



**Millenium Plot Developers & another v Njoroge (Civil Appeal  
E234 of 2024) [2025] KEHC 7826 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7826 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E234 OF 2024  
FN MUCHEMI, J  
MAY 29, 2025**

**BETWEEN**

**MILLENIUM PLOT DEVELOPERS ..... 1<sup>ST</sup> APPLICANT**

**PATRICK NDUATI NJUGUNA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SUSAN WAMBUI NJOROGE ..... RESPONDENT**

**RULING**

**Brief facts**

1. The application dated 8<sup>th</sup> November 2024 seeks for orders of leave to file an appeal out of time against the judgment in Thika Small Claims Court SCCCOMM No. E973 of 2023 delivered on 20<sup>th</sup> February 2024. The applicants further seek for orders of stay of execution in respect of the said judgment delivered on 20<sup>th</sup> February 2024 pending the hearing and determination of the intended appeal.
2. The respondent filed a Replying Affidavit dated 22<sup>nd</sup> February 2025 in opposition to the application.

**Applicants' Case**

3. The applicants state that the judgment in Thika SCCCOMM No. E973 of 2023 was delivered on 20<sup>th</sup> February 2024 and decree issued on 11<sup>th</sup> July 2024. The applicants argue that they pursued out of court negotiations with the respondent with a view to settle the matter amicably but the negotiations were not fruitful.
4. Being aggrieved with the entire judgement, the applicants state that they intend to lodge an appeal. However the statutory time within which to do so has lapsed.



5. The applicants further state that their intended appeal raises arguable points of law with high chances of success. The applicants are apprehensive that if the orders sought are not granted, they stand to suffer irreparably rendering the appeal nugatory.

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

6. The respondent avers that the 2<sup>nd</sup> applicant made a part payment of Kshs. 100,000/- however after that the applicant tried every tactic to avoid settling the claim. Further, the respondent states that no attempt has been made by the applicants towards an out of court settlement since the decree dated 3<sup>rd</sup> July 2024 was issued. Further, the applicant have not availed any evidence to that effect.
7. The respondent states that a ruling of the Notice to show Cause application was issued on 3<sup>rd</sup> October 2024 dismissing the 1<sup>st</sup> applicant's objection. The matter was set down again for hearing of the Notice to show Cause when the applicants filed a settlement proposal. What followed was the filing of this application.
8. The respondent avers that there has been unreasonable delay in filing the appeal as the decree was issued on 3<sup>rd</sup> July 2024 and not 11<sup>th</sup> July 2024 as alluded by the applicants. The applicants have not given any substantial reasons for the delay in filing the appeal making the instant application an afterthought. This application was filed four (4) months after the court pronounced itself on the matter. Additionally, the court has no way of ascertaining that the intended appeal is arguable with high chances of success as the applicants have not attached any memorandum of appeal.
9. Directions were issued that parties put in written submissions. However, the record shows that although both parties stated that they had filed their submissions, only the respondent complied having filed her submissions on 28<sup>th</sup> April 2025.

### **The Respondent's Submissions**

10. The respondent refers to the case of *Barno vs Tiny Bees Credit (K) Ltd* (Civil Appeal E143 of 2024) and submits that the applicants failed to show any substantial loss that they will suffer if the orders of stay of execution are not granted. Pursuant to Section 79G of the *Civil Procedure Act*, the respondent argues that the decree in the trial court was issued on 3<sup>rd</sup> July 2024 which is four months after the court had already pronounced itself on the matter thus the instant application is an afterthought.
11. The respondent argues that the applicants have not provided sufficient grounds for the delay in filing the appeal within the prescribed time. To support her contentions, the respondent relies on the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* [1999] 2 EA 231. Further, relying on the case of *Gianfranco Manenthi & Another vs Africa Merchant Assurance Co. Ltd* [2019] eKLR, the respondent submits that the applicants have not offered any security for the performance of the decree in the trial court.
12. The respondent argues that the intended appeal has no chances of success as the appeal does not raise any matters of law pursuant to the provisions of section 38 of the *Small Claims Court Act*. Further, the respondent submits that she will suffer prejudice if the orders sought are granted as she will be deprived of the judgment for an extended period and any further delay in the process would prolong her suffering and deny her the benefit of the judicial process.



## The Law

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

13. 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.

14. 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.

15. 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.

16. 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.”

17. The applicants attributes the delay in filing an appeal on the fact that they were pursuing out of court negotiations with the respondent which later failed. On perusal of the record, the judgment in the trial court being Thika SCCCOMM No. E973 of 2023 was delivered on 20<sup>th</sup> February 2024 and decree issued on 3<sup>rd</sup> July 2024. The applicants filed the present application on 12<sup>th</sup> November 2024 which is a period of approximately nine (9) months since judgment was entered. Although the applicants claim that they delayed in filing the appeal for the reason that they were pursuing out of court negotiations with the respondent, this has been refuted by the respondent who said there was no such an arrangement. In fact the respondent claims that the applicants have employed every tactic to avoid settling the claim. Additionally, the applicants have not annexed any proof of their attempts at an out of court settlement.
18. It is therefore my considered view that the delay of nine months is inordinate and inexcusable and no plausible explanation for the delay has been given.
19. Accordingly, I find that the applicant has not established to the satisfaction of the court that time ought to be enlarged to enable him file his appeal.
20. On the perusal of the intended Memorandum of Appeal, it is noted that the intended appeal raises matters of fact and not issues of law pursuant to Section 38 of the *Small Claims Court Act*. This contravention of the law reduces the chances of success of the intended appeal. In the circumstances it is my considered view that the applicants have failed to meet the test for enlargement of time to file an appeal.
21. This court having found that the prayer for admitting the appeal out of time has failed, it therefore follows that the prayer for stay of execution of the judgment and decree automatically suffers a similar fate since there is no existent appeal.
22. It is thus my considered view that the application dated 8<sup>th</sup> November 2024 lacks merit and ought to be dismissed with costs.
23. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 29<sup>TH</sup> DAY OF MAY 2025.**

**F. MUCHEMI**

**JUDGE**

