



REPUBLIC OF KENYA



**Njoroge v Mwaniki (Miscellaneous Civil Application  
E034 of 2025) [2025] KEHC 7828 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7828 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
MISCELLANEOUS CIVIL APPLICATION E034 OF 2025**

**FN MUCHEMI, J**

**MAY 29, 2025**

**BETWEEN**

**DAVID NGUGI NJOROGE ..... APPLICANT**

**AND**

**LAWRENCE MWENJA MWANIKI ..... RESPONDENT**

**RULING**

**Brief Facts**

1. The application dated 8<sup>th</sup> March 2025 is seeking for orders of leave to file an appeal out of time against the judgment in Thika CMCC No. E357 of 2023 delivered on 12<sup>th</sup> November 2024. The applicant further seeks for the orders of stay of execution in respect of the judgment in Thika CMCC No. E357 of 2023 delivered on 12<sup>th</sup> November 2024 pending the hearing and determination of the appeal.
2. The respondent filed a Replying Affidavit dated 28<sup>th</sup> March 2025 in opposition to the application.

**Applicant's Case.**

3. The applicant states that the judgment in Thika CMCC No. E357 of 2023 was delivered on 12<sup>th</sup> November 2024 whereby the court entered judgment in favour of the respondent finding the applicant fully liable and awarding the respondent general damages for pain and suffering at Kshs. 1,900,000/- and special damages of Kshs. 17,100/- 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 he instructed his advocate to file an appeal but the said advocate left the firm abruptly and therefore did not file the appeal.
5. The applicant is apprehensive that the respondent shall commence execution against him exposing him to suffer substantial loss.



6. The applicant argues that the decretal sum is colossal and therefore there is a need to have an order of stay of execution in order to safeguard his interests. Furthermore, the applicant is willing to provide security for the entire decretal sum in the form of a bank guarantee to be issued by Family Bank Limited which is a reputable bank in Kenya. The applicant is further apprehensive that if part payments are ordered to be made to the respondent such payments will be utilized and alienated by the respondent and recovery of the same will be arduous in the even the appeal succeeds.
7. The applicant states that his intended appeal raises pertinent issues and has a high chance of success.

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

8. The respondent states that the applicant has not given any satisfactory reason why he delayed in lodging his appeal for four months yet he was served with a decree and certificate of costs. The respondent argues that the reason the applicant has given for the delay in filing the appeal is not plausible as the applicant is using the same firm of advocates he used during the proceedings in the lower court yet he claims his advocate left the firm abruptly and thus did not file the appeal in time.
9. The respondent argues that there are several occasions where courts have held that clients cannot continue to hide behind the failure of their advocates to perform certain required actions on their part.
10. The respondent states that the applicant slept on his rights and was awoken from his slumber after being served with demands to settle the decretal amount or face execution. Thus, the application has been brought in bad faith, is an afterthought meant to divert his attention from execution.
11. The respondent states that judgment in the trial court was entered on 12<sup>th</sup> November 2024 yet the applicant filed the present application on 8<sup>th</sup> March 2025 which is four months after judgment was entered. Thus the delay is inordinate, inexcusable and only meant to push him further from the seat of justice.
12. The respondent avers that the intended memorandum of appeal does not raise any triable or arguable issues or grounds. The respondent further states that the applicant has not demonstrated what substantial loss he stands to suffer but has only stated that he shall be prejudiced if stay of execution is not granted.
13. The respondent states that execution is a lawful process and cannot amount to substantial loss. Further, the execution process in the matter has not yet commenced.
14. The respondent avers that he continues to suffer great prejudice as he has spent much resources initiating and prosecuting the matter for over 2 years and therefore allowing the present application will occasion him further loss.
15. This court gave directions to the parties to file submissions but from the record the applicant failed to file his submissions by the time of writing this ruling.

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

16. The respondent refers to Order 42 Rule 6 of the Civil Procedure Rules and the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417; *Wachira Karani v Bildad Wachira* [2016] eKLR and *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR and submits that the applicant has not demonstrated sufficient cause or substantial loss to warrant the grant of orders of stay of execution. The respondent argues that he is the one who stands to suffer substantial loss as he has suffered physical and financial challenges since the date of the accident on 28<sup>th</sup> November 2022 and even after judgment was delivered on 12<sup>th</sup> November 2024, he is yet to enjoy the fruits of his judgment.



17. The respondent further submits that the applicant has failed to demonstrate goodwill by depositing the decretal sum as security for the due performance of the decree.
18. Relying on Section 79G of the *Civil Procedure Act* and the case of Edith Guchungu Koine v Stephen Njagi Thoithi [2014] eKLR, the respondent submits that the power to grant leave to appeal out of time is discretionary. The respondent submits that the reason given by the applicant for the delay in filing his appeal is not reasonable as the applicant is using the same firm of advocates he used during the proceedings in the lower court. Further, failure by the applicant to file his appeal within the prescribed timelines is not excusable and merely citing of the advocate's mistake is not sufficient. To support his contentions, the respondent relies on the case of Gerald Mwithia v Meru College of Technology & Another [2018] eKLR.
19. The respondent submits that the applicant does not have an arguable appeal as the issue of liability was determined in the primary suit with the applicant being blamed for causing the accident. The respondent further submits that a successful litigant ought not to be denied the fruits of his judgment without a good cause, and there is none in the present application.
20. The respondent argues that the delay in filing the present application is inordinate and inexcusable as judgment was entered on 12<sup>th</sup> November 2024 and the present application was filed on 8<sup>th</sup> March 2025, which is four months after judgment was entered.
21. Relying on Section 27 of the *Civil Procedure Act* and the case of *Manindra Chandra Nandi v Aswini Kumar Acharjya* JILR (1921) 48 Ca. 427, the respondent argues that costs follow the event and the applicant ought to be condemned to pay costs.

## The Law

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

22. 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.

23. 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 v 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.
24. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v 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.

25. Similarly in the case of Paul Musili Wambua v 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.”

26. The applicant has faulted his advocate for the delay in filing his appeal because the said advocate left the firm he was working for abruptly. The applicant said that he had already given instructions to appeal to the said advocate.

27. On perusal of the record, judgment in Thika MCCC No. E357 of 2023 was delivered on 12<sup>th</sup> November 2024. Counsel for the respondent wrote to counsel representing the applicant on 13<sup>th</sup> November 2024 informing him of the judgment and attaching their tabulation of costs. The said letter was received by the applicant’s counsel on 14<sup>th</sup> November 2024. Further, the respondent’s counsel wrote another letter dated 15<sup>th</sup> January 2025 attaching a decree and certificate of costs which was received by the applicant’s counsel on 17<sup>th</sup> January 2025. Interestingly, the applicant blames his advocate for failing to file an appeal in time yet he used the same firm to file the present application. In my view, I am not persuaded by the applicant’s arguments on the reason for delay. The applicant has further not shown any proof of giving instructions to his advocate and his advocate failing to file an appeal. That notwithstanding, the fact that the applicant is represented by the same firm does not support his argument that his advocate failed to file the appeal on time. In any event, the applicant is being so vague in his explanation. He did not state which advocate left the firm and how the same firm took instructions afresh. It must be noted that instructions to represent a client are given to the firm of advocates and that any counsel from the firm can take up the matter. The applicant’s explanation is not plausible. It is therefore my considered view that the applicant has not given any plausible explanation on the reasons for delay.



28. The record further shows that the current application was filed on 8<sup>th</sup> March 2025 and the judgment was delivered on 12<sup>th</sup> November 2024 which is a delay of about 4 months. Although a delay of 4 months may 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.
29. Accordingly, I find that the applicant has not established that he is deserving time should be enlarged to enable him file his appeal.
30. On the perusal of the intended Memorandum of Appeal, the intended appeal does not raise arguable points of law or fact. The applicant 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 into the merits of the appeal, the chances of the appeal succeeding are limited. In the circumstances it is my considered view that the applicant has not established that time should be enlarged to enable him file an appeal out of time.
31. This court having found that prayer for admitting the appeal out of time has failed, the prayer for stay for execution also fails since there is no appeal in existence.
32. It is thus my considered view that the application dated 8<sup>th</sup> March 2025 lacks merit and is hereby dismissed with costs to the respondent.
33. 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**

