> October 2024 whereby the trial court entered judgment in favour of the respondent finding the applicant 100% liable and awarding the respondent general damages for pain and suffering at Kshs. 1,200,000/-, future medical expenses of Kshs. 400,000/-, loss of earnings of Kshs. 660,000/- and special damages of Kshs. 221,310/- with costs and interest. Being aggrieved with the said decision, the applicant states that he intends to lodge an appeal but the statutory time within which to do so has lapsed.
4. The applicant further states that the 30 days stay of execution granted in the matter has since lapsed and unless stay of execution is granted, the appeal shall be rendered nugatory and the applicant will suffer irreparable loss and damage.



5. The applicant avers that he received a copy of the judgment from his advocates one month after delivery of the same and immediately proceeded to review it. Upon receiving a copy of the judgment, the applicant states that he instructed his advocates to lodge an appeal against the quantum of damages awarded.
6. The applicant argues that the delay in getting the judgment was due to the challenges in system issues experienced by his advocates who were unable to locate their file and unable to access their accounts thus unable to pay for the memorandum of appeal.
7. The applicant further argues that the decree is for a substantial sum of money and if paid to the respondent, he is apprehensive that he will not be able to recover the whole sum. The applicant further states that there is an impending risk of sale of his motor vehicle registration number KCG 634R by the respondent which is the subject of the appeal, a step which will render the intended appeal useless.
8. The applicant states that his insurance company, Directline Assurance Limited is ready and willing to furnish security in the form of a bank guarantee from Family Bank. The applicant further states that it is in the interests of fairness and justice that the entire decretal sum be secured through a bank guarantee without any partial payment as his appeal is primarily on the trial court's determination on the issue of liability. The applicant is apprehensive that if any part payments are ordered to be paid to the respondent as a condition for stay of execution pending appeal, then such payments will be utilized and alienated by the respondent and recovery of the same will be arduous in the event the appeal succeeds.
9. The applicant states that the application has been filed without unreasonable delay. Further, the applicant states that his intended appeal raises pertinent issues and has a high chance of success.

### **The Respondent's Case**

10. The respondent states that he filed a suit in the lower court being Ruiru CMCC No. E317 of 2023. The respondent further states that the suit was concluded and judgment delivered on 30<sup>th</sup> October 2024 in the absence of the applicant's advocates. The respondent avers that the applicant did not file any submissions in the trial court although he was fully aware of the relative awards granted in similar cases as his. If the applicant was keen on mitigating his financial liability, he should have filed submissions and attached the relevant caselaw that best reflects the award he feels the trial court should have awarded.
11. The respondent states that the allegations by the applicant that a copy of the judgment was not available to him is false as the trial court posted the judgment and made it available on the case tracking system (CTS) platform on 13<sup>th</sup> November 2024. The respondent further states that the allegation that the delay was caused by the applicant's insurer in not accessing his file is unsubstantiated and not proved. There is no evidence tendered to the court on any system downtime that would have hindered the filing of a memorandum of appeal in time.
12. The respondent states that the applicant waited until he was proclaimed for him to file the current application through his advocates.
13. The respondent avers that due to the extent of his injuries he has incurred medical expenses which he struggles to pay for. Further, he has lost his source of income due to the accident and delay in execution of the trial court's judgment continues to prejudice him immensely. The respondent states that the delay in execution puts his health at risk as he can no longer pay for the healthcare he needs.
14. Parties put in written submissions and the applicant elected not to put in any written submissions.



## The Respondent's Submissions

15. The respondent reiterates what he deponed in his affidavit and further relies on the cases of Naomi Wangechi Gitonga & 3 Others vs Independent Electoral & Boundaries Commission & 17 Others [2018] eKLR and Nicholas Kiptoo Korir arap Saalat vs Independent Electoral & Boundaries Commission & 7 Others [2014] eKLR and submits that the applicant has not given plausible reasons why he did not file his appeal within the stipulated statutory period. The applicant has claimed that he received a copy of the judgment one month after its delivery yet he has not proved the same as there is no letter to the court registry attached to his application to show when he applied for a copy of the judgment.
16. The respondent submits that he has attached the CTS screenshot which shows that the trial court posted the copy of the judgment on 13<sup>th</sup> November 2024 which is before the lapse of the 30 days statutory period for filing a memorandum of appeal. Thus, the allegations by the applicant that a he got a copy of the judgment one month after its delivery is false and only intended to mislead the court. Further, the applicant waited until he was proclaimed on 2<sup>nd</sup> December 2024 when he rushed to the current court with the current application.
17. The respondent submits that although the applicant seeks to appeal on liability, he did not testify or call any witnesses to testify as to how the accident occurred or rebut the particulars of negligence outlined by the respondent. Further, the applicant did not file any submissions in the lower court to guide the court on issues of liability and what he thought was reasonable on the award of quantum.
18. The respondent submits that he sustained serious injuries which include a fracture of the left acetabulum and a fracture of the left tibia plateau with soft tissue injuries. Both Dr. Moses Kinuthia and Dr. Jennifer Kahotho awarded him permanent incapacity of 35% and that he would require future medical treatment for removal of both metal implants and physiotherapy. Thus, the respondent submits that the intended appeal does not have high chances of success.

## The Law

### Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;

19. Section 79G of the *Civil Procedure Act* states:-

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 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.

20. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.



21. The Supreme Court in the case of Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.

22. Similarly in the case of Paul Musili Wambua vs Attorney General & 2 Others [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now 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 whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of 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.”

23. The applicant has faulted the trial court for the delay in filing his appeal because he received a copy of the judgment one month after the delivery of the same.

24. On perusal of the record, judgment in the trial court being Ruiru MCCC No. 317 of 2023 was delivered on 30<sup>th</sup> October 2024 in the presence of counsel for the respondent. The court registry uploaded a copy of the judgment in the Case Tracking System (CTS) on 13<sup>th</sup> November 2024. This fact has not been denied by the applicant. Thus it is evident that the applicant is deponing to falsehoods. Furthermore, the applicant has not attached any correspondence to the executive officer showing that he followed up with obtaining a copy of the judgment. The applicant also did not provide any evidence that the system was down which prevented him from filing his memorandum of appeal. It is therefore my considered view that the applicant has not given any plausible explanation on the reasons for delay.

25. The record further shows that the current application was filed on 6<sup>th</sup> December 2024 and the judgment was delivered on 30<sup>th</sup> October 2024 which is a delay of about 6 days. Although a delay of about 6 days is not inordinate and inexcusable, the reasons given for the delay are not sufficient to warrant the court to exercise its discretion in favour of the applicant.



26. Accordingly, I find that the applicant has not established to the satisfaction of the court time for filing an appeal should be enlarged.
27. On the perusal of the intended Memorandum of Appeal and the judgment of the trial court and noted that the appeal does not raise arguable points of law and fact. Thus, without delving to the merits of the appeal, the chances of the appeal succeeding if the instant application is granted are limited. In the circumstances it is my considered view that the applicant has not established to the satisfaction of the court that time should be enlarged to enable him file his appeal.
28. Having declined to grant the prayer for admitting the appeal out of time, the prayer for stay of execution of the trial court's judgment and decree automatically fails since there is no existent appeal.
29. It is thus my considered view that the application dated December 4, 2024 lacks merit and is hereby dismissed with costs.
30. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 25<sup>TH</sup> DAY OF APRIL 2025.**

**F. MUCHEMI**

**JUDGE**

