



REPUBLIC OF KENYA



**Kalume v Brumerloh (Miscellaneous Application E049 of 2024)
[2025] KEELC 3190 (KLR) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3190 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS APPLICATION E049 OF 2024**

EK MAKORI, J

APRIL 2, 2025

BETWEEN

EVANS TSUMA KALUME APPLICANT

AND

RENA BRUMERLOH RESPONDENT

RULING

1. The applicant, in an application dated 18 November 2024, applied to this court requesting permission to appeal out of time and for a stay of execution pending the appeal.
2. The Respondent opposes the Motion, as indicated in the Replying Affidavit sworn by the Respondent on 24 January 2025, along with the submissions made herein.
3. The application raises two main issues:
 - a. Whether leave to appeal out of time should be granted to the applicant.
 - b. Whether a stay of execution ought to be issued in the interim.
4. From the submissions from the parties through their respective counsels, under Section 79G of the *Civil Procedure Act*:

“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 to the appellant 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 a good and sufficient cause for not filing the appeal in time.”



5. The wording of Section 79G of the *Civil Procedure Act* requires that, before the court considers an extension of time, the applicant must demonstrate to the court that they have good and sufficient cause for filing the appeal out of time.
6. This principle, as established in the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018] eKLR, dictates that an applicant seeking an enlargement of time to file an appeal or admission of an already filed appeal must demonstrate a good cause for doing so.
7. As submitted, the respondent accurately cited the Supreme Court's decision in *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 others* [2014] eKLR, which outlined the principles relevant to an application for leave to appeal out of time. The court stated, inter alia, that the underlying tenets a court should consider in exercising such discretion 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.
8. From the Memorandum of Appeal, the trial court's judgment, and the lower court proceedings, it should be evident that the appeal raises significant legal issues. Therefore, the appeal is likely to succeed. The courts have a duty to ensure that the factors considered align with the overriding objective of civil litigation, which is to achieve a just, expeditious, proportionate, and affordable resolution of disputes before the court.
9. The judgment being challenged was delivered on 19 December 2023. This court was approached on 18 November 2024 – almost a full year after the lower court's judgment. The reason proposed by the applicant is that he had neither gathered nor instructed his legal team to advise him on this appeal. This explanation is crucial in determining the merit of the application.
10. The respondent relies on the case of *Olivia Wamubu Kinyanjui v. Margaret Njeri Ndirangu* [2015] eKLR and submits that the applicant does not deserve to have the discretion exercised in his favor, as he has not sufficiently explained the delay in filing the appeal. The court, in that case, enunciated thus:

“Timelines are made to promote expeditious disposal of cases, and a party should not be denied adjudication of his claim on merits because of procedural defaults unless they cause prejudice to the opposite party that cannot be compensated with costs. See *Leo Sila Mutiso -vs- rose Hellen Wangari* – NAI C.A 225 of 1997. The applicant took over 90 days to bring this application. I agree with the Respondent that the Applicant and its advocates should have been more proactive and vigilant in following up the delivery of the ruling. In his submissions, the applicant did not urge the court, or even attempt to explain the inordinate delay.



In Court of Appeal Civil Application No NAI 98 of 2013 – Aviation Cargo Support Limited -vs- St. Mark Freight Services Limited an application for leave to file appeal out of time was denied on grounds that the applicant did not explain the inordinate delay of over six months to lodge the application. The applicant herein has neither told the court whether she has applied for the lower court proceedings or not. The court cannot be left to guess on what steps the applicant may have taken so as to persuade the court to exercise its discretion in its favour.”

11. In the same spirit, this court remains unconvinced that the applicant has provided sufficient reasons to justify extending the time to appeal due to the delay.
12. For Under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), an applicant should satisfy the court that:
 - a. Substantial loss may result to them unless the order is made;
 - b. That the application has been made without unreasonable delay; and
 - c. 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.
13. It is a well-established principle of law that execution is a lawful process, and it is not a basis for granting a stay of execution. The applicant is required to demonstrate how execution will irreparably affect them or alter the status quo to their detriment, thereby rendering the appeal nugatory. The appellant has failed to demonstrate substantial loss.
14. The respondent argues that the applicant was evicted in December 2024. He subsequently demolished his house and relocated all his materials and belongings, and there will be nothing to preserve pending appeal.
15. The respondent has since proceeded to build a perimeter wall fence, a sewer, and a house on the said property, incurring costs that translate into approximately Kshs. 3,000,000/-.
16. Having weighed both sides, I believe that the application dated November 18, 2024, has no merit and is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 2ND DAY OF APRIL 2025

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Marinda, for the Applicant.

Court Assistant: Happy

In the Absence of:

Mr.Obonyo, for the Applicant

