



**Ketraco & another v Githinji (Civil Miscellaneous E076 of 2024)  
[2025] KEHC 9381 (KLR) (30 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 9381 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL MISCELLANEOUS E076 OF 2024**

**TM MATHEKA, J**

**MAY 30, 2025**

**BETWEEN**

**KETRACO ..... 1<sup>ST</sup> APPLICANT**

**ERIC LILUNGA MUKHWAMI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SAMUEL KARANJA GITHINJI ..... RESPONDENT**

**RULING**

1. The application before me is brought under Section 1A, 1B, 3A and 95 of the *Civil Procedure Act* and order 50 Rules 6 and Order 51 of the Civil Procedure Rules, 2010
2. It seeks orders that pending the hearing and determination of the Appeal this honourable court be pleased to stay the execution of the judgment rendered in Kilungu MCCC No. E236 of 2022 – Samuel Karanja Githinji v Eric Lilunga Mukhwani and Kenya Electricity Transmission Company Limited delivered on 25th March, 2024 by Honourable Geno L. Okwengu (SRM)
3. The grounds are set out on its face and the supporting affidavit viz
  1. That on 25th day of March, 2024 Honourable Geno L. Okwengu (SRM) delivered a judgment on the Respondent’s plaint dated 23rd August, 2022 whose decision inter alia was against the Appellants/Applicants requiring payment to a tune of Kshs. 1,907,539.00 plus costs and interests of the suit (Annexed hereto and marked “KMM – 1” is a true copy of the judgment dated 25th March, 2024.
  2. That on 30th November, 2023 the matter had been scheduled for mention to confirm filing of submissions and take a judgment date before honourable Geno L. Okwengu.



3. That on the said date, counsel for the 1st and 2nd Appellants/Applicants appeared before the honourable court wherein they were informed that court was not sitting and that new dates would be issued at the registry.
  4. That regrettably, counsel for the 1st and 2nd appellants/applicants thereafter discovered that the respondent's counsel did take out a date from the registry which date was not served upon the 1st and 2nd appellants/applicants.
  5. That it is on the afternoon of 3rd May, 2024 that the 1st and 2nd defendant/applicants' counsel realized the judgment had since been delivered on 25th March, 2024 by honourable Geno. L. Okwengu.
  6. That given that judgment was delivered in the absence of the 1st and 2nd appellants/applicants, there is no stay in place and the 1st and 2nd appellants.
4. The applicant filed a memorandum of appeal contending as follows:
1. That the learned magistrate erred in law and fact in failing to consider and find that the appellants had shown a prima facie case with a high probability of success.
  2. That the learned magistrate erred in law and fact in failing to consider and find that the appellants were not blamed for causing the accident by apportioning 100% liability against the appellant.
  3. That the learned magistrate erred in law and fact in failing to consider and find that there was no concrete evidence placed before the court to determine who was to blame for the accident between the appellants and the Respondent.
  4. The learned magistrate erred in law and fact in failing to consider and find that the contents of a police abstract as extracted from the records held by the police is merely evidence that a report of an accident was made and not that an accident occurred.
  5. That the learned magistrate erred in law and fact in failing to consider and find that a police abstract is not conclusive proof of liability.
  6. That the learned magistrate erred in law and fact in failing to consider and find that the police officer were not present at the scene of the accident and as such cannot render any account leading up to or surrounding the alleged accident which goes against the evidentiary rules of direct evidence thereby rendering his testimonies as hearsay.
  7. That learned magistrate erred in law and fact in failing to consider and find that where there is no concrete evidence to determine how the accident occurred and who is to blame for causing an accident, both parties should be held equally liable.
  8. That the learned magistrate erred in law and fact in failing to consider and find that there can be no liability without fault.
  9. That the learned magistrate erred in law and fact in failing to consider and find that in assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike.



10. That the learned magistrate erred in law and fact in failing to consider and find that in assessing compensatory damages, the law seeks at most to indemnify the victim for the loss suffered and not to mulct the tortfeasor for the injury he has caused.

The applicant sought that ;

- i. The appeal be allowed.
- ii. The judgment of the honourable court in MCCC No. E236 of 2022 delivered on 25th March, 2024 be set aside.
- iii. Costs and interest of the appeal be borne by the respondent.
- iv. Any other relief that the court would deem fit to grant.

5. The application is opposed vide the replying affidavit of Teresia Muthua where she depones

1. That the application herein is frivolous, vexatious, bad in law misleading and does not reveal material facts herein and thus an abuse of the honourable court's process.
2. That following the judgment of honourable Gen L. Okwengu (SRM) delivered on 25th March, 2024 in Kilungu MCCc No. E 236 of 2022 - Samuel Karanja Githinji v Eric Lilunga Mukhwani and Kenya Electrical Transmission Company Limited the appellants herein have attempted to subvert the law by making this application with the aim of prolonging the matter.
3. That it is trite law that for an application to be filed outside of the statutory time period it is necessary for the appellant to provide good and sufficient cause for not filing the appeal in time.
4. That the reason for the undue delay as proposed by the appellant was that the respondent's advocate never served the appellant's advocate, a grave misrepresentation of the facts as they were indeed served past 30th November, 2023 vide notice of motion dated 1st February, 2024. Further the judgment notice was served to the appellant way back on 15th February, 2024.

6. And the further replying affidavit sworn by Samuel Karanja Githinji that

That the applicants have deliberately misled this honourable court by claiming that they were not aware of the judgment date. As evidenced by the attached Notice of Judgment (marked as "SG - 1"), the applicants were duly informed of the judgment date through their previous counsel. C.M Ngugi Rebiro & Co. Advocates, but chose not to appear before the court.

7. Parties filed written submissions and the respondent set out as follows:

#### **Whether there is a good and sufficient cause for leave to file the appeal out of time**

8. It was submitted that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion by the court. The court was referred to the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR where the following were set out as the principles to consider in such applications:
  - i. The period of delay
  - i. The reason for the delay
  - ii. The arguability of the appeal
  - iii. The degree of prejudice which could be suffered by the if respondent the extension is granted.



- iv. The importance of compliance with time limits to the particular litigation or issue; and
  - v. The effect if any on the administration of justice or public interest if any is involved.
9. It was submitted that the impugned judgment was delivered on 25th March, 2024 while the present application was filed on 9th May, 2024 nearly two months after the judgment was delivered. That there was no explanation for the delay.

#### **Whether an order of stay of execution would prejudice the respondent**

10. The applicant relied on *Gatirau Peter Munya vs Dickson Mwenda & 2 others* [2017] eKLR that the applicant must satisfy the court that the appeal was arguable, that the without stay the appeal would be rendered nugatory and that it was in the public interest that the stay be granted.
11. It was submitted that based on these three grounds the application failed in its entirety as it was a mere attempt to prolong the litigation process. frivolous and an abuse of the court process. The respondent urged the court to grant the following orders:
1. Dismissal of the Notice of Motion dated 9th May, 2024 for being frivolous vexatious and a waste of the court's time.
  2. Orders of execution of the judgment of honourable Gen. L. Okwengu(SRM) delivered on 25th March, 2024 in Kilungu MCC No. E236 of 2022 – Samuel Karanja Githinji - v – Eric Lilunga Mukhwani and Kenya Electrical Transmission Company Limited.
  3. Cost of this suit.
  4. Any other of further relief that this honourable court would deem fit to grant.
12. For the applicant it was argued that for the order of stay of execution pending appeal to be granted, the court must be satisfied as per Order 42 rule 6 sub-rule 2, that: -
- a. Substantial loss may result to the applicant unless the order is made and that the application has been made without reasonable 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.
13. The court was referred to *Dickson Muricho Muriuki v Timothy Kagondou Muriuki & 6 others* [2013] eKLR where the Court quoted with approval the sentiments of the court in *Equity Bank Limited v West Link MBO Limited – Civil Application No. 78 of 2011*; that: -

“Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met...

Further in *Henry Sakwa Maloba v Bonface Papando Tsabuko* [2020] eKLR, the High Court reiterated the finding in the case of *Century Oil Trading Company Limited v Kenya Shell Limited Nairobi* [2008] eKLR, stating that,

Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is



seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

**Whether security has been given for the due performance of orders granted.**

14. It was submitted that the applicant was ready to deposit up to half the decretal sum Kshs. 1,907,539.00 into a joint interest account amounting to Kshs. 955,769.50 or in court as the court may deem fit, and the applicant was amenable to any further directions of Honourable court regarding the question of security.

**Whether the application has been brought without undue delay**

15. The court was urged to exercise its discretion in favour of the applicant. That the Judgment was delivered on 25th March 2014, the application was filed on 9th May. That the difference was 16 days out of the 30 days within which they were to file the appeal.
16. The applicant relied on High Court Miscellaneous Application E008 of 2024, Charles N. Ngugi v ASL Credit Limited [2022] eKLR

Almas Hauliers Ltd v Abdulnasir Abukar Hassan [2017] eKLR and Sokoro Savings and Credit Co-operative Society Ltd vs Mwamburi (Civil application E032 of 2022) [2023] KECA 381 (KLR) 31 March, 2023) Ruling where the court stated that:

“The applicant herein moved within reasonable time to follow up on the matter and instructed counsel to file the instant application without unreasonable delay. The delay cannot therefore be said to be inordinate in the circumstances. In my view, the explanation tendered by the applicant is plausible and sufficient considering the delay period was only 43 days. Additionally, I note that the delay occasioned was as a fault of the advocate in the conduct of the matter and the applicant cannot be blamed for the delay. Without evidence to the contrary, I am unable to find carelessness in the actions of the applicant hence the explanation offered for the delay is sufficient.”

17. The court was pointed to the provisions of Article 159(2)(d) of the 2010 Constitution of Kenya which requires the court to administer justice without undue regard to procedural technicalities. For this proposition The applicant relied on Raila Odinga v IEBC and 4 others [2013] eKLR. Shabbir Ali Jusab v Anaar Osman Gamrai & another [2013] eKLR
18. I have carefully considered the applications, the submissions, the authorities cited. The first issue is whether the applicant has explained the delay in filing the appeal.
19. The question becomes: was the applicant notified of the date of judgment? The notice attached to the further replying affidavit is for 20/3/2024. The judgment was delivered on 25/3/2024.
20. There is no explanation for that difference of dates - and it is possible that the applicants were not aware of the judgment date. I note that judgment was delivered in open court - it does not state who was present.
21. I must hasten to state that it is the duty, obligation of a litigant/his counsel to keep abreast of their case - they had notice for the 20/3/2024 did they attend court? And if they did, what transpired? This part remains silent on the part of the applicant. That the notice of 20/3/2024 is not denied is evidence that the applicants were aware of that date – and failed to attend court or whatever happened and the new date - five days later - passed them, or they attended court, or failed to appear.



22. Have the applicants explained the delay sufficiently? From 25/3/2024 to 9/5/2024 - what was happening?
23. The fact that the judgment was delivered 5 days after the date they were served with and they were absent has not been explained. In addition, from 25th March to 9th May is more than one month, not 15 days. It is more and the applicant does not explain it. Merely urging the court to exercise its discretion in the applicants favour is not enough. It must be explained, and to the satisfaction of the court. The applicant spent a lot of time arguing other things but failed to pay any focus on the issue of delay.
24. The delay in filing the appeal is not explained to warrant the exercise of discretion in favour of the applicant.
25. In the circumstances, leave is declined. The issue of execution does not arise.
26. The application is declined with costs to the respondent.

**DATED SIGNED AND DELIVERED VIA CTS THIS 30TH MAY 2025 WITH CONSENT OF COUNSEL. MUMBUA T MATHEKA**

**JUDGE**

**SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA**

Ms. Maina for applicant

Mrs. Ngugi for respondent

**THE JUDICIARY OF KENYA.**

**MAKUENI HIGH COURT**

**HIGH COURT DIV**

DATE: 2025-06-01 18:24:09

The Judiciary of Kenya

