



REPUBLIC OF KENYA



**Onginjo v Lipesa (Miscellaneous Civil Application E001 of 2025)
[2025] KEHC 2137 (KLR) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
MISCELLANEOUS CIVIL APPLICATION E001 OF 2025**

DK KEMEL, J

FEBRUARY 13, 2025

BETWEEN

ERICK ODHIAMBO ONGINJO APPLICANT

AND

MANOAH MUSA LIPESA RESPONDENT

RULING

1. The Applicant filed an application dated 17/12/2024 seeking principally leave to file an appeal out of time against the judgment and decree of the court in Ukwala PMCC No. E073 of 2022 delivered on 11/9/2024 as well as an order of stay of execution of the said judgment and decree pending the hearing and determination of the intended appeal.
2. The application is supported by an affidavit sworn by Mary Ong'ong'a, learned counsel for the Applicant who averred *inter alia*; that the 30 days stay of execution lapsed thus exposing the Applicant to risk of execution; that the Applicant has a draft Memorandum of Appeal against the award of quantum of damages; that the delay to lodge appeal in time was caused by ongoing management wrangles in the insurance company which led to a court case vide Nairobi HCC No. E 328 of 2024 and which led to the delay in lodging the appeal; that the Applicant had in the meantime initiated negotiation with the Respondent's counsel regarding the decretal sums; that the delay is excusable; that the Applicant stands to suffer prejudice if the execution is not stayed as the Respondent's means are unknown and would not refund the sums in the event of success of the intended appeal; that the intended appeal raises triable issues; that the applicant is ready and willing to furnish a bank guarantee from Family Bank as security for the stay of execution pending the hearing and determination of the intended appeal; that the Respondent will not be prejudiced if the application is allowed.
3. The application was strenuously opposed by the Respondent. Mr. Omondi, learned counsel for the Respondent swore an affidavit dated 7/2/2025 wherein he averred *inter alia*; that the Respondent has never had any post judgment negotiations with the Applicant's counsel; that the issue of wrangles



in the Applicants insurer is a lame reason since despite the alleged wrangles the Applicant's counsels managed to file appeals in Kisumu and Busia and therefore they have no excuse for not filing the appeal regarding the Ukwala Law Courts matter; that the application has been filed after undue delay and should be dismissed with costs.

4. The application was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
5. I have given due consideration to the application, rival affidavits as well as the submissions. It is not in dispute that the Applicant did not lodge his appeal within the stipulated period of thirty days upon the delivery of the judgment sought to be appealed against. It is also not in dispute that the Respondent being the decreeholder is entitled to enjoy the fruits of the judgment. It is also not in dispute that Section 79G of the *Civil Procedure Act* allows a party to lodge an appeal out of time if an applicant demonstrates good and sufficient cause as to why the appeal could not be filed in good and sufficient time. I find the only issue is whether the application has merit.
6. The Applicant seeks to be granted leave to lodge appeal out of time and an order for stay of execution of the lower court judgment and decree pending the hearing and determination of the intended appeal.
7. As regards the issue of leave to lodge appeal out of time, the Applicant has presented a draft Memorandum of appeal as an indication that he is aggrieved by the judgment of the lower court regarding quantum of damages and that he seeks to be allowed to ventilate the same. The reasons for the delay is that there were squabbles within the insurance company management leading to the delay in instructing the advocates to lodge the appeal. The Applicant has further indicated that the said wrangles culminated in a Nairobi High Court Civil Case. The Applicant therefore requests this court to grant him leave to lodge his appeal out of time. He has further undertaken to furnish security for the due performance of the decree and that no prejudice will be suffered by the Respondent if the request is granted. The Respondent on the other hand has vehemently opposed the request for leave as he slept on his rights and ought to suffer for the inordinate delay in lodging his appeal in time. It was further contended that the Applicant's insurer had instructed its advocates to lodge appeal in some other matters in Kisumu and Busia and that no good reason has been given as to why the same advocates did not file the appeal here in Siaya in good time.
8. I have perused the lower court record and note that the impugned judgment was delivered on 11/9/2024 while the Applicant moved to this court on 17/12/2024 which is a period of about three months. I find the said period not to be too long to amount to an inordinate delay, and further cannot be said to be over the edge. The explanation offered by the Applicant appears plausible in my view and that the Respondent's discomfiture can comfortably be taken care of by an award of costs. It is in the interest of justice that each party should be given their day in court. Section 79G of the *Civil Procedure Act* provides as follows:

“Every appeal from a subordinated 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 the computation of such period any time which the lower court may certify as having been requisite for 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 good and sufficient cause for not filing the appeal in time.”

The Applicant has rendered a plausible explanation for the delay and which warrants this court to grant the Applicant leave to lodge his appeal out of time.



9. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR derived the following as the underlying principles that a court should consider in the exercise of discretion in regard to extension of time:

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- “1. 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.
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
4. Whether there is a reasonable delay. The delay should be explained to the satisfaction of the court.
5. Whether there will be prejudice suffered by the Respondent if the extension is granted.
6. Whether the application has been brought without undue delay; and whether in certain cases like election petitions public interest should be considered for extending time.”

Being guided by the foregoing authority as Juxtaposed with the explanation rendered by the Applicant, I am satisfied that Applicant has made out a case for the grant of leave to lodge appeal out of time.

10. As regards the issues of stay of execution of the judgment or decree pending determination of the intended appeal, learned counsel for the Respondent submitted that in the absence of an appeal then an order of stay should not be granted as the same is premature. It was also submitted that the Applicant’s advocate should not have deponed the affidavit since matters of fact are served for the client and not the advocate. It was finally submitted that the purported bank guarantee offered as security has since expired as it was assured in 2023 to last for six months which has since lapsed. Learned counsel for the Applicant submitted that substantial loss will be suffered if the stay is not granted since the Respondent’s means are unknown and that the sums might not be refunded once the appeal succeeds and further the appeal will be rendered nugatory. On the issue of delay, in filing the application, it was submitted that the delay was due to some wrangles within the Applicant’s insurer which led to the filing of a suit before Nairobi high court. Finally, it was submitted that the bank guarantee as security was proper as the same is good like any other security and should be accepted.

I have considered the rival depositions and submissions regarding whether or not the applicant has satisfied the conditions imposed by Order 42 Rule 6 (2) of the *Civil Procedure Rules*.

On whether the application has been filed within without undue delay, it has already been observed in the preceding paragraphs that the period of about three months was not inordinately late and that the prayer for leave to lodge appeal out of time has been found to have merit.

As regards the issue of substantial loss, the applicant has averred that he stands to suffer loss if the money is paid to the Respondent whose means are unknown and that he might not refund the same in the event of success of the appeal. It is noted that the Respondent did not provide evidence to the effect that he has the means with which to refund the Appellant in the event of success of the appeal. The Applicant has claimed that the sums involved is not small by any standards and that he stands



to be prejudiced if the stay is not granted and the appeal succeeds in the end. The issue of prejudice in my view cuts both ways in that the Respondent is entitled to the fruits of the judgment while the Applicant is entitled to ventilate his appeal. There is need to strike a balance so as to ensure that the interest of the parties are taken care of. The deposit of security is the cure to the parties' concerns. However, the Applicant's bank guarantee issued in 2023 which lasts for six months has since expired. The Applicant did not file a supplementary affidavit annexing a new bank guarantee. That being the position, I find that an order that the Applicant deposits the decretal sum plus assessed costs in a joint interest earning account in the names of both advocates pending determination of the intended appeal would be appropriate.

In view of the foregoing, I find that the Applicant has satisfied the conditions imposed by Order 42 Rule 6 of the Civil Procedure Rules to warrant the grant of the orders.

11. In the result, it is my finding that the Applicant's application dated 17/12/2024 has merit. The same is allowed in the following terms:
 - a. The Applicant is granted leave to file an appeal out of time and that the Memorandum of Appeal be filed and served within the next ten (10) days from the date hereof.
 - b. An order of stay of execution of the judgment and decree in Ukwala PMCC No. E073/2022 is hereby granted upon the Applicant depositing the decretal sum plus assessed costs into an interest earning account in the names of both advocates within the next thirty (30) days from the date of this ruling failing which the stay shall lapse.
 - c. The cost of the application shall abide in the intended appeal.

DATED AND DELIVERED AT SIAYA THIS 13TH FEBRUARY, 2025.

D. KEMEI

JUDGE

In the presence of:

M/s Turgat for M/s Ongong.....for Applicant

Omondi.....for Respondent

Ogendo.....Court Assistant

