



**Badar Hardware Limited v Vuto & another (Suing as the Legal Representatives
of the Estate of Benson Musyoki Kimilu - Deceased) (Civil Miscellaneous
Application E027 of 2025) [2025] KEHC 12445 (KLR) (29 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 12445 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL MISCELLANEOUS APPLICATION E027 OF 2025**

**TM MATHEKA, J
AUGUST 29, 2025**

BETWEEN

BADAR HARDWARE LIMITED APPLICANT

AND

VERONICA MUMBI VUTO 1ST RESPONDENT

DORCAS WAVINYA KIMILU 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF BENSON
MUSYOKI KIMILU - DECEASED**

RULING

1. On 30th January 2025 the learned magistrate in Kilungu MCCC E006 of 2024 delivered judgment against the applicant and awarded the sum of Kenya shillings 6,037,284;00 as loss of dependency under the *Fatal Accidents Act*.
2. The applicant was aggrieved by the same, but was unable to file appeal within time hence, this application Notice of Motion dated 11th March 2025 brought under section 79G of the *Civil Procedure Act*, Order 42 rule 6 of the Civil Procedure rules, sections 1A, 1B,3 A of the *Civil procedure Act*.
3. The applicant seeks orders inter alia for stay of execution of the judgment and any consequent decrees therein ,pending the hearing of and determination of the application and the intended appeal before the High Court .
4. The applicant has filed a draft memorandum of appeal and he seeks that it be deemed as filed upon payment of the requisite filing fees.
5. The grounds for the application are mainly that the applicant became aware of the judgment upon being served with the proclamation of attachment on the 27th of February 2025 and upon making



inquiry from the insurers. That the applicant was represented in court by the insurers advocates the firm of Kinyanjui Njuguna & Co advocates who did not inform the applicant of the judgment in time; that upon receipt of the judgment on the 6th of March 2025 the applicant dispatched the judgment to her lawyers Earnest Mogaka and Associates for legal opinion and received an opinion on 10th March 2025 and elected to file an appeal on the award of loss of dependency. The applicant has an arguable appeal that warrants consideration of this hon court and that the issues raised in its draft memorandum of appeal is that the court erred in law in fact by awarding the plaintiffs the sum of Ksh 34,302/ 75 as monthly pay for a heavy commercial driver yet the said job designation under the wages regulation order was not proved by the plaintiffs/ respondents.

6. The applicant is ready to deposit the sum of Kenya shillings 2.037 284 within the timeline set by the court as the sum of Kenya shillings. Three million was already remitted to the respondents' advocates. That no prejudice will be suffered by the respondent if stay of execution is granted on the interim basis.
7. The application is supported by the affidavit of Omar Ahmed Yusuf the managing director of the applicant. The grounds on the face of the application.
8. The application is opposed through the replying affidavit of Ichaura Wachira Advocate on record for the respondent. He depones that the application is misconceived bad in law fatally defective and untenable brought by busy bodies, by advocates who are improperly on record. Further that the application is moot and has been overtaken by events since the applicant through its insurers has already paid part of the decretal sum. He depones further that it would defeat the purpose of the *Insurance Act* if the applicant is to be accorded a right of appeal, whereas its insurer has already conceded on the issue of liability and settled the same up to the maximum limit of three million shillings. That the applicant's obligation in the circumstances is to settle the excess. That the doctrine of subrogation would be put in jeopardy if the applicant was to be allowed to reopen the proceedings of the trial court. That in any event, no sufficient and valid reason has been advanced why the appeal was filed out of time and the application has only been provoked by execution. The application is thus an afterthought and delaying tactic.
9. The parties canvassed the application through written submissions.
10. I have considered that the rival submissions and the authorities cited.
11. The issues for determination are one whether the applicant's managing director had the authority to swear the supporting affidavit. Two, whether the application for leave to file an appeal out of time is merited. Three, whether the applicant should have stay. pending the hearing of the intended appeal.
12. The first issue was raised by the respondents in their submissions. It is noteworthy that it was not raised in the replying affidavit which would obviously have prompted a response by the deponent on whatever his authority was . Considering that that objection was not raised in the pleadings it would not be proper for the court to entertain the objection raised in the submissions.
13. Whether the applicant should have leave to file the appeal out of time. This is tied to the ground of appeal. It is evident that the interest of the insured and the interest of the insurer parted ways at the point where the insurer deposited the three million shillings, which is the limit of its liability with counsel for the respondent. At that point, the insured was left with a burden of paying the balance and it is at that point that the insured realized her liability to pay the sum.
14. It is clear to me from the memorandum of Appeal that the insured is not fighting the issue of liability, the insured is fighting the issue of quantum of damages. The insured only has an issue with the manner



in which the subordinate court arrived at the quantum of damages for loss of dependency because it is that issue that has led to the sum that the applicant is now required to pay.

15. It is my considered view that this is an arguable point for this appeal. It will also be an arguable point whether or not this jeopardizes the doctrine of subrogation despite the fact that it does not matter what the quantum of damages awarded is the insurance company is still liable to pay the maximum of its liability which is Ksh three million.
16. The applicant has explained the process the applicant went through to get to this point. It is not disputed that the applicant was represented by counsel for the insurance company. Is she bound to accept the excess if she is of the view that it was arrived at erroneously? Is the applicant bound to pursue the appeal through the insurer? In my view these are issues that ought to be canvassed at the appeal.
17. As it is now the applicant has explained the delay which is not inordinate in the circumstances of this case.
18. The applicant has demonstrated that it will suffer substantial loss if the stay is not granted but in any event the applicant is ready willing and able to abide by orders on security for the performance of the decree.
19. In the circumstances I find that the application has merit.
20. I allow the application on the following conditions.
That the leave is granted to file the appeal out of time . The memorandum of appeal is deemed as filed as soon as it is paid for,
The record of appeal be filed and served within 30 days.
21. The applicant to deposit the balance of the decretal sum in a joint interest earning account in the names of both counsel within 30 days hereof. In default the stay will lapse and execution to issue.
22. The matter be mentioned before the DR within 30 days to confirm filing of the record of appeal and to fix date for directions.

DATED SIGNED AND DELIVERED VIA CTS THIS 29TH AUGUST 2025

MUMBUA T MATHEKA

JUDGE

