



**Mutuku & another v Kilorit (Civil Miscellaneous Application
146 of 2024) [2025] KEHC 12438 (KLR) (26 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 12438 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL MISCELLANEOUS APPLICATION 146 OF 2024**

TM MATHEKA, J

AUGUST 26, 2025

BETWEEN

TEDDY MUTUKU & ANOTHER APPLICANT

AND

JAMES KIRISIA KILORIT RESPONDENT

RULING

1. The applicants come under order 42 rule 6 Order 51 Rule 1 and order 50 Rule 6 of the Civil procedure Rules and section 1 A, 1B 3 A, 79G and 95 of the [civil procedure act](#) Cap 21 of the laws of Kenya.
2. He seeks orders that this honorable court be pleased to enlarge time to allow the applicants to file an appeal out of time against the judgment of the small claims court delivered in 26th July 2024 in Makindu SCCCOM number E 050 of 2024. In addition, the court do grant a stay of execution of the said judgment and decree pending the hearing and determination of the intended appeal.
3. The application is supported by the grounds on its face and the supporting affidavit sworn by Teddy Mutuku Ndunda and Dennis Musya.
4. The main grounds are that the applicants were self-representing in the subordinate court and when they filed an application for stay due to technical error, it was not actioned. That they could not find an advocate and instruction fees in time to help them file their appeal, since they both have unstable incomes. That the appeal has valid points of law with a high chance of success. They have annexed a copy of the draft Memorandum of appeal. That they are ready and willing to provide security. That the amount of judgment is substantial at Kenya shillings 785, 444/=
5. The application is opposed through the replying of the of James Kirisia . Kilorit the respondent. The main ground is that the applicants filed an application in SCCCOM E050 of 2024 stating that they were ready and willing to liquidate their portion of the Judgment by way of monthly instalments of Kenya shillings. 10,000 until payment in full. That the applicants could not have offered to pay



- the decretal sum if indeed they were dissatisfied with the judgment. In any event, they had not demonstrated substantial loss they will suffer yet he stands to suffer irreparable prejudice.
6. He has annexed the applications dated 5th of September 2024 by the applicants in which they say they are ready and willing to liquidate their portion of the degree by way of monthly installments of Kenya shillings. 10,000 shillings until payment in full.
 7. The application was canvassed by way of written submissions.
 8. The applicants set out three issues for determination.
 9. Whether time to file and serve their appeal should be extended, whether a stay of execution of the judgment should be granted, and who should bear the costs.
 10. The applicants rely on *Leo Sila Mutiso versus Rose Hellen Wangari Mwangi* [1999] 2 EA 231 on the proposition that whether or not to extend time for appeal, is discretionary on the part of the court.
 11. They also cite article 50 (1) of *the Constitution* of Kenya on the right of every person to have any dispute heard in fairness . It is their submission that to deny the applicants the opportunity to appeal would amount to an infringement of their right and would cause an injustice.
 11. On whether there was delay in filing the application, it is submitted that the applicants have explained the delay.
 12. The applicants rely on *Hezekiah Wanjohi Njenga vs Fidelity Commercial Bank, Ltd* and another 2016 eKLR on their proposition that the application to pay the money by installments was made without prejudice and that *negotiations, proposals, or settlement discussions do not amount to admission of liability*. They also cite *Philip Chemwolo and another vs Augustine Kubende* [1982-1988] 1 KAR 103 on the proposition that when a party makes a blunder it does not follow that the party should suffer the penalty of not having his case heard on merit.
 13. That that the said applications were withdrawn by consent, and therefore the respondents could not rely on them as in doing so they would be violating the principle of *res judicata* .
 14. It is further submitted that the applicants have an arguable appeal. And they rely on *Stanley Kang'ethe Kinyanjui versus Tony Keter & Others* [2013] eKLR.
 15. On whether a stay of execution should be granted it is submitted that the applicants have complied with the requirements of the law.
 16. On costs, it is submitted that the costs should abide the outcome of the intended appeal.
 17. In conclusion, they submitted that this court should be guided by the Supreme Court in *Abdirahman Abdi versus Safi petroleum products limited and 6 others* [2011]eKLR that courts should endeavor to do substantive justice, rather than rely on procedural technicalities. The applicants cite, article 159(2) (d) of *the Constitution* of Kenya.
 18. The respondent in his submissions raises three issues; whether there was a reason for the delay; Whether the intended appeal has any chance of success; Whether the prayer sought in the notice of motion dated 25th of October, 2024 should be granted.
 19. On the first issue it is argued that ignorance of the law is not a defense and the applicants cannot use the fact that they were a self-representing as a reason for not following their laid down procedures.
 20. That the appeal has no chance of success, as evidenced by the judgment of the lower court which the applicants even agreed with and offered to pay the money. That their fear of being committed to civil



jail should they fail to pay the decretal sum cannot be a ground enough to allow the filing of an appeal out of time.

21. That the prayers sought are untenable because the applicants have not shown any substantial loss or prejudice they will suffer should this court disallow their prayer for stay.
22. That the respondent is working in a well-paying job and therefore, is able to pay whatever amount he may be required to buy the court.
23. That should the court find in favor of the applicants, the respondent submits that the applicants be ordered to pay the respondent half the decretal sum and to deposit the remaining half in court or in an interest-bearing account in the names of both advocates to act as security for the performance of the decree appealed against, they rely inter alia on Joseph Kimeli A Sitonik and 12 others vs Grogoken Limited and two others. [2020] eKLR where such orders were made.
24. I have carefully considered the application, the annexures, the submissions and the judgment from the lower court.
25. The issue is whether one the applicants should have time to file an appeal out of time and two whether they should have a stay of execution of the judgment of the lower court and three what orders should issue.
26. From a perusal of the judgment of the lower court, the applicants admitted to receiving certain amounts of money in the transaction that was in dispute in the subordinate court. Those facts will not be before me for determination. They are settled.
27. A perusal of the memorandum of appeal shows that the issue now is the legality or otherwise of the alleged contract between the parties. And that goes to issue whether there is an arguable appeal and the answer would be in the affirmative.
28. Having found that then they would need an order of stay of execution pending the hearing and determination of the appeal.

That stay will be accompanied by conditions.

Orders:

1. Time is enlarged for the applicants to file appeal out of time
2. There be stay of execution pending the hearing and determination of the appeal.
3. The applicants to pay the respondent the sum of Ksh 386,000 being half the decretal sum at the time of the application within 30 days hereof. In default the stay to lapse and execution to issue.
4. The appeal and the record of appeal be filed and served within 30 days hereof
5. The matter be mentioned before the DR in 30 days for compliance with (4) above.
6. Costs to abide the outcome of the appeal.

DATED SIGNED AND DELIVERED VIA CTS ON 26TH AUGUST 2025.

MUMBUA T MATHEKA.

JUDGE

