



REPUBLIC OF KENYA



KENYA LAW
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Eastleigh Route Sacco Ltd & 2 others v Njenga alias Mary Wairimu Njega (Miscellaneous Civil Application E173 of 2024) [2025] KEHC 7523 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL APPLICATION E173 OF 2024**

FN MUCHEMI, J

MAY 29, 2025

BETWEEN

EASTLEIGH ROUTE SACCO LTD 1ST APPLICANT

PATRICK KINYANJUI 2ND APPLICANT

JOHN KIOKO WAMWEA 3RD APPLICANT

AND

MARY WAIRIMU NJENGA ALIAS MARY WAIRIMU NJEGA RESPONDENT

(Appeal against the judgment in Thika CMCC No. E274 of 2023 delivered on 8th May 2024.)

RULING

1. The application dated 11th November 2024 seeks for orders of leave to file an appeal out of time against the judgment in Thika CMCC No. E274 of 2023 delivered on 8th May 2024. The applicant further seeks for orders of stay of execution in respect of the judgment in Thika CMCC No. E274 of 2023 delivered on 8th May 2024 and/or attachment and sale pursuant to the proclamation issued in favour of the respondent's auctioneers namely Milan Auctioneers pending the hearing and determination of the appeal.
2. The respondent filed a Replying Affidavit dated 6th December 2024 in opposition to the application.

Applicant's Case

3. The applicant states that the judgment in Thika CMCC No. E274 of 2023 was delivered on 8th May 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. 900,000/-, future medical expenses at Kshs. 80,000/- and special damages of Kshs. 189,990/- with costs and interest.



Being aggrieved with the said decision, the applicants state that they intend to lodge an appeal however the statutory time within which to do so has lapsed.

4. The applicants further state 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 applicants will suffer irreparable loss and damage.
5. The applicants aver that the delay in lodging the appeal was occasioned by negotiations between the parties on the judgment sum which later failed. The applicants state that they have a strong appeal which has high chances of success. Further, the decree is for a substantial sum of money and if paid to the respondent, they are apprehensive that they will not be able to recover the whole sum.
6. The applicants argue that the respondent has already proclaimed motor vehicle registration number KCY 159C together with other moveable properties which risk being attached, advertised and sold. The applicants are further apprehensive that unless stay of execution orders are issued, the proclaimed motor vehicles will be disposed off through public auction leading to irreparable loss.
7. The applicants state that if the decretal sum is paid to the respondent, the said respondent may not be in a position to refund the same if the appeal is successful. The respondent has not disclosed nor furnished court with any documentary evidence to prove his financial standing.
8. The applicant says it is ready and willing to furnish the court with a bank guarantee from Family Bank Limited as security for the due performance of the decree.

The Respondent's Case

9. The respondent states that the application was brought in bad faith as it was filed on 13/11/2024 and was served on 16/12/2024, on the eve of the scheduled date for taking directions. The respondent argues that the supporting affidavit of Patrick Kinyanjui is defective, incompetent and ought to be struck out as the deponent deposes the affidavit for and on behalf of the 1st and 3rd applicants but does not demonstrate any nexus or authorization from the said applicants to confer authority to him to depose the affidavit on their behalf. Further, to the extent that the 1st applicant is a company, the deponent has not demonstrated that he has authority to depose the affidavit on its behalf.
10. The respondent states that the applicant's counsel contacted his advocates with a view to reviewing the judgment sum but the negotiations never materialized and there was a consensus that the applicants should file its appeal by 7/6/2024, giving the applicants a day or two to file the intended appeal.
11. The respondent argues that it is not correct that the delay in filing the appeal was precipitated by negotiations but it is obvious that the applicants moved the court owing to the imminent attachment. Thus, the applicants have not offered any reasonable explanation for the delay of more than 6 months in bringing the instant application and have chosen to lie to the court. That notwithstanding, the respondent states that the applicants are undeserving of the discretion sought in enlarging time to file an appeal.
12. The respondent states that there being no appeal, there is no basis to grant the orders of stay. Further, the applicants have not sufficiently demonstrated what substantial loss they stand to suffer if stay is not granted. Further, the respondent argues that the uncertainty of her means is not ipso facto proof of substantial loss. The applicants' belief that she will not repay the decretal sum solely based on the lack of knowledge as to her financial capability does not give rise to the presumption that she will be unable to repay the decretal sum, the applicants have to demonstrate that fact.



13. The respondent further states that an appeal cannot be rendered nugatory by a money decree being satisfied by payment particularly where substantial loss has not been demonstrated and thus the applicants' appeal will not be rendered nugatory if stay is not granted.
14. The respondent states that the bank guarantee the applicants are relying on is untenable in law as the bank guarantee is issued by a third party and it is not specific to the instant suit. Further, the bank guarantee is dated 6/7/2023 and is for 12 months with an option to renew which the applicants have not demonstrated was actually renewed. Even assuming the bank guarantee was renewed, there is no certainty that the guarantee will be renewed in 2025 and if it is not renewed, it cannot serve as security. Under Clause 3, the purpose of the guarantee is to provide security for awards and/or costs awarded in various claims pending before court. The number of claims is not disclosed and given that the guarantee is issued to Directline Assurance Company Limited, the leading PSV insurer, it is not farfetched to say that the guarantee is or can be exhausted. The applicants have not attached any proof of the number of claims to ascertain that fact thus making the guarantee uncertain and insufficient as security.
15. The respondent argues that court to direct that the applicants pay at least half of the decretal sum and the balance to be held in an interest earning savings account held in the names of both advocates on record. Further, the applicants should pay the auctioneers' fees. Additionally, the applicants should be ordered to file the intended appeal within 7 days and the record within 45 days.
16. This court gave directions to the parties to file submissions but only the respondent complied.

The Respondent's Submissions

17. The respondent submits that the applicants were granted two occasions to file their submissions, on 17/12/2024 and 3/3/2025 but they failed to do so. The respondent argues that failure to file submissions amounts to the applicants' failure to prosecute their application and the same ought to be dismissed for want of prosecution. To support her contentions, the respondent relies on the cases of Francis Maingi K. Ndumbu vs Joseph Munyasya Matolo [2021] eKLR and Elaki vs District Land Registrar Vihiga & Another [2021] KECA 340 (KLR) and submits that the applicants have not given any reason for failing to file their written submissions despite being given an opportunity to do so. The record shows that the applicants have been guilty of inordinate and inexcusable delay in this matter.
18. Relying on the cases of Korica (U) Limited & Another vs Kenya Ports Authority [2008] eKLR; In the Matter of the Estate of M'Magiri M'Mugira (Deceased) [2005] eKLR; Pamela Jebichi Koskei vs Horizon Coach Co. Ltd & 2 Others [2018] eKLR, the respondent submits that the affidavit sworn by the 2nd applicant is defective for not showing the nexus or authorization between the deponent and the 1st and 3rd applicants and no authorization to the deponent to act for the 1st applicant, which is a company. The respondent urges the court to strike out the supporting affidavit by Patrick Kinyanjui. Consequently, there being no affidavit evidence as required under Order 51 Rule 5, the motion ought to be dismissed with costs.
19. The respondent argues that the instant application was filed on 13/11/2024 which is more than 6 months from the date of judgment. Further relying on the cited cases of Nairobi City County vs Salima Enterprises Limited [2020] eKLR and Joseph Ngigi Ibare vs Myovi James & Another [2016] eKLR, the applicants have not explained the delay of more than six months.
20. The respondent submits that the applicants are deliberately lying to the court in attributing the delay in filing the appeal to negotiations. The record show that parties tried to negotiate but the said negotiations failed on 7/6/2024 and there was a consensus that the applicants should file the intended appeal. The respondent submits that the said negotiations were between her counsel and the applicants' counsel



Miss Ayiera who filed the instant application under the umbrella of the firm of Kimondo Gachoka & Co. Advocates. The applicants have not disputed the contents of her replying affidavit leaving the facts undisputed. The respondent refers to the cases of Nesco Services Limited & Another vs City Council of Nairobi [2011] eKLR and George Arab Muli Mwalabu vs Senior Resident Magistrate Kangundo & 2 Others and submits that where a party chooses to lie to the court in a bid to explain default, no favourable orders are granted to the party. The respondent argues that the delay of more than five months from the date when negotiations failed is inordinate and inexcusable.

21. The respondent refers to the case of Nicholas Kiptoo arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR and submits that extension of time being an equitable remedy, the applicants are undeserving of it. The respondent further argues that the applicants have not sufficiently explained the delay of more than six months. Further, rather than the applicants being candid to the court, they chose to mislead the court through contrived grounds. The respondent further submits that she will be greatly prejudiced if the extension is granted.
22. The respondent argues that there is no appeal in existence and therefore stay cannot be granted pending non-existent appeal. To support her contentions, the respondent refers to the cases of Rosalindi Wanjiku Macharia vs James Kiingati Kimani (Suing as the legal representative of the Estate of Martin Muiruri (Deceased) [2017] eKLR and Abubaker Mohammed Al-Amin vs Firdaus Siwa Somo [2018] eKLR. The respondent further argues that the applicants have not satisfied the conditions for grant of stay of execution as judgment of the trial court was delivered on 8/5/2024 and the instant application was filed more than six months after, thus the applicants are guilty of unreasonable delay.
23. On substantial loss, the respondent submits that the applicants have not demonstrated substantial loss as it is not clear how the applicants' advocates know that she cannot refund the decretal sum without disclosing the source or basis of information. To support her contentions, the respondent relies on the case of Socfinac Company Limited vs Nelphat Kimotho Muturi [2013] eKLR. Further, relying on the case of Antoine Ndiaye vs African Virtual University [2015] eKLR, the respondent argues that there being no demonstration of facts, the burden of proving the ability to refund cannot shift to her. The applicants must first establish reasonable facts sufficient to shift the burden of proof to her.
24. The respondent refers to the cases of Moyale Liner Bus Services vs Gachu Ibrahim [2021] eKLR and Gianfranco Manenthi & Another vs Africa Merchant Assurance Company Ltd [2019] eKLR and submits that the bank guarantee offered has a lot of uncertainties which makes it inadequate security.
25. Relying on the cases of Kenya Shell Limited vs Kariga [1982-88] 1 KAR 1018; Tabro Transporters Ltd vs Absalom Dova Lumbasi [2012] eKLR; J.P Macharia t/a Macharia & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63, the respondent submits that the court has a duty to balance the parallel positions of the parties. The respondent further relies on the cases of Stephen M. Kimani & Another vs Stephen Rurigi Njoroge [2013] eKLR and Wilson K. Kanyingi vs Alice Wangari & Another [2007] eKLR and submits that as the appeal is purely on quantum, the applicants ought to pay half the decretal sum and deposit the other half in an interest-earning account held in both the names of the advocates on record. The applicants should also pay the auctioneers' fees.

The Law

Whether the application is defective.

26. The respondent argues that the application is defective for not showing nexus or authorization between the deponent and the 1st and 3rd applicants and no authorization to the deponent to act for the 1st applicant, which is a company.



27. Courts have consistently held that a board resolution may be filed at any time before a suit is fixed for hearing. In the case of *Leo Investments Ltd vs Trident Insurance Company Ltd* (2014) eKLR where the court stated:-

....such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore not fatal to the suit.

28. The Court of Appeal in the case of *Spire Bank Limited vs Land Registrar & 2 Others* [2019] eKLR stated as follows:-

It is essential to appreciate that the intention behind Order 4 Rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.

29. From the foregoing, it is clear that the deponent has not attached any authorization permitting him to swear the affidavit on behalf of the 1st and 3rd applicants. However, the respondent has not averred that the 2nd applicant was unauthorized nor has she produced any evidence to that effect. That notwithstanding, this court is bound by Article 159(2)(d) of *the Constitution* which enjoins the court to administer justice expeditiously and without undue regard to procedural technicalities. It is my view that striking out the application on the premise that the 2nd applicant did not file such authorization will amount to a procedural technicality which would impede to the administration of justice.

Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;

30. 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.

31. 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.



32. 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.

33. 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.”

34. The applicants have attributed their delay in filing the appeal to negotiations held between them and the respondent. From the record shows that the parties attempted but the same failed on 7th June 2024 following which parties agreed that the applicants should file the intended appeal. Thus, if the applicants had filed their appeal then they would have still been within the statutory timeline to lodge their appeal. The applicants have not given any reasons why it took them over 5 months from the date the negotiations failed to file their appeal. It is therefore my considered view that the applicants have not given any plausible explanation on the reasons for the delay.

35. The record further shows that the current application was filed on 11th November 2024 and the judgment was delivered on 8th May 2024 which is a delay of about six months. It is my considered view that a delay of six months is inordinate and inexcusable. The reasons given for the delay are not sufficient to warrant the court to exercise its discretion in favour of the applicants.

36. Accordingly, I find that the applicants have not established to the satisfaction of the court on extension of time to file an appeal.



37. On the perusal of the intended Memorandum of Appeal, the intended appeal does not raise arguable points of law and facts. The applicant however did not attach a copy of the trial court's judgment for the court to appreciate the learned trial magistrate's reasoning. Thus, without delving to the merits of the appeal, the chances of the appeal succeeding if the instant application is granted are limited, in my view. For the applicant to attempt settlement of the decree out of court is evidence of acceptance of the judgment. There is a high possibility that the intended appeal is meant to delay execution of the decree.
38. It is my view that this court 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 existing appeal.
39. In the circumstances it is my considered view that the applicants have failed to establish that they deserve the orders for extension of time to file an appeal.
40. I find no merit in this application and it is hereby dismissed with costs
41. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 29TH DAY OF MAY 2025.

**F. MUCHEMI
JUDGE**

