



**Kilonzo v Ndithya & another (Suing as Administrators of the Estate of the Late Faith Kaidi Ndithya (Deceased)) (Miscellaneous Application E072 of 2024) [2025] KEHC 9547 (KLR) (25 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9547 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
MISCELLANEOUS APPLICATION E072 OF 2024**

**LW GITARI, J**

**JUNE 25, 2025**

**BETWEEN**

**SHADRACK MUMO KILONZO ..... INTENDED APPLICANT**

**AND**

**KAVISA NDITHYA ..... 1<sup>ST</sup> RESPONDENT**

**NDITHYA SYANDA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE FAITH KAIDI NDITHYA (DECEASED)**

**RULING**

1. The applicant filed a Notice of Motion dated 29/10/2024 seeking orders that an immediate order of Stay of Execution of Judgment issued on 17/7/2024 in Mutomo PMCC E056/2022 pending the hearing and determination of this application and the appeal.
2. The applicant was also seeking an order that he be granted leave to file the memorandum of Appeal out of time. the Notice of Motion was supported by the affidavit of the Inviolata Achola sworn on 29/10/2025. She avers that by the time she received instructions to file the appeal, the time for filing had already lapsed. She contends that the appeal is arguable and has high chances of success. The respondent opposed the application and contends that the application was brought four months after the entry of Judgment and the applicant had not settled the decree.
3. She avers that the applicant has not shown that the application has high chances of success and has not offered security. She avers that if the application is allowed she be paid Kshs. 30,000/= thrown away costs and half the decretal sum as a condition for stay. The court ordered stay of execution pending the hearing and determination of the application. The application was canvassed by way of written submission.



## **Applicant's Submissions**

### **a. Stay of Execution pending Appeal**

4. The applicant relies on Order 42 Rule 6(1) & (2) of the Civil Procedure Rules which provides for the frame work for granting stay of execution pending appeal. She submits that the provision empowers the court to order a stay of execution upon the applicant demonstrating that she has sufficient cause. The applicant relies on Vishram Ranji Halal -vs- Thornton and Turpin where the conditions for granting stay of execution were articulated as follows: The applicant has to demonstrate that he is likely to suffer substantial loss. He submits he is likely to suffer substantial as the decretal sum is Kshs. 2,259,160/= and if execution is carried out they will suffer substantial loss and its ability to peruse a meritorious appeal. That the appeal was filed without unreasonable delay. The provision of adequate security for due performance of the decree.
5. The applicant submits that they are ready to comply with the order to provide security as this court may order. The applicant further relies on Section 1A & 1B of the *Civil Procedure Act* which mandates the court to ensure a just, efficient and affordable dispute resolution and relies on Stephen Boro Gitilha -vs- Family Finance Building Society & 3 Others and Kenya Commercial Bank Limited & Kenya Planters Co-Operative Union where it was held that Procedural Rules field to the pursuit of substantive justice she urges the court not to adhere to statutory timelines but to consider the reason for delay and do substantive justice.
6. On leave to appeal out of time it is submitted that Section 79 G of the *Civil Procedure Act* gives 30 days timeline for filing at the appeal from sub-ordinate court but the court retains discretion to extend time. it is submitted that the delay was reasonable, the appeal raises substantive legal issues and the respondents are likely to suffer prejudice. She prays that the application be allowed.

## **Respondents Submissions**

7. The respondent relies on Section 79G of the *Civil Procedure Act* and Mwangi -vs- Kenya Airways Limited (2003) KLR where the court of Appeal addressed the factors to consider when exercising discretion. These are:
  - i. The period of delay
  - ii. Reason for delay.
  - iii. Arguability of the Appeal and
  - iv. The degree of prejudice which could be suffered.
8. It is submitted that the delay was intentional since no cogent reason has been shown. She relies on Aviation Cargo Support Limited -vs- St. Mark Freight Services Limited where the court held that the grant of extension of time to file appeal is discretionary. That the party must demonstrate that the delay is not inordinate and where it is inordinate, the applicant must give plausible explanation to the satisfaction of the court. It is submitted that the intended appeal does not raise pertinent issues and the respondent is likely to be prejudiced. The respondent prays that the application be dismissed.



## Analysis and Determination

9. The issue for determination is whether the application meets the threshold for granting of leave to appeal out of time. Section 79G of the Civil Procedure Act provides:

“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.”

The applicant was supposed to demonstrate a plausible reason for failure to appeal within the timeline provided under the Act. The court of Appeal has dealt at length with issue of granting leave to appeal and stay of execution. In Kenya Revenue Authority & Another -vs- Ali (Civil Application E107/2024) (2025) KECA 1680 (KLR) (20 June 2025) Ruling cited Trust Bank Ltd & Another -vs- Investment Bank Limited and 3 Others (2000) eKLR. The applicant has to show that the appeal or intended appeal is arguable, to put it another way it is not frivolous. Secondly, unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles and must be considered against facts and circumstances of each case”

10. In consider whether the intended appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. Danji Pragji Mandavia -vs- Sara Lee Household & Body case (K) Limited Civil Application No. Nairobi 345/2004. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court, one which is not frivolous. Joseph Gitahi Gachau & Another -vs- Pioneer Holdings (A) Ltd & Others Civil Application 124/2008. Thus, an arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before the court and one that is not frivolous. The term nugatory has to be given its full meaning. It does not only mean mouthless, futile or invalid. It also means trifling. Reliance Bank Ltd -vs- Norlake Investments Ltd (2002) 1EA 232 whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible, whether damages will reasonably compensate the party.
11. In this matter the amount involved is quite substantial. The applicant has given a plausible reason why the appeal was not filed in time. the court has discretion to extend time. it is trite that courts discretion should e exercised judiciously. The Constitution at Article 159 (2)(d) provides that courts shall administer justice without undue regard to procedural technicalities. Section 1A & 1B of the Civil Procedure Act give court direction that it applies the occluding objective of the Act which is to facilitate the “just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act”.
12. On the other hand, Section 3A gives the court jurisdiction to issue such orders as may be necessary for the ends of justice and to prevent abuse. I have noted that the appeal is arguable. The respondent extended an alive bunch and urged the court to order that they be paid costs of this application and as a condition stay half decretal sum be paid to the respondent and half the decretal sum be deposited in an interest earning account.
13. For these reasons, I find that I should exercise discretion in favour of the applicant and order as follows:
1. The application is allowed on the following conditions:



- i. The applicant to pay the respondent Kshs. 1,297,522.50 being half the decretal sum. The same be paid within 21 days.
  - ii. The balance, Kshs. 1,297,522.50 be deposited in an interest earning account in the joint names of the advocates for the parties. This order be complied with within forty-five (45) days.
2. The respondent be paid thrown away costs of Kshs. 15,000/=.
  3. The appeal shall be filed within 30 days from today.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 25<sup>TH</sup> DAY OF JUNE 2025**

**HON. LADY JUSTICE L. GITARI**

**JUDGE**

