



**Family Bank Limited v Makoyo & another (Miscellaneous Application
E118 of 2024) [2025] KEHC 6851 (KLR) (27 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6851 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MISCELLANEOUS APPLICATION E118 OF 2024**

WM MUSYOKA, J

MAY 27, 2025

BETWEEN

FAMILY BANK LIMITED APPLICANT

AND

NEMWEL MAKOYO 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The application, dated 30th October 2024, is for leave to file appeal out of time, and for stay of execution of the judgement and decree in Busia CMCCC No. 386 of 2019, of 29th August 2024.
2. The affidavit, sworn in support of the application, is by an officer of the applicant, Catherine Nyambura Ndungu. She avers that the judgement was initially due for delivery on 21st July 2023, then it was deferred to 9th August 2023, but on both dates it was not delivered. Everything went quiet until the respondents proclaimed movable assets of the applicant in October 2024. It was then that it was established that judgement had been delivered on 29th August 2024. It is averred that that was without notice to the applicant. It is averred that the respondents did not notify the applicant of entry of judgement, before they embarked on execution. The applicant expresses a desire to appeal against the said judgement, that there is an arguable appeal and there would be substantial loss if stay will not be granted. The applicant also expresses willingness to offer security for due performance or abide by such conditions as the court may grant with respect to it.
3. In support, several documents have been attached. There is an email, dated 10th August 2023, from the Advocates for the applicant, advising of the judgement scheduled for 9th August 2023. There is a letter of 18th September 2023, from the Advocates for the applicant, to court, enquiring about the date for judgement, after it had been communicated that judgement would be on notice. There is a bundle of documents relating to the proclamation of attachment that the applicant is aggrieved about. There



are several documents from court, including a copy of the judgement delivered on 29th August 2024, and the decree and certificate of costs dated 8th October 2024. There is a copy of a draft memorandum of appeal.

4. There is a reply by the 1st respondent, Nemwel Makoyo, vide an affidavit, sworn on 19th November 2024. It is averred that no good reason has been given for not filing appeal within the timelines, after delivery of the judgement on 29th August 2024. It is stated that there was a notice that was issued on 27th August 2024, for the delivery on 29th August 2024. He has attached a notice from court, dated 27th August 2024, of the rulings and judgments that were due to be delivered on 29th August 2024.
5. A further affidavit was sworn on 20th November 2024, on behalf of the applicant, by Ms. Ndungo, in reaction to the reply by the 1st respondent.
6. Directions were given on 11th February 2025, for disposal of the application by written submissions. Both sides have complied, by filing their respective written submissions, which I have read and noted the arguments made.
7. The only issue for me to determine is whether the application is merited.
8. The provision that the applicant relies on, in pursuit of leave, is section 79G of the [Civil Procedure Act](#), Cap 21, Laws of Kenya, among others, which provides:

“Time for filing appeals from subordinate courts

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 to the appellant 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.”

9. The court has the discretion to extend time for filing an appeal, but the exercise of that discretion is not automatic. Sufficient cause must be shown, to warrant exercise of the discretion. The principles were laid out in Nicholas Kiptoo arap Salat vs. Independent Electoral and Boundaries Commission & 7 others [2014] eKLR (Ibrahim & Wanjala, SCJJ), a decision of the Supreme Court, premised largely on the Supreme Court Rules, but of relevance to the exercise of similar discretion under the [Civil Procedure Act](#) and Rules.
10. The points made there are that the extension of time is not a matter of right, for it is an equitable remedy, available only to a deserving party; a party seeking exercise of the discretion in its favour must endeavour to demonstrate that they deserve it; the discretion would be exercised on a case to case basis; where delay is alleged to be reasonable, then the reasonableness of the delay must be explained; it ought to be demonstrated that the other parties would not be prejudiced by the exercise of the discretion; and the application must be filed without undue delay.
11. The explanation, herein, for the delay in filing appeal, is that judgement was to be delivered on notice, and the court did not notify the applicant of the date when it scheduled the matter for delivery of the judgement, and that even after the respondents obtained the judgement, they did not notify the applicant of that fact. The applicant only got to know of the judgement when execution proceedings were initiated.



12. Has the delay been adequately explained? I believe it has been. Judgement in the matter ought to have been delivered way back in July 2023, when it was not, and was pushed forward, only to be announced that it was to be delivered on notice. Upon the decision that delivery was to be on notice being made, it became the responsibility of the court to notify the applicant once a date was fixed. That decision effectively took the matter away from the hands of the applicant. I have not seen any evidence that the court made any effort to notify the applicant of the date that was fixed for delivery of the judgement.
13. What has been exhibited is a general notice, to all and sundry. Indeed, that notice appears to have been intended for pinning at a noticeboard. There is no evidence that a notice was mailed to the applicant, or its Advocates. If the general notice is all there was, then it was not effective, as the Advocates for the applicant appear to have been based at Nairobi. The Advocates for the 1st respondent, who appear to have been based at Busia, no doubt with access to that general notice, did not extend the courtesy of notifying their counterparts of that notice of delivery of the judgement, neither did they notify them of the judgement itself after it was delivered, and before they initiated execution proceedings.
14. Extension of time to file appeal is discretionary. I will exercise that discretion, in this case, in favour of the applicant, for they were let down by the court, when it proceeded to deliver judgement, which was to be delivered on notice, without first giving notice to the applicant.
15. In *Gerald M’Limbine vs. Joseph Kangangi* [2008] eKLR (Emukule, J), the court construed section 79G of the *Civil Procedure Act*, by stating that that provision does not provide for leave to appeal out of time, but rather for admission of appeals out of time, which would presuppose that a party, approaching the court, under section 79G of the *Civil Procedure Act*, should first file an appeal out of time, and then ask the court to admit that appeal. It was argued that a court ought not exercise discretion, to extend time to admit an appeal, before it has perused the appeal filed out of time, to assess, under section 79B of the *Civil Procedure Act*, whether the same ought to be admitted or not.
16. The applicants have not filed an appeal out of time, which it would be asking me to admit out of time. However, a draft memorandum of appeal has been annexed, whose grounds, in my opinion, do not raise idle arguments.
17. On the matter of grant of stay of execution of the impugned judgement, the respondent has not vigorously litigated on whether such stay ought not be granted, ostensibly as it would appear to be tied to grant of leave to appeal out of time. On the matter of the applicant suffering substantial loss, should stay not be granted, I note that the respondent has not made it an issue. I shall not have to consider whether stay of execution ought to be granted and whether substantial loss would be suffered.
18. In view of everything said above, I will, as I hereby do, allow the application, dated 30th October 2024. Time to appeal is extended by 30 days from the date of this ruling. There shall be a stay of execution of the judgement and decree, in Busia CMCCC No. 386 of 2019, of 29th August 2024, on condition that the applicant either deposits the total judgement sum in court, or provides a bank guarantee for the said amount, within the next 30 days of the date of this ruling. The stay order shall lapse automatically, should the condition above not be met. The stay order shall also lapse automatically, should the appeal not be filed within the 30 days.
19. The application, dated 30th October 2024, is disposed of in the terms set out above. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED, AT BUSIA, THIS 27TH DAY OF MAY 2025.

W. MUSYOKA

JUDGE



Arthur Etyang, Court Assistant.

Advocates

Ms. Machio, instructed by Lillian Amere Machio & Company, Advocates for the applicant.

Mr. Bogonko, instructed by Bogonko Otanga & Company, Advocates for the 1st respondent.

