



REPUBLIC OF KENYA



KENYA LAW
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**Nyasani v Ochiemo (Civil Appeal E254 of 2024)
[2025] KEHC 3464 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3464 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E254 OF 2024
RN NYAKUNDI, J
MARCH 21, 2025**

BETWEEN

GEOFFREY NYASANI APPELLANT

AND

VICTOR JUMA OCHIENO RESPONDENT

RULING

1. By a Notice of Motion dated 17th December, 2024 expressed to be brought under the provisions of section 1A, 3A, 79G, 95 of the *Civil Procedure Act*, Order 42 Rule 6 Order 51 Rule 1 of the Civil Procedure Rules, Order 50 Rule 5, Order 22 Rule 22(1) and Art. 159(2), the Applicant seeks the following orders:
 1. Spent.
 2. That the Honourable court be pleased to extend time for lodging of a Memorandum of Appeal against the judgment of the Hon. P.N Areri made on 2nd May, 2024 in Eldoret CMCC No. 866 of 2018; Geoffrey Nyasani v Victor Juma Ochiemo.
 3. That the Memorandum of Appeal dated 13th May, 2024 be deemed properly filed.
 4. That pending the hearing and determination of the application herein, there be a stay of execution of the judgment made on 2nd May, 2024 in Eldoret CMCC No. 866 of 2018 and of all subsequent orders entered against the Appellant/Applicant emanating therefrom.
 5. That pending the hearing and determination of the appeal herein, there be stay of execution of the judgment made on 2nd May, 2024 in Eldoret CMCC No. 866 of 2018 and of all subsequent orders entered against the Appellant/Applicant emanating therefrom.



6. That pending the hearing and determination of the intended appeal and under the applicant herein do avail security by way of Bank Guarantee from Family Bank for the whole judgment sum of Kshs. 700,000/=.
7. That the costs and incidentals to this application abide the result of the Appeal
2. The application is premised on the grounds therein and it is further supported by the Affidavit sworn by the Applicant on the same date.
3. The applicant contends that judgment was delivered in Eldoret CMCC No. 866 of 2018 on 2nd May, 2024 whereby the Plaintiff was awarded a Net Award of Kshs. 700,000/= exclusive of costs and interests.
4. That the Appellant/Applicant being dissatisfied with the judgment has instructed its advocates to institute an appeal against the said judgment.
5. That the Appellant/Applicant being dissatisfied with the judgment prepared the Memorandum of Appeal dated 13th May, 2024 within the required timelines.
6. That this being a road traffic accident claim with the instructing client being Directline Assurance, was faced with challenges whereby their accounts were frozen by the Insurance Regulatory Authority which made payments of court fees impossible.
7. That the said delay in filing the Appeal was not by want and/or negligence but the same was beyond the Applicant's control.
8. 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.
9. The applicant further contended that the 30 days stay 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 the appeal.
10. That no prejudice will be occasioned upon the Respondent if the application herein is allowed and the orders sought granted.
11. That the delay in filing this appeal was not deliberate and has been explained.
12. 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.

Replying Affidavit

13. In response to the application, the Response swore a replying affidavit on 27th January, 2025 in which he deposed as follows:
 - a. That on or about 2nd May, 2024 judgment was entered in our favor as against the Defendants/applicants herein in the sum of Kshs. 565,912/= and the defendant was given 30 days stay of execution.



- b. That the applicants filed a memorandum of appeal being ELDORET HIGH COURT CIVIL APPEAL NO E254 OF 2024 and the same was served upon our advocates as an annexure to their application dated 17th December, 2024.
 - c. That I am aware that the applicant had valid insurance cover with Directline Assurance Company Ltd vide policies number 09009424.
 - d. That the applicant has not demonstrated that I am impecunious hence undeserving to be paid the decretal dues.
 - e. That the applicant has not demonstrated that I am impecunious hence undeserving to be paid the decretal dues.
 - f. That in any event, the Application does not meet the requirements for grant of stay pending appeal in that:
 - i. The application has not put facts in the affidavit to show that we will be unable to pay the decretal sum on conclusion of appeal is successful.
 - ii. There is no credible evidence or sufficient cause to enable the court reach a conclusion that the applicants will suffer substantial loss if the decretal sum is paid.
 - iii. The refusal of stay of execution will not render the appeal nugatory as that case involves a money decree capable of being repaid.
 - iv. The applicants are relying on mere apprehension which cannot be a basis of grant of stay without proof that we are impecunious.
 - g. That the Defendant has not given any valid reason in his memorandum of appeal as to why he finds the learned trial Magistrate erred in awarding the Respondent Kshs 565,912/= as the subject accident was admitted at the hearing and liability compromised at 80%:20% in favour of the plaintiff against the defendant.
 - h. That indeed, litigation must come to an end and a successful party allowed to enjoy fruits of their judgment and the delay would amount to undue hardships on our part.
 - i. That further we are people of means capable of offering restitution to the applicant even if the appeal succeeds and hence the applicant will not suffer irreparable loss.
 - j. That if security has to be offered then I depone that it should be deposit of the decretal sum as the bank guarantee is inappropriate.
 - k. That in any event we are amenable to have three quarters of the decretal sum paid to us and the balance deposited in a joint interest earning account.
14. On record, I have had sight of the respondent's submissions which I briefly highlight as hereunder:
15. Learned counsel Mr. Alwanga, representing the respondent, tendered written submissions in opposition to the instant application. Counsel argued that the provisions of Order 42 Rule 6 2(a) and (b) of the Civil Procedure Rules 2010 are clear on the requirements for stay of execution. He emphasized that no order for stay of execution shall be made under sub rule (1) unless the court is satisfied that substantial loss may result to the applicant unless the order is made, and that the application has been made without unreasonable delay, with appropriate security provided.



16. Mr. Alwanga submitted that the applicants have not met the threshold to warrant stay of execution as per the quoted provisions of the law. He raised several issues to urge the court to dismiss the application with costs to the respondents.
17. On the issue of whether substantial loss may result to the applicant if the orders sought are not granted, counsel argued that the mere fact that the applicants have filed an appeal or that execution proceedings might be commenced should not automatically be grounds for granting stay of execution. He contended that the applicants must demonstrate the kind of irreparable loss and damage they would likely suffer if execution is not stayed, which in his submission, they have failed to do.
18. Counsel further submitted that the applicants' claim regarding the respondents' unknown financial ability and unlikelihood to refund the judgment sum lacks foundation. He maintained that the law of evidence requires that one who alleges must prove, and the applicants' statement about the respondents' financial abilities being unknown is an unfounded allegation.
19. On this argument, counsel cited the decision in Nairobi HCC No. 830/2003 TRiton Petroleum Co. Ltd. v. Kirinyaga Construction (K) Ltd, where Ibrahim J. emphasized that there must be facts on affidavit showing the decree holder will be unable to pay the decretal sum if the appeal is successful.
20. Regarding whether the application was made without unreasonable delay, Mr. Alwanga noted that the application was served upon his advocates after the thirty days granted for stay had been exhausted. He pointed out that judgment notice was served upon the Applicant on 8th May, 2024, six days after judgment was issued, and urged the court to dismiss the application for having been brought after the lapse of the stay period.
21. On the issue of security, counsel noted that a consent on liability was recorded at 80%:20% in favor of the Plaintiff against the defendant. In the event the court upholds the defendants' application, counsel urged that the defendants/applicants should be ordered to pay half of the decretal amount (Kshs. 282,956/=) to the respondents with the other half deposited in a joint interest earning account.
22. Mr. Alwanga also submitted that the costs of the suit are estimated at Kshs 137,600/=, and since this amount is not contested, he prayed that it be paid together with three quarters of the decretal amount, totalling Kshs. 420,556/=.
23. In support of his submissions, counsel relied on several authorities including Kericho HCCA Misc App no 34 of 2011 (Eldoret Bus Services v William Kipkirui & Another), Bungoma HCCA 31 of 2012 (tabro Transporter Limited v Absalom Dova Lumbasi), And Kisumu Hcca Misc App No E022 of 2020 (benard Kigada & Another v Tom Ochieng Omollo). Counsel concluded by stating that for a money decree as in the present case, bank guarantee cannot suffice as security, as courts have held that deposit of the decretal sum should be done.

Analysis and determination.

24. This Court is confronted with an application that invites scrutiny of two cardinal principles in civil litigation: the statutory time limitations for appeal and the judicial discretion to stay execution pending appeal. At their intersection lies the delicate balance between procedural adherence and substantive justice. The applicant, having failed to file an appeal within the prescribed statutory period, now seeks the Court's indulgence to enlarge time and to stay execution of a judgment delivered in favor of the respondent. The law, while rigid in its framework, is not devoid of flexibility where compelling circumstances exist. It is against this backdrop that this Court must determine whether the applicant has established good and sufficient cause to warrant the exceptional exercise of judicial discretion in circumventing the statutory time limitations, and whether the established threshold for stay of



execution has been met. This court in arriving at a just determination is guided by statutory provisions, judicial precedent, and the overarching principle that procedural law should serve, not obstruct, the interests of justice.

25. Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the *Civil Procedure Act* provides that:

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

26. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR laid down the principles that govern the exercise of discretion in applications for extension of time as follows:

- “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 reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the respondents if the 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.”

27. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd*[2003] eKLR. They include the following:

- “i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;
- iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;



- v) The importance of compliance with time limits to the particular litigation or issue; and
- vi) The effect if any on the administration of justice or public interest if any is involved.”

28. The judgment was delivered on 2nd May, 2024 while the present application was filed on 17th December, 2024, more than seven months after the lapse of the 30 days stay of execution granted by the trial court. The appellant has submitted that the delay was occasioned by challenges faced by the insurance company, Directline Assurance, whose accounts were frozen by the Insurance Regulatory Authority, making payment of court fees impossible. The applicant further explains that due to the audit and heightened surveillance by the Authority, communication with insurers was strained and broken down, hence delaying approval of payment to facilitate filing fees. It is noteworthy that despite the Memorandum of Appeal being dated 13th May, 2024, it was not actually filed until 28th November, 2024, which does not negate the significant delay. However, the preparation of the appeal document within the initial timeline demonstrates the appellant’s intention to pursue the matter. While this delay is substantial, I am mindful that the circumstances described were largely beyond the applicant’s control. In the interest of justice and considering the explanation provided, I am inclined to allow the applicant leave to file his intended appeal. Section 79G permits the extension of time to file an appeal. Once the delay is convincingly explained, then time ought to be enlarged.

29. An application for stay invokes the discretionary powers of this court under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 that empowers the court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states as follows:

“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 applicant unless the order is made and that the application has been made without unreasonable delay; and
- 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.”

30. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise discretion and held that: -

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and



unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
31. On the issue of substantial loss, I note that this is a factual issue which must be raised in the supporting affidavit and further supported by evidence. The applicant in this case has not specifically demonstrated the substantial loss he will suffer should the court disallow his prayer for stay. In the case of *Machira T/A Machira & Co. Advocates v East Africa Standard* [2002] eKLR, Kuloba J. as he then was held that an applicant's ground for substantial loss must be specific and detailed as it is not enough merely stating that substantial loss will result or that if the appeal is successful it will be rendered nugatory.
32. The total decretal sum awarded in this case is Kshs. 700,000/= exclusive of costs and interests. Considering the nature of this road traffic accident claim and the consent on liability recorded at 80%:20% in favor of the plaintiff against the defendant, I find it reasonable that the applicant should deposit half the decretal amount in a joint interest earning account as security pending the hearing and determination of the appeal.
33. I do find that the applicant is entitled to pursue his appeal. I do allow the application dated 17th December, 2024 in the following terms:
 - a. Time is enlarged to the applicant to file an appeal against the judgment delivered in Eldoret CMCC No. 866 of 2018.
 - b. The Memorandum of Appeal dated 13th May, 2024 is deemed as properly filed.
 - c. Execution of the Judgment/decree in Eldoret CMCC No. 866 of 2018 is hereby stayed pending the hearing and determination of the appeal.
 - d. The applicant to deposit a sum of Kshs. 350,000/= (half of the decretal sum) in a joint interest earning account of both advocates within thirty (30) days hereof.
 - e. In default of complying with order number four (4), the orders staying execution shall lapse and the respondent shall be at liberty to execute.
34. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA CTS AT ELDORET THIS 21ST DAY OF MARCH 2025.

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R. NYAKUNDI
JUDGE

