



**Nganga v Mbithi (Suing as Administrator of the Estate of the
Late Jackson Kisoi Maingi - Deceased) (Miscellaneous Application
E005 of 2025) [2025] KEHC 11585 (KLR) (27 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 11585 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS APPLICATION E005 OF 2025
DO CHEPKWONY, J
JUNE 27, 2025**

BETWEEN

KAMAU NGANGA APPLICANT

AND

**AGNES ITUMBI MBITHI (SUING AS ADMINISTRATOR OF THE ESTATE OF
THE LATE JACKSON KISOI MAINGI - DECEASED) RESPONDENT**

RULING

1. What is before the court for determination is the Notice of Motion application filed under Certificate of Urgency dated 16th January, 2025 seeking the following orders:
 - a. Spent.
 - b. Spent.
 - c. That there be a stay of execution of the Judgment and decree entered against the Applicant on 27th November, 2024 in Kikuyu CMCC No. E077 of 2021 and/or any other subsequent proceedings or acts arising therefrom or as a consequent thereof pending the hearing and determination of the Appellant's intended appeal preferred therefrom.
 - d. That the Applicant herein be and is hereby granted leave to appeal out of the prescribed time against the Judgment and decree entered against the Applicant on 27th November, 2024 in Kikuyu CMCC No. E077 of 2021.
 - e. That the Honourable Court be pleased to grant the orders sought subject to any conditions as the court may deem just.
 - f. That the costs of and incidental to this application be provided for.



2. The Application is based on the grounds as set out on its face and the Supporting Affidavit of Millian Aligula, the Legal Officer of Britam Insurance Co. Ltd, who are the Applicant's Insurers, sworn on the instant date.
3. The Respondent opposed the application through her Replying Affidavit sworn on 23rd January, 2024 in wherein she has deponed that the Applicant has Zero(0) chance of success and hence that application is only a delay tactic meant to deny her from enjoying the fruits of her Judgment.
4. The court directed the parties to file and serve written submissions in respect to the application and it is worth noting that the Applicants' submissions are dated 1st April, 2025 while the Respondent's submissions are dated 24th March, 2025. The court has read through the said submissions in consideration of the arguments raised and the authorities cited therein for its determination of the application.

Analysis and Determination

5. Having read through the grounds set out on the face of the Notice of Motion application and Supporting Affidavit sworn by M/S Millian Aligula alongside the Replying Affidavit, the court finds that the main issues for determination are whether the court should allow the application and;
 - a. Grant the Applicant leave to appeal out of time,
 - b. Grant the orders of stay of execution.
6. On the issue of leave to appeal out of time, the law under Section 79G of the [Civil Procedure Act](#) provides that:-

“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.”
7. From the legal provision, it is clear the power of a court to grant leave to appeal is discretionary and the courts in this jurisdiction have set out the various factors which a court ought to consider in granting leave to appeal.
8. In the case of Edith Gichungu Koine –vs- Stephen Njagi Thoithi [2014]eKLR and again by the Court of Appeal in Thuita Mwangi –vs- Kenya Airways Ltd [2003] eKLR, the following factors were set out for consideration in an application for leave to appeal out of time:-
 - a. The period of delay which ought to be reasonable and not inordinate.
 - b. The reason for delay which is expected to be valid and plausible.
 - c. The arguability of the appeal, expected to have a chance of success.
 - d. The degree of prejudice which could be suffered by the Respondent if the extension is granted.
 - e. The importance of compliance with the terms to the particular litigation or issue; and,
 - f. The effect, if any on the administration of justice or public interest if any is involved.



9. In the instant case, having read through the pleadings filed by the parties, this Court finds that it is not in doubt that the impugned Judgment was delivered on 27th November, 2024 by the trial court and the time within which to appeal lapsed on 27th December, 2024. Given that the law provides for thirty (30) days within which an aggrieved party should file an appeal, this Court finds that this application having been filed almost twenty (20) days after the lapse of thirty (30) days, the delay was not so inordinate. The court has also considered the explanation for the delay which is said to have been failure to issue instructions on appeal to the advocate in conduct of the matter in good time, and finds that the explanation, which has not been challenged is satisfactory.
10. On the issue of stay of execution, the law is provided for under Order 42 Rule 6 of the Civil Procedure Rules as follows:-
- “..(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside. “
11. This provision clearly states that the conditions which ought to be satisfied by a party in seeking for grant of stay of execution orders, which are that a prima facie case must be demonstrated, likelihood of a party suffering substantial loss, provision of security for due performance and application be filed within reasonable time.
12. In the instant case, the Applicant has stated that he stands to suffer substantive loss if orders for stay of execution are not granted as the Respondent is likely to execute the decree. He also submitted that the Intended Appeal has high chances of success and he is ready to deposit half (1/2) the decretal sum in an interest-earning account. In response, the Respondent has averred that the Applicant has not demonstrated the substantial loss he is likely to suffer and argues that she is capable of refunding the decretal sum if the appeal succeeds. She has thus urged that the Applicant deposit the entire decretal sum in court or in an interest-earning account as security for due performance.
13. Having considered the arguments by either party on whether or not to grant the order for stay of execution, this Court finds that it needs to balance the rights of each party in the matter as per the finding in the decision of RWW –vs- EKW [2019] eKLR, where the Court in pronouncing itself on the purpose of granting stay of execution orders had this to say:-
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her Judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
14. In view of the aforesaid arguments and findings, this Court proceeds to allow the Notice of Motion application dated 16th January, 2025 on the following terms:-



- a. The Applicant be and is hereby granted leave to appeal out of time.
- b. The draft Memorandum of Appeal filed herein be and is hereby deemed as duly filed and served.
- c. The Deputy Registrar to direct for an appeal file to be opened and call for the original Record of Proceedings to enable parties take directions on hearing of the appeal.
- d. There be a stay of execution of the Judgment and decree entered against the Applicant on 27th November, 2024 in Kikuyu CMCC No.E077 of 2021 pending the hearing and determination of the appeal herein on condition that the Applicant deposits the entire decretal sum in court within forty-five (45) days from the date of this ruling.
- e. Failure to comply with orders (b) and (d) herein will render the application automatically dismissed and interim orders issued herein lapsed without further recourse from this court.
- f. Mention on 13th August, 2025 before the Deputy Registrar for the parties to confirm compliance and take further directions.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 27TH DAY OF JUNE 2025.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Ngumbao holding brief for M/S Ochieng counsel for Applicant/Appellant

Mr. Munguti counsel for Respondent

Court Assistant - Martin

