



REPUBLIC OF KENYA



**Shikunzi v Imbongo & another (Civil Appeal E255 of 2024)
[2025] KEHC 1814 (KLR) (14 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1814 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E255 OF 2024
RN NYAKUNDI, J
FEBRUARY 14, 2025**

BETWEEN

ELPHAS SHIKUNZI APPLICANT

AND

JULIUS HAZRON IMBONGO 1ST RESPONDENT

ALEX GITHINJI 2ND RESPONDENT

RULING

Representation:

Kimondo Gachoka & Co. Advocates

M/s Alwang'a & Co. Advocates

1. What is pending before me for determination is a Notice of Motion Application dated 17th December 2024 where the Applicant is seeking the following orders;
 - a. Spent
 - b. That the Honourable Court be pleased to extend time for lodging a Memorandum of Appeal against the Judgement of the Hon. Keyne Gweno made on 21st June 2024 in Eldoret CMCC No. 935 of 2018; Elphas Shikunzi Vs Julius Hezron Imbongo & Alex Githinji.
 - c. That the Memorandum of Appeal dated 21st June 2024 be deemed as properly filed.
 - d. Spent
 - e. That pending the hearing and determination of the intended appeal and under the Applicant herein do avail security by way of a Bank Guarantee from Family Bank for the whole judgement of sum of Kshs. 350,000/=



- f. That the costs of and incidentals to this application abide the result of the appeal.
2. The Application is based on the grounds on the face of it summarized as follows:
- a. That judgement was delivered in Eldoret CMCC No. 935 of 2018 on 21st June 2024 whereby the Plaintiff was awarded a Net Award Kshs. 350,000/= exclusive of interests and costs.
 - b. That the Appellant/Applicant being dissatisfied with the Judgement has instructed its advocates to institute an Appeal against the said judgement.
 - c. That the Appellant/Applicant being dissatisfied with the Judgement prepared the Memorandum of Appeal dated 21st June 2024 within the required timelines.
 - d. That this being a road traffic accident claim with the instructing client being Direct Line Assurance, was faced with challenges whereby their accounts were frozen by the Insurance Regulatory Authority which made payments of court fees impossible.
 - e. That the said delay in filing the Appeal was not by want and/or negligence but the same was beyond the Applicant's control.
 - f. That due to the audit and heightened surveillance by the Authority, communication with insurers was strained and/or broken down hence a delay in approval of payment and/or release of money to facilitate filing fees.
 - g. That the 30 days granted for stay of execution as well as the time for lodging the appeal lapsed without filing the Appeal and the subsequent Application for stay pending the hearing and determination of the appeal hence the need to seek an extension of time within which to lodge an appeal.
 - h. That no prejudice will be occasioned upon the Respondent if the Application herein is allowed and the orders sought are granted.
 - i. That delay in filing this appeal was not deliberate and has been explained.
 - j. That the 30 days stay of execution granted by the trial court has since lapsed and unless stay of execution is granted the Applicant's application and consequently the Appeal will be rendered nugatory and the Appellant/Applicant will suffer irreparable loss and damage.
 - k. That the application has been brought without unreasonable or undue delay.
 - l. That the Appellant/Applicant has just but issued instructions to their advocates to appeal the said judgement which intended appeal has high chances of success.
 - m. That the Appellant/Applicant is reasonably apprehensive that the Respondent as Decree Holder, may proceed and levy execution against them as the 30 days stay period granted by the trial court has lapsed several days before the lodging of this application.
3. The Application is supported by the annexed affidavit dated 17th December 2024 sworn by Elphas Shikunzi, the Applicant herein which contents I have and considered.

Analysis and Determination

4. I have considered the applicant's notice of motion, its supporting affidavit and annexures thereto and there are two sole issues of determination



- a. Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;
 - b. Whether the applicant has met the prerequisite for grant of stay of execution pending appeal; Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time
5. The legal framework governing leave to file an appeal out of time is Section 79G of the [Civil Procedure Act](#) which 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.

6. 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 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 Vs William Muthama Kitonyi* [2018] eKLR 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.
7. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat Vs 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.
8. Similarly, in the case of *Paul Musili Wambua vs 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.”

9. Applying the above principles to the present case, the judgment herein was delivered on 21st June 2024 and the applicant filed the current application on 17th December 2024. This is outside the time limited for filing an appeal. The applicant has attributed the delay in filing his appeal to the following;
 - a. That this being a road traffic accident claim with the instructing client being Direct Line Assurance, was faced with challenges whereby their accounts were frozen by the Insurance Regulatory Authority which made payments of court fees impossible.
 - b. That the said delay in filing the Appeal was not by want and/or negligence but the same was beyond the Applicant’s control.
 - c. That due to the audit and heightened surveillance by the Authority, communication with insurers was strained and/or broken down hence a delay in approval of payment and/or release of money to facilitate filing fees.
10. In my view, the reasons for the delay have been satisfactorily explained to the court as required by the law. With view of this, the applicant has given plausible reasons for the delay in filing the appeal. I have perused the intended Memorandum of Appeal and the judgment of the trial court and noted that the appeal does raise pertinent issues of law. As such, the appeal can be said to be arguable.
Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.
11. 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;
 - 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.
12. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
 - a. Substantial loss may result to him/her 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. Substantial loss was clearly explained in the case of James Wangalwa & Another Vs 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.

14. The applicant in his affidavit explains on how he stands to suffer substantial loss. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show the manner in which execution will irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory. The appellant has demonstrated substantial loss in my considered view.

15. Similarly, in Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others [2016] eKLR the Court of Appeal expounded on stay of execution stating:

In Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows: -

The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.

The same reasoning was applied in the case of Raymond M. Omboga vs Austine Pyan Maranga (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter: -

The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order.... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

Has the application has been made without unreasonable delay.

16. Judgment was delivered on 21st June 2024 and the applicant filed the instant application on 17th December 2024. It has taken the applicant approximately 5 months between the date of judgment delivered in the trial court and the time when he filed the instant application. It is therefore my



considered view that the delay is not inordinate and inexcusable provided it is explained to the satisfaction of the court.

Security of costs.

17. The purpose of security was explained in the case of Arun C. Sharma vs 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.

18. From the foregoing decisions, it is evident that the issue of security is discretionary and it is upon the court to determine the same. Notably, in his application, the applicant stated that he is willing to offer security in the form of a bank guarantee if called upon by this Honourable Court to do so.

19. It is imperative that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of Samvir Trustee Limited vs 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.”

20. The court in granting stay has to carry out a balancing act between the rights of the parties. The issue that arises is whether there is a just cause for depriving the respondents their right of enjoying their judgment. Upon perusal of the grounds of appeal and without going into the merits of the appeal noted that they do raise arguable points of law.

21. Having found that the applicant has satisfied the requirements of extension of time to appeal and that he has met the threshold for grant of stay pending appeal, I reach the conclusion that this applicant ought to pass.

22. Accordingly, it is my considered view that the application is merited and the same is allowed as prayed. It is hereby so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 14TH DAY OF FEBRUARY, 2025

.....

R. NYAKUNDI

JUDGE

