



**Beatsyl Enterprise Ltd & another v Kariui (Miscellaneous Civil Appeal
E014 of 2025) [2025] KEHC 14468 (KLR) (29 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 14468 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CIVIL APPEAL E014 OF 2025**

NIO ADAGI, J

JULY 29, 2025

BETWEEN

BEATSYL ENTERPRISE LTD 1ST APPLICANT

COMMERCIAL BANK OF AFRICA LTD 2ND APPLICANT

AND

FRANCIS NGARUIYA KARIUI RESPONDENT

RULING

1. This ruling is on the applicants' notice of motion application dated 28th January, 2025 seeking for orders:
 1. Spent
 2. Spent
 3. That this Honourable court be pleased to grant leave to the Applicants (proposed Appellants) to appeal out of time against the Judgment made by Hon. D. Kuto (SPM) on the 29th February 2024 in Mavoko Chief Magistrates Court Civil Case No. 699 of 2020 Francis Ngaruiya Kariuki - v- Beatsyl Enterprise Limited & Commercial Bank of Africa Limited.
 4. That the time for lodging an appeal against the Judgement delivered by the Hon. D. Kuto (SPM) on the 29th February 2024 in Mavoko Chief Magistrates Court Civil Case No. 699 of 2020 Francis Ngaruiya Kariuki - v- Beatsyl Enterprise Limited & Commercial Bank of Africa Limited be extended/ enlarged.
 5. That the said leave do operate as a stay of all proceedings and/ or execution of any ruling, Judgement, decree, order and all consequential orders in Hon. D Kuto (SPM) on the 29th February 2024 in Mavoko Chief Magistrates Court Civil Case No. 699 of 2020 pending the hearing and determination of the intended appeal.



6. That the draft annexed Memorandum of Appeal be deemed as filed upon leave being granted as per prayer 5 above and upon payment of the requisite fees thereto.
 7. That consequently leave be granted to the applicants to lodge a Record of Appeal upon payment of the fees subject of prayer 6 hereinabove.
 8. That costs of this application and other costs incurred herein consequential to follow the events.
2. The application is based on the grounds set out on the face thereof and supported by the supporting affidavit of Faith Wanjiru sworn on 24/01/2025 and her supplementary Affidavit sworn on 14/05/2025.
 3. The application is opposed by the Francis Nguia Kariuki, the Respondent through his replying affidavit of sworn on 05/03/2025. The Respondent contends that he has already initiated execution proceedings by extracting a decree in the trial court and it is this possible commencement of the execution process that has awoken the Applicants to file the instant application, noting that he has been following up with them for a very long period of time on the settlement of the trial court judgement. The Respondent avers that the Applicants' intended appeal is contemptuous with the sole purpose of delaying execution proceedings in the trial court to my detriment. That allowing the Applicants to appeal out of time, almost 1 year after the trial court delivered its judgement, will unduly prejudice him, causing unnecessary delay and injustice owing to the indolence of the Applicants who have clearly been sleeping on their rights since the trial court judgement was delivered. The respondent states that the Applicants' intended appeal lacks merit and has no probability of success, making the instant application an abuse of the court process designed to delay the execution of the judgment delivered by the trial court.
 4. Directions were given by the court for the application to be canvassed through written submissions. Both parties have filed their respective submissions.

Analysis and determination

5. I have considered the application, the supporting affidavit, the Replying Affidavit, and the rival submissions filed by the parties' counsel as well as the judicial decisions relied upon. In my view, the issues for determination are as follows:-
 - a. Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;
 - b. Whether the applicants have met the prerequisite for grant of stay of execution pending appeal;

a. Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;

6. 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.

7. It is clear from the wording of Section 79G of the Civil Procedure Act that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of Diplack Kenya Limited v William Muthama Kitonyi [2018] eKLR that 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.
8. The Supreme Court in the case of Nicholas Kiptoo Korir arap Salat v 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.
9. Similarly in the case of Paul Musili Wambua v 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.”

10. Applying the above principles to the present case, the judgment herein was delivered on 29th February 2024 and the appeal ought to have been filed by 29th March 2024. The Applicant filed the current application together with the annexed Memorandum of Appeal on 29th January 2025. This is about ten months outside the time limited for filing an appeal. The Applicant has attributed the delay in filing their appeal to an internal error and mix up within the applicants' insurers legal department as a result



of the huge volumes of claims that the said insurer receives on a daily basis from the entire country as such the applicants' insurer failed to issue instructions to the advocates to proceed and appeal the judgement in good time.

11. The Applicants have not disclosed when they notified their insurer of the judgment and what attempts they made to follow up on any instructions on the same. The Applicants are the parties to this suit and have the obligation to pursue their insurer and not sit back when they knew the time for filing an appeal was limited. The Applicants would have been expected to reach out to their previous advocates on any instructions from their insurer. It is trite law that parties have the responsibility to show interest in and to follow up on their cases even when they are represented by counsel. The Applicants cannot in the circumstances blame their insurer for the delay in filing the appeal.
12. In my view, ten months is inordinate delay which has not been satisfactorily explained to this court as required by the law. I therefore find that the Applicants have not given any plausible reasons for the delay in filing the appeal.
13. The above notwithstanding, I have perused the intended Memorandum of Appeal and the judgment of the trial court and noted that the appeal challenges the trial court's finding on liability on the basis that the Applicants' subject vehicle herein was hit from behind. As such, the appeal cannot be said to not to be arguable although at this juncture, I will restrain from delving into the merits of the appeal.

b. Whether the applicant has met the prerequisite for grant of stay of execution pending appeal;

14. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
 1. "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
 2. No order for stay of execution shall be made under sub rule 1 unless:-
 - a. The Court is satisfied that substantial loss may result to the 1st Applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.
15. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay;
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.



16. Substantial loss was clearly explained in the case of [*James Wangalwa & Another v Agnes Naliaka Cheseto*](#) [2012] eKLR:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the [*CPR*](#). This is so because execution is a lawful process. The applicant must establish other factors which show 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...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”.

17. The Applicants have asserted that they stand to suffer substantial loss if the execution proceeds in compliance with the decree extracted on account of the judgment delivered on 29/02/2024 and their properties are sold via public auction, the same would create a state of affairs that will irreparably affect and/or negate the very essential core of the applicants’ appeal if the same were to succeed to appeal.

18. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The Applicants are required to show the manner in which execution will irreparably affect them or will alter the status quo to their detriment therefore rendering the appeal nugatory. The Applicants have thus demonstrated substantial loss in my considered view.

19. On the issue of security for costs, the purpose of security was explained in the case of [*Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others*](#) [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the [*Civil Procedure Rules*](#) acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

20. Evidently, the issue of security is discretionary and it is upon the court to determine it and set its terms. The trial court entered judgment for Kshs.2.3 Million for the Respondent as against the Applicants. The Applicants have also indicated under paragraph 17 of the supporting affidavit that they are agreeable to abide by the terms imposed on them by this court pending the final determination of the Intended Appeal if leave is granted herein.

21. It is imperative that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff/claimant to enjoy the fruits of the judgment delivered in his/her favour. In the case of [*Samvir Trustee Limited v Guardian Bank Limited*](#) [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits



of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

22. I note that the Applicants have not offered any amount of money as security for costs on the judgement amount or on the performance of the decree.
23. The Applicants cannot have a blanket stay of execution without providing reasonable security for the performance of the decree particularly on the decretal sum.
24. Consequently, I do find that the Applicants are entitled to pursue their appeal on merit. I do allow the application dated 28th January 2025 in the following terms:
 - a. Leave is granted to the Applicants to file an appeal out of time against the judgment delivered by the Hon. D. Kuto (SPM) on the 29th February 2024 in Mavoko Chief Magistrates Court Civil Case No. 699 of 2020 *Francis Ngaruiya Kariuki - v- Beatsyl Enterprise Limited & Commercial Bank of Africa Limited*.
 - b. The draft Memorandum of Appeal annexed to the application to be deemed as properly filed upon payment of the requisite court fees.
 - b. The Applicants to compile, file and serve the Record of Appeal within Forty-Five (45) days of this ruling in default the appeal to stand dismissed.
 - d. Execution of the judgment/decreed of Hon. D. Kuto (SPM) dated 29th February 2024 in Mavoko Chief Magistrates Court Civil Case No. 699 of 2020 is hereby stayed pending the hearing and determination of the intended appeal on condition that the Applicants shall deposit the entire decretal sum into a joint interest earning bank account to be opened in a reputable commercial bank in the names of both parties’ advocates within sixty (60) days hereof, in default of compliance, the orders staying execution herein shall lapse and the Respondent shall be at liberty to execute.
25. It is hereby so ordered.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 29TH JULY 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 29TH JULY 2025

In the presence of :

Ms. Omollo for Ms. Kahiti for Appellant

Ms. Abobo for Respondent

Milly..... Court Assistant

