



Toroni v Kariuki (Civil Appeal E261 of 2024) [2025] KEHC 11725 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11725 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E261 OF 2024
FN MUCHEMI, J
JULY 31, 2025**

BETWEEN

TONNY TORONI APPELLANT

AND

HANNAH WANJIRU KARIUKI RESPONDENT

RULING

Brief facts

1. The application dated 28th September 2024 seeks for orders of stay of execution against the judgment in Ruiru Chief Magistrate’s Court CMCC No. E189 of 2023 delivered on 28th August 2024 pending the hearing and determination of the appeal.
2. The respondent opposed the application and filed a Replying Affidavit dated 4th December 2024.

Applicant’s Case

3. The applicant states that judgment in Ruiru MCCC E189 of 2023 was delivered on 28th August 2024 awarding the respondent Kshs. 202,840/- plus costs of the suit and interest. The applicant avers that he is aggrieved by the decision of the subordinate court and intends to appeal against it.
4. The applicant is apprehensive that the respondent will obtain a decree and proceed to execute the orders issued on 28th August 2024 before the appeal is heard and determined. The applicant further states that he has an arguable appeal with high chances of success as the learned trial magistrate erred in law and in fact in holding that he bore 80% liability for the accident despite finding that the respondent had failed to prove the elements of negligence alleged against him. Further, the learned magistrate erred in law and in fact by misapprehending the evidence submitted by the respondent thereby misdirecting herself as to the extent and nature of the respondent’s injuries.
5. The applicant avers that in the event the respondent executes the decree and the appeal is successful at a later date, the respondent shall not be able to reconstitute him as she has not shown her financial



capabilities. The applicant states that he has an arguable appeal and if stay of execution is not granted, execution will proceed without any lawful justification and he shall suffer irreparable damage and the appeal shall be rendered nugatory.

The Respondent's Case

6. The respondent states that the applicant filed his appeal out of time without the leave of court on 2nd October 2024, outside the statutory timelines for lodging an appeal. Further, the applicant has failed to offer any reasonable grounds for the delay in exercising his rights of appeal. The respondent states that the decision of the court to grant leave to appeal out of time or to admit an appeal filed out of time is a matter of the court's discretion.
7. The respondent states that the applicant has not met the required conditions to deserve orders of extension of time. Further the applicant has not presented any good reason for the delay which demonstrates indolence on his part and he should not be allowed to seek the court's assistance to rectify his own inaction.
8. The respondent argues that the draft memorandum of appeal does not present an appeal with high chances of success. It is evident that the appeal has been filed solely to delay the resolution of the suit.
9. The respondent avers that she is capable of refunding any sums advanced to her and the allegations regarding her inability to refund the said sums are unsubstantiated and puts the applicant to strict proof. The respondent further avers that the applicant has failed to meet the conditions for grant of stay of execution as he has not provided any evidence of substantial loss and further an appeal cannot be rendered nugatory by a money decree as substantial loss is not demonstrated.
10. The respondent argues that although the applicant contends that the learned magistrate erred in apportioning liability in the ratio of 80:20 against her, the applicant failed to demonstrate through credible evidence that she contributed in any way to the occurrence of the accident. The evidence adduced during trial unequivocally showed that she was standing completely off the road at the time of the incident which absolves her of any contributory negligence. Thus the trial magistrate's decision to apportion liability to her despite the absence of any proof of her contribution to the accident was a clear error in judgment which warrants correction on appeal. The respondent further argues that the trial magistrate was correct in apportioning liability to the applicant however she erred in failing to assign full liability despite the overwhelming evidence presented during the trial. The respondent states that she provided clear and uncontroverted proof that the applicant was entirely at fault for the accident and thus the failure to apportion 100% liability to the applicant was a misjudgment that requires rectification on appeal.
11. The respondent states that the applicant is deliberate to deny her the chance to enjoy the fruits of her successful litigation by dint of his failure to discharge his burden of proof in establishing his defence at the trial court. The applicant hopes to have a second bite at the cherry with the instant application and appeal to obtain orders and continue to deny her the right to enjoy the fruits of her judgment.
12. The respondent states that the balance of convenience tilts in her favour as she stands to suffer the most harm considering the injuries sustained necessitating the suit have resulted in her failure to accomplish tasks to earn a living and therefore stands to suffer great prejudice if any of the orders sought are granted.
13. Parties put in written submissions.



The Applicant's Submissions

14. The applicant submits that the instant application has been brought timeously. The applicant further submits that while the judgment in the case was delivered virtually on 28th August 2024, it took more time for the lower court to avail the typed judgment to the parties, a fact that is well within the knowledge of the respondent.
15. Relying on the case of *Nicholas Stephen Okaka & Another vs Alfred Waga Wesonga* [2022] eKLR, the applicant submits that the rationale for grant of stay of execution pending appeal is to ensure that the appellants rights are safeguarded and the appeal is not rendered nugatory.
16. The applicant refers to the cases of *Bollore Transport & Logistics Ltd vs Kidaha* (Appeal E060 of 2022) [2022] KEELRC 1613 (KLR) (28 July 2022) (Ruling) and *Benisa Limited vs John Ngotho Maina* (2022) eKLR and submits that the respondent has not shown that she is capable of refunding the decretal sum if the appeal is successful. It is incumbent upon the respondent to adduce evidence to show that she has sufficient ability to refund the monies, which she has failed to do. Thus, the applicant argues that he is exposed to the possibility of substantial loss despite having an appeal with overwhelming chances of success.
17. Relying on the cases of *Paul vs Mutua* (Environment and Land Appeal E013 of 2022) [2022] KEELC 13439 (KLR) (5 October 2022) (Ruling) and *Gianfranco Manenthi & Another vs African Merchant Assurance Co. Ltd* [2019] eKLR, the applicant submits that an order for security for costs ought not to be so punitive as to impede his right of appeal. The applicant submits that in the alternative, he prays that the court direct that he issues a bank guarantee as security of costs.

The Respondent's Submissions

18. The respondent refers to Order 42 Rule 6 of the Civil Procedure Rules and the case of *Lumunyasi & Another vs Soita* [2025] KEELC 4368 (KLR) and submits that the applicant has not shown sufficient cause why the orders of stay ought to be granted.
19. Relying on the cases of *Kenya Shell Limited vs Benjamin Karuga Kibiru & Another* [1986] KECA 94 (KLR); *Pan African Insurance Co. Ltd vs International Air Transport Association* High Court No. 86 of 2006; *Antoine Ndiaye vs African Virtual University* [2015] eKLR and *Dominic Wamugi Nderi vs Daniel Okeri Matunda* [2022] eKLR, the respondent argues that the onus of proving substantial loss and the inability of the respondent to pay the decretal sum if the appeal is successful lays with the applicant, who is required to place real and cogent evidence before the court to prove that the respondent would be unable to refund the decretal sum should the appeal succeed. The respondent further relies on the cases of *Baraza Tindi & Another vs BMW* [2021] eKLR and *Stephen Wanjohi vs Central Glass Industries Ltd Nairobi HCCC No. 6726 of 1991* and submits that financial ability of a decree holder is not a reason for allowing stay as it is not enough that the decree holder is not a dishonourable miscreant without any form of income.
20. The respondent concedes to the fact that the judgment was delivered on 28th August 2024 while the instant application was filed on 28th September 2024 which was 30 days later.
21. The respondent relies on the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] KEHC 2430 (KLR) and submits that the applicant has not offered to provide security to show willingness to settle the decretal sum.



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 vs 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 vs 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 vs 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 not sought to have his appeal admitted out of time yet he filed his appeal on 2nd October 2024 which was outside the statutory time stipulated for filing an appeal. The applicant has further not explained the delay in filing the appeal and it is in his submissions that he states that the lower court took more time in availing the typed judgment.
27. On perusal of the record, judgment in the trial court being Ruiru MCCC No. E189 of 2023 was delivered on 28th August 2024 in the presence of both parties’ advocates. Thus, it is evident that the applicant was represented when judgment was being delivered and was aware of the judgment and the contents of the judgment. Furthermore, the applicant prepared his memorandum of appeal on 28th September 2024 yet does not explain why he did not file it the same day, yet he was within time to do so. I am not persuaded by the applicant’s arguments on the reason for delay. The 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 timeously but the applicant does not explain why he filed the memorandum of appeal late. Although a delay of 2 days 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 to the satisfaction of the court why 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 and fact. I have perused the lower court record and a copy of the judgment to appreciate the lower court’s reasoning. Thus, without delving to the merits of the appeal, the chances of the appeal succeeding if the instant application is granted are quite limited. In the circumstances it is my considered view that the applicant has not established to the satisfaction of the court that time should be enlarged for him to file an appeal out of time.
31. Having declined to grant the prayer for admitting the appeal out of time, the prayer for stay of execution of the trial court’s judgment and decree automatically fails since there is no existent appeal.
32. It is thus my considered view that the application dated 28th September 2024 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 31ST DAY OF JULY 2025.

F. MUCHEMI

JUDGE

