



REPUBLIC OF KENYA



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**Gamaliel v Bunde (Miscellaneous Application E037 of 2024)  
[2024] KEHC 11258 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11258 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION E037 OF 2024  
SM MOHOCHI, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**CHRISTOPHER AMUGA GAMALIEL ..... APPLICANT**

**AND**

**OLGA AWINO BUNDE ..... RESPONDENT**

**RULING**

1. Before this Court for determination is the Applicant's Notice of Motion Application dated 20<sup>th</sup> February, 2024 brought under Order 51 Rule 1, Order 50 Rule 6 and Order 42 Rule 6(2) of the [Civil Procedure Rules](#) as well as Sections 1A, 3A and 79G of the [Civil Procedure Act](#) wherein he seeks the following orders:-
  - i. Spent
  - ii. Spent
  - iii. That the Honourable Court be pleased to issue an order of stay of the Judgement delivered by Honorable E. Nderitu on 5<sup>th</sup> December, 2023 pending hearing and determination of this Application and the Appeal;
  - iv. That costs of this Application be provided for.
2. The Application is predicated on the grounds on its face and the Supporting Affidavit of Sally Mbeche, advocate, wherein she deposes that the Respondent being dissatisfied by the decision in Molo CMCC Cause No E105 of 2023 delivered on 5<sup>th</sup> December, 2023 preferred an appeal against it. She nevertheless acknowledged the appeal ought to have been filed on or before 19<sup>th</sup> December, 2023 and the delay was not intentional or deliberate since parties were negotiating on lowering the award.
3. It was averred that it would be in the interest of justice for the Court to grant leave to file the appeal out time. She also deposed that the thirty (30) days stay of execution granted have since lapsed and there



is high risk of execution by the Respondent. That if stay is not granted the appeal will be rendered nugatory. And the Respondent will suffer substantial and irreparable loss. It was also her contention that there were sufficient reasons for appeal therefore arguable and that the Respondent was also willing to abide by any considerations to be imposed by Court.

4. The Respondent in opposition, filed Grounds of Opposition dated 21<sup>st</sup> May, 2024 and contended that the application is misplaced, misconceived, fatally defective and strange.
5. Pursuant, to the directions of 11<sup>th</sup> June, 2024 the Applicant filed written submissions on 11<sup>th</sup> Jul, 2024 while the Respondent filed her submissions on 18<sup>th</sup> June, 2024.

### **Applicant's Submissions**

6. It was the Applicant invoked Section 79G of the [Civil Procedure Rules](#) and the decision in [Nicholas Kiptoo Arap Korie slat v Independent Electoral and Boundaries Commission & 6 Others](#) [2013] eKLR to submit that provided sufficient reasons had been advanced an appeal can be admitted out of time.
7. The reason for delay was submitted to be unfruitful negotiations to lower the decretal amount. On Prejudice it was submitted the Respondent is not likely to suffer prejudice whereas the Applicant stands to suffer prejudice since his appeal has high chances of success. That the Applicant was willing to deposit the whole decretal sum in Court.
8. That the draft memorandum of appeal demonstrates how the trial magistrate erred in awarding the damages and if appeal is determined on merits it has high chances of success. It was argued that an arguable appeal is one that raises issues not one that should succeed.

### **Respondent's Submissions**

9. The Respondent relied on the case of [Thuita Mwangi v Kenya Airways Ltd](#) [2003] eKLR where the Court of Appeal expressed itself on the considerations in exercising discretion on extension of time to file Appeal out of time thus:
  - a. period of delay;
  - b. reason for the delay;
  - c. arguability of the appeal;
  - d. degree of prejudice likely to be suffered;
  - e. the importance of compliance with time limits and
  - f. the effect on the administration of justice or public interest involved.
10. The Respondent further submitted that the period for delay was more than three (3) months. That the Applicant's contention that the delay was because of negotiations to lower the award has not been supported by proof therefore there's no reason for the delay.
11. It was also the Respondent's submissions that the Applicant's failure to seek leave to file appeal out of time is fatally which fatally omission cannot be cure by Article 159 of the [Constitution](#).
12. Reliance was placed in the decisions in, [Chelashaw v Attorney General & Another](#) [2005] 1EA 33, [Onjula Enterprises Ltd v Sumaria](#) [1986] KLR 651 and [Nicholas Kiptoo Arap Korie slat v Independent Electoral and Boundaries Commission & 6 Others](#) [2013] eKLR. The Courts in these decisions held that rules and procedures are the backdrop of law enforcement and administration of justice and that Article 159 of the [Constitution](#) is not a tool to destroy procedure.



## Analysis and Determination

13. I have refined two (2) issues for consideration as follows;
- i. Whether the Applicant has satisfied the conditions for invoking of the discretion of Court to extend time to file the Appeal?
  - ii. Whether the Applicant is entitled to grant of Stay against execution orders?
14. In considering the first issue it is worthy to locate the law, Section 95 of the Civil Procedure Act, provides for the enlargement of time;
- “Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
15. Order 50, rule 6 provides for the Power to enlarge time:
6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the Court orders otherwise.
16. In the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR the Supreme Court enunciated the principles for consideration thus:
- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
  - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court
  - iii. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - vi. Whether the application has been brought without undue delay; and
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
17. In the circumstances of the instant case, the Applicant gave reasons for the delay which she relied on to urge this Court to have in mind when considering the application. The applicant on whose behalf Sally Mbeche, Advocate, swore the Supporting Affidavit wherein she deposes that, the Respondent being dissatisfied by the decision in Molo CMCC Cause No E105 of 2023 delivered on 5<sup>th</sup> December, 2023 preferred an appeal against it. She nevertheless acknowledged the appeal ought to have been filed on or before 19<sup>th</sup> December, 2023 and the delay was not intentional or deliberate since parties



were negotiating on lowering the award. It is noteworthy that no evidence is provided to argue the alleged mutual negotiations by the parties to lowering the award post judgment. This reason is unsatisfactory and implausible.

18. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, the Court was of the view that:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

19. This Court is unpersuaded that, unfruitful negotiations to lower the decretal amount after judgment is a valid reason to extend time to Appeal against judgment. It should be noted that this reason has no place in the Civil Procedure and the Validity of a judgment remains alive unless set aside or until executed.

20. From the provisions of the law and authorities cited above it is evident that the Application for extension of time fails for want of merit.

21. Order 42(6) of the *Civil Procedure Rules* provides for the principles for grant of stay of execution pending appeal;

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 order 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 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.
- (3) Notwithstanding anything contained in sub-rule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule, an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with.



22. This Court finds that, with the failing of the Applicant to provide plausible and satisfactory reason for extension of time, it will be an academic exercise to consider if there is basis for grant of stay against execution in the absence of a substantive Appeal.
23. Considering an Application for stay against execution of judgment in the absence of a substantive Appeal would amount to granting an equitable relief without a cause.
24. The upshot of my analysis is the Application dated 20<sup>th</sup> February, 2024 is without merit and the same is dismissed.
25. Costs of this Application are hereby awarded to the Respondent

It is So Ordered.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**MOHOCHI S.M**

**JUDGE**

