



REPUBLIC OF KENYA



**KENYA LAW**  
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**Odhiambo v TTW (Minor suing through next friend and mother JNW) & 2 others  
(Civil Appeal E007 of 2023) [2025] KEHC 2118 (KLR) (19 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2118 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPENGURIA  
CIVIL APPEAL E007 OF 2023  
RPV WENDOH, J  
FEBRUARY 19, 2025**

**BETWEEN**

**DANIEL ODHIAMBO ..... APPELLANT**

**AND**

**TTW (MINOR SUING THROUGH NEXT FRIEND AND MOTHER**

**JNW ..... 1<sup>ST</sup> RESPONDENT**

**TURKRIFT SHUTTLE SACCO LTD ..... 2<sup>ND</sup> RESPONDENT**

**DICKSON KIMANI KAMAU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. By the notice of motion dated 8/12/2023, the appellant/applicant, Daniel Odhiambo seeks the following orders
  1. Spent
  2. That this Honourable court be pleased to extend time for lodging of Memorandum of Appeal against the Judgment of the SPM, Kapenguria, dated 9/11/2023 in Kapenguria CMCC 3A/2021 (TTW, Minor suing through the next friend and mother). JNW versus Turkrift shuttle Sacco Ltd, Dickson Kamau, Daniel Odhiambo and Spring Valley Machinery Limited (third party).
  3. That the Memorandum of Appeal dated 8/12/2023 be deemed as duly filed;
  4. That pending hearing and determination of this application, there be a stay of execution of the Judgment made on 9/11/2023 in Kapenguria HCC 3A of 2021 and all subsequent orders entered against the applicant emanating therefrom;



5. That pending hearing and determination of the intended appeal, the applicant do avail a Bank Guarantee from Family Bank for the whole judgment of Kshs.126,550/=;
  6. That costs of this application do abide the appeal.
2. The grounds upon which the application is premised are that the applicant is dissatisfied with the lower court Judgment; that after delivery of judgment the applicant had to confer with the Insurer to find out if they wished to appeal and that occasioned the delay to file appeal; that there has been delay in getting a typed copy of the Judgment from the Magistrate's Court hence the need to seek extension of time; that the delay in appealing is not deliberate and a delay of two (2) days is not inordinate; that the trial court had allowed thirty (30) days stay which lapsed and unless an order of stay is granted, the intended appeal will be rendered nugatory and the appellant will suffer irreparable loss and damage.
  3. The application was supported by the affidavit of the applicant, Daniel Odhiambo which reiterated the grounds.
  4. The application was opposed and William Ndinya Omollo, Counsel for the Respondents swore a Replying Affidavit dated 12/1/2024 in which he contended that the application lacks merit and is an afterthought and meant to delay settlement of the matter because the applicant has not satisfactorily explained why he failed to lodge the appeal in time; that the Judgment was delivered in the presence of Counsel on 9/11/2023 and there is no proof that he applied for typed copy of Judgment or that there was a delay in getting the Judgment; that there was no requirement of a typed copy of Judgment before an appeal can be filed; that the prayer for stay is pending appeal, yet no appeal exists; that the grounds of appeal have not been demonstrated and that the decree being a monetary one, the court should exercise its discretion with great caution; that the Respondent should not be deprived of their fruits of judgment because the appellant has not demonstrated that he is deserving of the orders.
  5. Both Counsel filed submissions on the application.
  6. The applicant's Counsel filed submissions on 1/8/2024. On extension of time, Counsel submitted that timelines for filing the appeal lapsed on 8/12/2023 and the ten (10) days delay in getting instructions from the Insurer and copy of Judgment do not amount to inordinate delay. Counsel relied on the decision of Mombasa HCCA 120/2020 Paul Kiriga Mwanganyi –V- Kenya Wildlife Services and Another (2021) eKLR and Nairobi HCCA 71/2016 Charles Karanja Kiiru –V- Charles Githinji Muigwa
  7. As regards grant of an order of stay, Counsel considered the four prerequisites for grant of an order of stay as set out in Order 42 of the CPR which are:
    1. The court must be satisfied that substantial loss may ensue if the order is not granted,
    2. That the application has been brought without unreasonable delay;
    3. That the applicant will be prejudiced if an order of stay is not granted and the appeal will be rendered nugatory;
    4. That the applicant is willing to provide security for the due performance of the decree.
  8. On the question of substantial loss, counsel submitted that they are apprehensive that they will not recover the decretal sum from the 1<sup>st</sup> respondent if the orders are not granted and they will suffer loss if the appeal succeeds. Counsel relied on the decision of HC. Civil Application no. 238/2005 National Industrial Credit Bank Ltd –Vs- Aquinas Francis Wasike and Another where the court held that once the applicant alleges that the Respondent may be unable to repay the decretal sum if paid to him, the



evidential burden shifts to the Respondent to show that he has resources and will be able to repay the sum in the event the appeal succeeds.

9. On the issue of delay, it was submitted that the Judgment was delivered on 9/11/2023 and the application filed on 19/12/2023, a delay of only ten (10) days, which was not inordinate.
10. On whether the appeal will be rendered nugatory, Counsel relied on the case of Ishmael Kagunyi Tande –V- Housing Finance Company Kenya Ltd (2005) eKLR and Housing Finance Company Kenya Ltd –V- Sharok Kher Mohammed Ali Hirji & another (2015) eKLR. Counsel urged that the appeal is arguable as it raises triable issues as held in Kenya Tea Growers Association and Another –V- Kenya Planters & Agricultural Workers Union HCA 72/2001.
11. On security, Counsel urged that they are ready and willing to give a bank guarantee for Kshs.126,550/=.
12. The Respondent’s Counsel filed submissions on 2/8/2024. On the question of leave to file appeal out of time, Counsel reiterated that the applicant has not satisfactorily explained the delay in filing of the appeal.
13. As to whether the applicant will suffer irreparable loss; Counsel relied on the case of Meteine Ole Kilelu and 19 others -V- Moses K. Nailole (2009) eKLR in which it was held that the applicant has to demonstrate that the Respondent will be unable to repay the decretal sum if paid to him; that it is not enough for the applicant to state that he will suffer substantial loss because of the execution process, which is a lawful process;
14. On the offer of security; Counsel submitted that the applicant has not offered to deposit the decretal sum or half of it. Whether the appeal has high chances of success; Counsel urged that the applicant has not annexed any Memorandum of appeal to the application to demonstrate what the grounds of appeal are. He urged the court to allow the Respondent to enjoy the fruits of his judgment as there is no arguable appeal. Counsel urged the court to dismiss the application.
15. I have now considered all the grounds, the affidavit upon which the application is premised, the replying affidavit and the rival submissions.
16. Order 42 Rule 6 Civil Procedure Rules governs the grant of stay of execution pending Appeal. The grant of stay is an exercise of the court’s discretion upon the applicant satisfying certain criteria set out in Order 42 Rule 6. The conditions set out in the above order are so intertwined that failure to prove one of them will affect the court’s exercise of discretion in granting the order of stay as held in Mukuma -V- Abuogo (1988) eKLR. I will therefore go ahead to consider each of the pre-conditions.

### **Substantial Loss.**

17. As was held in James Wangalwa & another -V- Agnes Naliaka Cheseto (2012) eKLR, 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 where execution has been levied and completed, that is, the attached properties have been sold, it does not amount to substantial loss under order 42 Rule 6 CPR because execution is a lawful process.
18. The applicant must establish other factors that are likely to befall his appeal. The court discussed this issue in Silverstein -V- Atsango Chesoni (2002) 1KLR 867 where the court said “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”
19. In Equity Bank Ltd –V- Taiga Adams Company Ltd (2006) e KLR the court stated “in the application before me. The applicant has not shown or established the substantial loss that would be suffered if



this stay is not granted. The only way of showing or establishing substantial loss is by showing that ..... that if execution is carried out in the event the appeal succeeds, the respondent would not be in a position to pay reimburse as he/it is a person of no means. Here, no such allegation is made much less established by the appellant /applicant. I have read the affidavit of the Respondent and nowhere did the Respondent allude to his means or ability to reimburse the applicant if the decretal sum were paid to her and the appeal succeeds. In National Industrial Credit Bank Ltd –V- Aquinas Francis Wasike & another NRB. HCA 230/2005 the court stated thus

20. This court has said before and it would bear repeating that while the legal duty is an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay or repay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the Respondent or lack of them. Once an applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge”
21. In this case, having failed to demonstrate that she is a person of means, the applicant’s fears that the decretal sum may not be reimbursed in the event the appeal succeeds are crystalised.

**Delay:**

22. Whether the application was brought without delay. Justice Mwera in Mbogo Gatuiku –V- Attorney General HC 1983/1980 held that “even a delay of a day or two calls for an explanation.” The judgment herein was delivered on 9/11/2023 and the application was filed on 19/12/2023, a delay of about ten (10) days. The judgment having been delivered in the Respondents Counsel’s presence, there was no reason for the delay because a judgement is posted on the website at most seven (7) days after delivery. However, the explanation that the applicant’s Counsel was seeking instructions from the Insurer may be plausible in the circumstances and this court would hold that the delay in the circumstances was not inordinate.
23. On security, the applicant’s Insurer offered a bank guarantee for the decretal sum but I find the amount to be too small to avail a guarantee. Instead, the decretal sum should be deposited in a joint interest-earning account of both Counsel.
24. Regarding leave to file appeal out of time, Section 79G of the CPA gives the court discretion to enlarge time for filing appeal

Section 79G of the *Civil Procedure Act* stipulates that “any appeal from a subordinate court to the High Court must be filed within 30 days from the date of the decree or order being appealed against, excluding any time the lower court may certify as necessary for preparing and delivering a copy of the decree or order to the appellant; essentially setting the time frame for filing an appeal from a lower court to the High Court.”

25. The applicant has to demonstrate that he had a good and sufficient course. The court has to consider the period of delay, the reasons for the delay, the degree of prejudice to the Respondent if the order is granted and whether the matter raises matters of public importance. (See Edith Gichungu Koine –V- Stephen Nyaregi Thorths (2014) eKLR.
26. The court has already settled the issue of delay, that it was not inordinate in the circumstances
27. The applicant filed what I would refer to as a draft Memorandum of Appeal and he challenges both the issues of liability and quantum. Generally, I find these are triable issues.



28. The applicant sought to have the Memorandum of appeal dated 8/12/2023 to be deemed as properly filed. Courts have considered such questions before. In *Charles Karanja Kuria –V- Charles Githinji Muigwa* (2017) eKLR the court held as follows; -

Having expressed ourselves as herein above, the other issues that falls for consideration is whether the appeal filed out of time on 24/10/2014 could be deemed as being properly on record.” There is a plethora of authorities from the High Court which interpret the proviso to section 79G of the *Civil Procedure Act* to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted. Emukule Judge in *Gerald M’limbine –v- Josfin Kangangi* (2009) eKLR stated that, “my understanding of the proviso to section 79G is that an applicant seeking an appeal to be admitted out of time must in effect file such an appeal and at the same time seek leave of court to have the appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the stipulated period. To do so would actually be an abuse of the court’s process under Section 79B.” The applicant’s application is properly before the court. This court is fully aware of the right of the Respondent to enjoy the fruits of his judgment which has to be balanced against the applicant’s right of appeal.

29. Having considered all the above, this court is satisfied that the applicant is deserving of the orders sought and makes the following orders;

- (1) that there be an order of stay of execution of the judgment in CMCC 3A/2021 pending appeal;
- (2) that the memorandum of appeal filed herein and dated 8/12/2023 is deemed to be properly filed on condition the requisite court fees are paid within seven (7) days hereof.
- (3) The applicant do deposit the full decretal sum in a joint interest-earning account of both Counsel for the applicant and Respondent in a reputable financial institution within fourteen (14) days of this Ruling.
- (4) Costs to abide by the appeal.

The orders herein apply to HCA E008/2023.

**DELIVERED, DATED, AND SIGNED AT KAPENGURIA THIS 19TH DAY OF FEBRUARY, 2025.**

**R. WENDOH**

**JUDGE**

Judgment delivered in open court in the presence of

Applicant/Appellant – Mr. Amikanda

Respondent – N/A

Juma/Hellen – Court Assistants

