



Edung v Simon (Suing as the administrator & legal representative of the Estate of Clent Pkoror Pkonyang - Deceased) (Civil Appeal E006 of 2024) [2025] KEHC 3421 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3421 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CIVIL APPEAL E006 OF 2024
RPV WENDOH, J
MARCH 20, 2025**

BETWEEN

DANIEL EDUNG APPELLANT

AND

PAULINE CHEBET SIMON (SUING AS THE ADMINISTRATOR & LEGAL REPRESENTATIVE OF THE ESTATE OF CLENT PKOROR PKONYANG - DECEASED) RESPONDENT

RULING

1. For determination is the application dated 19/2/2024 seeking the following orders;-
 1. That the court be pleased to extend time for lodging of a Memorandum of Appeal against the Judgment of Hon. B.O Ondego, Chief Magistrate made on 30/11/2024 in Kapenguria CMCC.288/2020, Pauline Chebet Simioni (suing as administrator and legal Representative of Estate of Clement Simion – deceased);
 2. That there be stay of execution of the Judgment made on 30/4/2024 and all consequential orders entered against the appellant;
 3. That the applicant do avail security by way of bank guarantee from Family Bank for the whole judgment sum.
 4. That costs to abide the appeal.
2. The application is premised on grounds found in the body of the application and an affidavit sworn by the applicant, Daniel Edung.
3. The grounds are reiterated in the supporting affidavit and they are that after delivery of judgment on 30/4/2024, the counsel was unable to trace the applicant for instructions for a period of two months;



that by the time the applicant was found, the time for filing an appeal had lapsed on 29/5/2024; That there was also a delay in getting a copy of the judgment because proceedings had not been typed; that the delay was not deliberate hence, he seeks extension of time; that the 45 days stay that had been granted by the trial court has lapsed and the applicant will suffer irreparable loss and damage if an order of stay is not granted; that the Respondent has not furnished anything to court to prove that she is of sound financial standing and is able to repay the decretal sum if the appeal succeeds; the appellant deponed that the Insurer is ready to provide security by way of a Bank guarantee from Family Bank.

4. The application was opposed through the Affidavit of Pauline Chebet Simioni the Respondent. She deponed that the applicant wants to deny her enjoyment of fruits of her judgment; that the 45 days stay granted to the applicant lapsed and she has no obligation to provide her financial standing, since she has a judgment in her favour; that the applicant has failed to give a satisfactory explanation for the delay because, he had a duty to find out from his advocate what was happening in this case.
5. Both Counsel filed submissions which I have duly considered. The issues for consideration are twofold;
 1. Whether the applicant has established good grounds for extension of time to file the appeal.
 2. Whether the applicant has met the threshold for grant of a order of stay of execution.
6. Section 79G, of the *Civil Procedure Act* gives the court discretion to enlarge time for filing appeals out of time. Section 79G CPA provides as follows;79G. TIME FOR FILING APPEALS FROM SUBORDINATE COURTS- “Every appeal from a subordinate court to the High Court shall be filed within a period of thirty (30) 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 good and sufficient cause for not filing the appeal in time.
7. The exercise of the court’s discretion is governed by certain principles which the Supreme Court set out in the case of Mombasa County Government -V- Kenya Ferry Services & Another (2019) eKLR as follows;-

“25 Concerning extension of time, this court has already set the guiding principles in the Nick Salat case as follows:

“... It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.

“.....we derive the following as the underlying principles that a court should consider in exercising such discretion:

1. Extension of time is not a right of a party. It is equitable remedy that is only available to a deserving party, at the discretion of the Court;
2. A party who seeks 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. Where there is a reasonable (cause) for the delay, (the same should be expressed to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondent, if extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time”
8. The applicant’s explanation for the delay is that he had changed his phone numbers and could not be traced by the advocates to give instructions on the appeal. As correctly submitted, the applicant (litigant) has a duty to follow up his case with the advocate and not just sit back and let the advocate do everything. The principle was captured in *Habo Agencies Limited -V- Wilfred Odhiambo Musingo* (2015) eKLR where the court said,
- “Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel”,
9. Again in *Bi-Mach Engineers Limited -V- James Kahoro Mwangi* (2011) eKLR, the court said
- “The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up on the matter with his erstwhile advocates”.
10. The above decisions underscore the responsibility placed on the litigant to follow up on his matter.
11. In the instant case, the delay was about six (6) weeks. It was not explained how the counsel ultimately got hold of the applicant. All things considered, however, even if the explanation for the delay of six weeks is not satisfactory, the court in the interest of justice allows an extension of time now that the applicant has shown keenness to prosecute the appeal and this court/will not falter that right of appeal
12. As regards the prayer for grant of an order of stay, the same is governed by Order 42(6) (1) Civil Procedure Rules which sets out the conditions to be met by an applicant before an order of stay can be granted and they include;
1. That substantial loss may result to the applicant unless the order of stay is granted;
 2. That the application has been made 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.

On substantial loss;

13. The applicants submitted that the applicant will not be able to recover the decretal sum if paid to her; that the applicant will suffer substantial loss in the event the appeal succeeds because the Respondent will not be able to repay the decretal sum of 617,225/= which is quite substantial; that the Respondent has not demonstrated that she is a person of means and able to repay the applicants in the event the appeal succeeds. The applicant relied on the decision in *Civil application 230/2005 National Industrial Credit Bank Ltd -V- Aquinas Francis Wasike and Another*. The court said “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”

14. Earlier in the case of *Silverstein -V- Atsango Chesoni* (2002) IKLR 867, 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”
15. Guided by the above authorities, having shown that the applicant is apprehensive that the Respondent may not be able to repay the decretal sum, it is upon the Respondent to demonstrate that she is not a person of straw and is able to repay the said sum. I have read the replying affidavit of the Respondent and nowhere did the respondent allude to her means or ability to reimburse the applicant if the appeal succeeds. And the fears of the applicant have therefore crystalized.

Whether there was unreasonable delay.

16. The Judgment in this matter was delivered on 30/11/2024 and the instant application filed on 19/7/2024, The delay was for a period of about six (6) weeks. Justice Mwera in *Mbogo Gatuiku -V- Attorney General HCC 1983/1980* held that “even a delay of a day or two calls for an explanation” whether or not there has been an unreasonable delay depends on the peculiar circumstances of each case. The court has accepted the explanation given by the applicant that he could not be traced for sometime because he did not have a phone and he resides far off in Lodwar.

Whether the applicant will be prejudiced if the application is not allowed and if the applicant has an arguable Appeal;

17. I have found earlier in this ruling that the applicant will suffer substantial loss if the decretal sum is paid to the Respondent. I have seen the draft Memorandum of Appeal filed herein where the applicant contests the whole award of damages which in my view is an arguable issue.

Provision of Security

18. At paragraph 16 of the supporting affidavit, the applicant deponed that the Insurer is ready and willing to furnish the court with a Bank guarantee issued by Family Bank as security for the entire decretal sum.
19. In the end, this court is satisfied that the applicant has demonstrated that he is deserving of the orders sought. The court makes the following orders; -
 1. That there be an order of stay of Execution in the judgment in CMCC NO. 28B/2020 pending appeal;
 2. That the Memorandum of appeal filed herein and dated 19/7/2024 is deemed as properly filed on condition that the requisite court fees is 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 twenty one (21) days of this Ruling;
 4. The Record of Appeal be filed and served within forty (45) days of filing the Appeal.
 5. The Applicant is to bear costs of this application.



DELIVERED, DATED, AND SIGNED AT KAPENGURIA THIS 20TH DAY OF MARCH, 2025.

R. WENDOH

JUDGE

Ruling delivered in open court in the presence of

Applicant/Appellant – Mr. Amihanda

Respondent – M.s Aisha H/B for Ms. Cheruto

Juma/Hellen – Court Assistants

