



**Ogoti v Muthuku (Miscellaneous Application E915 of 2024)
[2025] KEHC 9213 (KLR) (Civ) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS APPLICATION E915 OF 2024**

JN MULWA, J

JUNE 26, 2025

BETWEEN

CHARLES OGOTI APPLICANT

AND

JOHN MUTHIANI MUTHUKU RESPONDENT

RULING

1. The Applicant herein by his application dated 29/09/2024 seeks prayers for orders that his new Advocates Nelko Msati & Co. Advocates be granted leave by the court to come on record in place of his former advocates Meritad Law Africa LLP. Annexed to the supporting affidavit is a duly executed consent dated 25/09/2024 by the said law firm allowing this prayer. This prayer is allowed.
2. In addition, the Applicant seeks leave to file an appeal out of time from trial courts judgment in Milimani CMCC No 5269 of 2015 delivered on 5/02/2021 in the sum of Kshs 600,000/= in general damages, special damages of Kshs 23,185/- with a 10% contributory negligence leaving the total award of Kshs 560,866.50/=
3. As at date of the motion before the court the said amount had increased to Kshs 892,589.93/= being interest and other fees as stated in the Notice to show cause why execution should not issue against the applicant issued on 29/08/2024 prompting filing of the motion.
4. Further the Applicant seeks an order of stay of execution pending hearing and determination of the intended appeal, and therein provides a draft Memorandum of Appeal stating the intended grounds of appeal on both liability and quantum faulting the trial court for taking into account the evidence tendered by the Appellant during hearing of the suit.



5. In his Supporting Affidavit sworn on 27/09/2024 the Applicant puts forth the reasons for the inordinate delay in bringing the motion to what he terms as delivery of the judgment in the parties absence but again admitting that the previous advocates had been duly notified of the entry of judgment though after the statutory period had lapsed for filing an appeal in may 2024 and that he is ready and willing to comply with conditions for stay as the court may direct.
6. In opposition to the motion, the Respondent filed his replying affidavit sworn on 3/02/2025 in which he disputes the reasons for the motion, stating that the Applicant at all times was aware of delivery of the judgment as the notice of delivery was served upon his former advocates on 13/05/2021 soon after its deliver. That several communication was exchanged between the advocates on settlement of the decretal sum which letters are attached as exhibits, including a copy of a decree and therefore as well as the notice to show cause that was also served upon the applicant which awoke him from his sleep.
7. The Respondent therefore urges the court to disregard the Applicants depositions and dismiss the application with costs.
8. The court has considered the factual material placed before it by both parties. The court is not convinced that the applicant was not aware of the judgment delivered against him on 5/02/2021 as the same is disapproved by service of the entry of judgment, the decree and the notice to show cause why execution should not be levied against him.
9. Order 42 Rule 6 of the *Civil Procedure Rules* is categorical that the reason for the delay to approach the court for the orders of stay of execution must be explained to the satisfaction of the court as held in the cases of *Thuita Mwangi v Kenya Airways ltd* [2003] eKLR that include:-
 - a. The period of delay
 - b. Reason for the delay
 - c. Arguability of the appeal
 - d. Degree of prejudice, which the respondent is likely to suffer.
 - e. Importance of compliance with time limits to a particular litigation or issue.
10. The above principles have since been applied in numerous decisions across all courts, which are readily available. Without a doubt, the delay of over five (5) years have not been sufficiently explained. There is a lawful decree in favour of the Respondent. He has been denied enjoyment of fruits of his judgment for a very long and unexplained period.
11. The court in the case of *James Wangalwa & another v Agness Nalika Cheseto* [2012]eKLR held that:-

“Execution is a lawful process hence the applicant must establish other factors which saw that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.”
12. Considering the Applicants affidavit evidence, the court finds noncompliance with the above principle.
13. The court in consideration of Order 42 Rule 6 *CPR*, finds no substantial loss that may be suffered by the applicant. Indeed the applicant has already deposited the full decretal sum in court as security for stay of execution orders. However, that was a temporary measure pending hearing and determination of the application interpartes.



14. As to whether the Applicant should be granted leave to file appeal out of time, an Applicant is mandated to establish factors that may persuade the court for his failure to file appeal within the statutory period.

The court has already rendered itself that no reasons have been advanced for the inordinate delay of over three years as held in the decisions of *Thuita Mwangi v Kenya Airways* (*supra*); *Seven L. General trading Ltd & another v Karau* [2024] eKLR (*supra*)
15. In *Omar Shurie v Marian Rashe Yafar* (Civil Appln. No 107 of 2020 UR); the court of appeal held that to extend time or not is a discretionary power of the court, upon taking into account reasons for the delay, length of the delay, chances of success of the appeal degree of prejudice to the respondent if application is granted, as earlier held in the *Thuita Mwangi* (*supra*) among many others.
16. The court takes the view that the respondent who has been waiting for payment of the decretal sum since May 2021 will be greatly prejudiced if the Applicant is allowed to lodge an appeal against the judgment yet no sufficient reasons have been provided for the inordinate delay.
17. Further, the court is not convinced that the appeal has high chances of success considering the grounds of appeal raised in the draft Memorandum of Appeal.
18. As held in the case of *Nicholas Kiptoo Korir arap Salat v IEBC & 7 others* [2014]eKLR while considering the principles upon which leave to extent time to file appeal out of time extension of time is not a right to a party. An equitable remedy is only available to a deserving party at the discretion of the court; that a party seeking extension of time has the burden of laying a basis to the satisfaction of the court.
19. For the foregoing, the court in its exercise of discretion finds no satisfactory reasons to grant to the Applicant the orders sought in the motion dated 29/09/2024. It is dismissed with costs.
20. The sum of Kshs 892,589.93/= deposited in court as security shall forthwith be released to the Respondent John Muthiani Muthuku through his Advocates on record, J. Okorosi Ochako & Co. Advocates

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF JUNE, 2025.

.....
JANET MULWA.
JUDGE

