



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwikya v Nyumu (Civil Miscellaneous E128 of 2024)  
[2025] KEHC 9380 (KLR) (30 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 9380 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL MISCELLANEOUS E128 OF 2024**

**TM MATHEKA, J**

**MAY 30, 2025**

**BETWEEN**

**VINICENT MUTUKU MWIKYA ..... APPLICANT**

**AND**

**SHADRACK MUTUKU NYUMU ..... RESPONDENT**

**RULING**

1. Before me is the Notice of Motion dated 15/8/2024 brought under Order 21 rule 1B(*sic*), Order 22 rule 22, Order 40 rule 5, Order 51 rule 1 of the Civil Procedure Code, Section 1A, 1B and 3A of the Civil Procedure Act, Article 159 (2) (a) & (d) of the Constitution of Kenya, 2010.
2. The applicant seeks two main orders:-
  1. Extension of time and leave to file appeal out of time/lodge their memorandum of appeal out of time against the judgment of Hon. Jalang'o SPM in Tawa MCCC E106 of 2024; and
  2. Stay of execution of the judgment and decree therein pending hearing and determination of the appeal.
3. Should the 2nd prayer be allowed then he seeks to be allowed to deposit a bank guarantee as security for the performance of the decree.
4. The ground for the application are set out on its face, and the affidavit sworn on 15/8/2024. There is also the memorandum of appeal annexed thereto where it is clear that the appeal is only against the quantum of damages.



5. The ground for the application for extension of time to file the appeal is stated thus:-
 

“The delay was occasioned by the fact that after judgment was delivered on 6/6/2024, by the time the applicant. Intended appellant got back to his advocates on record regarding the appeal the time to launch the appeal had already expired.”
6. It is also contended that the respondent has not established he can refund the money should the appeal succeed and the fear is that the appeal will be rendered nugatory.
7. The application is opposed vide replying affidavit sworn by Dominic Mulyungi - that the delay is unreasonable coming three months after the judgment without any explanation. That there is no arguable appeal, no evidence of alleged imminent substantial loss, further that since liability is not contested, then the ½ the decretal sum plus costs in the lower court be released to respondent – otherwise the application be dismissed with costs.
8. The parties filed submissions.
9. The applicant’s submissions are centered on the exercise of discretion by the court, as and when it should be exercised.
10. Then applicant proceeds to submit on the issue of stay of execution. The applicant relies on:- *Bake “N” Bite (NRB) Limited v Daniel Mutisya Mwalonzi* [2015] eKLR  
*Esther Wamaittha Njibia & 2 others v. Safaricom Limited* [2014] eKLR  
*Tabro Transporters Ltd v. Absalom Dova Lumbasi* [2012] eKLR  
*Edward Kamau & Another v Hanna Mukui Gichuki & Another* [2015] eKLR  
*National Industrial Credit Bank Ltd v Aquinans Francis Wasike*, Court of Appeal Civil Application No. 238/2005
11. For the respondent it is submitted that the applicant has not explained the delay at all and does not deserve the exercise of this court’s discretion. The respondent relies on the following cases:- *Samvir Trustee LD v Guardian Bank Ltd* Nairobi HCCC 795 of 1997  
*Machira T/A Machira & Co. Advocates v East African Standard* (2002) KLR 63  
*Kenya Shell Ltd v Kibiru and another* CA 97 of 1986  
*Antoine Ndiaye v African Virtual University* Nairobi CC 422 of 2006  
*Paul Nderitu & Another v Jacinter Mbete Mutisya & Another (Suing as the Legal Representatives of the Estate of William Musonzo (Deceased))* [2018] eKLR  
*Mbukoni Services Limited & Another v Reuben Nzili & Others* Misc application No. 77 of 2021
12. I have carefully considered the foregoing. The only issues for determination are two:- Whether there is sufficient explanation for the delay in filing the appeal as explained in the quoted words of the applicant.
13. I have considered the text and even on its face there is no sufficient explanation for the delay – the applicant appears to take that casually and does provide the challenge that they had for failing to file the appeal in time what is stated therein appears simply indicate some indolence on its part:- in *Reuben M. Muli T/A Konza Merchants v Kesbra Visbra T/A Alpesb Enterprises* [2007] KECA 22 (KLR) the Judge of appeal in a similar application stated



The affidavit sworn by Francis Manthi Masika in support of the application says absolutely nothing about that period. It concentrates instead on the period before receipt of the copies of proceedings and the ruling which, for reasons stated above, I found excusable. Indeed, Mr Masika conceded at the hearing of the application that there was nothing in the affidavit covering the period in issue. It follows therefore that there is no basis for making any finding that the delay was excusable. On the contrary, in the absence of any explanation, I find it inordinate. As this Court stated in *First American Bank of Kenya Ltd & Anor v Grandways Venture Ltd*, Civil Application No. NAI 173/99 (UR).

“We always understood the rule to be that once a party was in default (as the applicants here admittedly were) it was for them to place the necessary and relevant material before the Court to satisfy the Court that despite their default the discretion should nevertheless be exercised in their favour. This burden unfortunately the applicants have not discharged.”

I would say the same about the applicant in this matter

14. It is my considered view that the applicant herein falls squarely in the same scenario as the applicant in the case above. The applicant has not given any reasonable explanation for the delay. Hence, the applicant has not discharged the duty to explain..
15. For that reason, the prayer for extension of time, leave to file or lodge the appeal out of time is denied.
16. Without leave to file the appeal out of time the issue of the stay pending appeal does not arise.
17. I find that the application is without merit and is dismissed with costs to the respondent.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 30<sup>TH</sup> MAY 2025**

**MUMBUA T MATHEKA**

**JUDGE**

