



**Simba Bus Cea v Ooga & 2 others (Miscellaneous Application
E111 of 2024) [2025] KEHC 2793 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2793 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MISCELLANEOUS APPLICATION E111 OF 2024
WM MUSYOKA, J
MARCH 14, 2025**

BETWEEN

SIMBA BUS CEA APPLICANT

AND

MARGARET AOKO OOGA 1ST RESPONDENT

**JOHN OTIENO WANGA (SUING AS THE ADMINISTRATOR OF THE ESTATE
OF GEORGE OPIYO WANGA (DECEASED)) 2ND RESPONDENT**

SIMBA POA LIMITED 3RD RESPONDENT

RULING

1. The application, dated 6th August 2024, is for leave to file appeal out of time, and for stay of execution of the judgement and decree in Busia CMCCC No. 329 of 2021, of 10th June 2024.
2. The affidavit, sworn in support of the application, is by the Advocate for the applicant, the proposed appellant, Theldred Wesonga. She avers that after the judgement was delivered on 10th June 2024, they, as Advocates, notified their instructing client, Directline Assurance Company Limited, of the same, vide a letter of 12th June 2024. The said instructing client then communicated instructions to the Advocates, vide a letter, dated 26th July 2024, to go ahead and appeal, on quantum. By the time the letter of 26th July 2024 was being written, the time for filing appeal had lapsed, on 10th July 2024. It is claimed that there is an appeal on merit which would succeed. It is further averred that execution proceedings have commenced in the earnest, and that the applicant was ready to provide a bank guarantee as security for costs.
3. In support, several documents have been attached. The judgement of 10th June 2024 is one of them. The letters of 12th June 2024 and 26th July 2024 are the other. A draft of the memorandum of appeal is also attached, and so is an offer of a bank guarantee, dated 6th July 2023.



4. A response was filed to the application, vide a replying affidavit by Okwaro Winnie Anono, the Advocate for the 1st respondent, sworn on 2nd October 2024. It is averred that sufficient cause has not been shown for the delay in filing appeal.
5. Directions were given on 2nd October 2024, for disposal of the appeal by written submissions. Both sides have complied, by filing written submissions.
6. The written submissions by the applicant are dated 18th October 2024. They address 2 issues, grant of leave to file an appeal out of time and the grant of stay of execution pending appeal. It is argued that the guiding principle for enlargement of time, to institute an appeal, was outlined in section 79G of the *Civil Procedure Act*, Cap 21, Laws of Kenya. Paul Musili Wambua vs. Attorney General & 2 others [2015] eKLR (Koome, JA), Dilpack Kenya Limited vs. William Muthama Kitonyi [2018] eKLR (Odunga, J) and Nicholas Kiptoo arap Salat vs. Independent Electoral and Boundaries Commission & 7 others [2014] eKLR (Ibrahim & Wanjala, SCJJ), on the applicable principles. It is argued that the applicant would suffer substantial loss, should stay not be granted, and cites Order 42 rule 6(2) of the Civil Procedure Rules. As a condition for grant of stay, the applicant offers a security for costs, being a bank guarantee. Samvir Trustee Limited vs. Guardian Bank Limited [2007] eKLR (Warsame, J), Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Company Advocates & 2 others [2014] eKLR (Gikonyo, J) and Justin Mutunga David vs. China Road & Bridge Corporation (K) Limited [2019] eKLR (Nzioki wa Makau, J) are cited in support.
7. The written submissions by the 1st respondent are dated 24th September 2024. 2 issues are outlined. On whether the threshold for grant of leave to appeal, against the orders of 10th June 2024, out of time, has been reached, section 79G of the *Civil Procedure Act* is cited, to argue that extension of such time would be a matter subject to discretion, the exercise of that discretion is judicial, based on evidence and sound legal principles, and the burden is on the applicant to disclose the relevant material required by the court, to assist it assess whether to exercise the discretion with respect to the application, and it is submitted that the applicant herein has not provided such material, particularly to demonstrate the circumstances of the delay. First American Bank of Kenya Ltd v Gulab P. Shah & 2 others [2002] eKLR (Ringera, J), Dilpack Kenya Limited vs. William Muthama Kitonyi [2018] eKLR (Odunga, J) and Supa Hauliers Ltd vs. David Masinde Musungu [2015] eKLR (Aburili, J) are relied upon. On security for costs, it is argued that the applicant has not attached the bank guarantee alluded to in its filings. The 1st respondent submits that it would be entitled to the costs of the application, should the application be dismissed.
8. The only issue for me to determine is whether the application is merited.
9. The provision that the applicant relies on in his pursuit of leave, is section 79G of the *Civil Procedure Act*, which provides:

“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 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.”
10. The court has the discretion to extend time for filing an appeal, but the exercise of that discretion is not automatic. Sufficient cause must be shown, to warrant exercise of the discretion. The principles



were laid out in *Nicholas Kiptoo arap Salat vs. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR (Ibrahim & Wanjala, SCJJ), a decision of the Supreme Court, premised largely on the Supreme Court Rules, but of relevance to the exercise of similar discretion under the *Civil Procedure Act* and Rules. The points made there are that the extension of time is not a matter of right, for it is an equitable remedy, available only to a deserving party; a party seeking exercise of the discretion in its favour must endeavour to demonstrate that they deserve it; the discretion would be exercised on a case to case basis; where delay is alleged to be reasonable, then the reasonableness of the delay must be explained; it ought to be demonstrated that the other parties would not be prejudiced by the exercise of the discretion; and the application must be filed without undue delay.

11. The applicant admits that there was a 2-week delay in the bringing of the instant application. The explanation is that the instructing client was notified of the delivery of the judgement within 2 days, but delayed in relaying the instructions to appeal. The time to appeal lapsed on 10th July 2024, and the instructions to file appeal were borne in a letter written on 26th July 2024, and the application for leave was filed on 13th September 2024.
12. Has the delay been adequately explained? I do not think so. The affidavit in support of the application was sworn by the Advocate for the applicant, and not by an officer of the applicant or of the instructing client. The delay was not caused by the Advocate, it came from the clients. The Advocate has no capacity to explain delay by his or her client. That delay can only best be explained by the person causing it. There is no such explanation. The affidavit by the Advocate merely gives a narration about what the Advocate is privy to, in terms of her advice to the client on delivery of the judgment, and about the letter the client wrote to her instructing her to file appeal. The affidavit gives no explanation as to why the client did not act between 12th June 2024, when it was informed of the judgment, and 26th July 2024, when it wrote the letter to communicate the instructions to appeal. Between 12th June 2024, and 10th July 2024, when the time lapsed, was a duration of 28 days. The failure to act within that duration has not been explained at all.
13. It has been cautioned time and again that Advocates ought to avoid swearing affidavits of this kind, on behalf of their clients, to address issues that they do not have first-hand information on and knowledge about. See *MA Mwinyi Advocate vs. Matano Mwasina* [2021] eKLR (Munyao Sila, J), *Habiba Ali Mursai & 4 others vs. Mariam Noor Abdi* [2021] eKLR (Mboya, J) and *Kwacha Communications Limited & another vs. Pindoria Holdings Limited & another* [2022] eKLR (Chitembwe, J).
14. I have noted that after instructions were given, by the letter of 26th July 2024, the Advocates for the applicant did not move the court until 13th September 2024, some 43 days thereafter. That was another delay. It has not been explained.
15. I do note that the delay by the client was of 16 days or so, and that by the Advocates was 43 days. I note too that an effort was made to notify the client of the judgement soon after its delivery. Extension of time to file appeal is discretionary. I am tempted to exercise that discretion, in this case, on grounds that the delay, in both respects, although unexplained, was not so inordinate as to be deemed unreasonable.
16. In *Gerald M'Limbine vs. Joseph Kangangi* [2008] eKLR (Emukule, J), the court construed section 79G of the *Civil Procedure Act*, by stating that that provision does not provide for leave to appeal out of time, but rather for admission of appeals out of time, which would presuppose that a party approaching the court, under section 79G of the *Civil Procedure Act*, should first file an appeal out of time, and then ask the court to admit that appeal. It was argued that a court ought not exercise discretion, to extend time to admit an appeal, before it has perused the appeal filed out of time, to assess, under section 79B of the *Civil Procedure Act*, whether the same ought to be admitted or not.



17. The applicant has not filed an appeal out of time, which it would be asking me to admit out of time. However, a draft memorandum of appeal has been annexed, whose grounds, in my opinion, do not raise idle arguments.
18. On the matter of grant of stay of execution of the impugned judgment, the 1st respondent has not vigorously litigated on whether such stay ought not be granted, ostensibly as it would appear to be tied to grant of leave to appeal out of time. On the matter of the applicant suffering substantial loss, I note too that the 1st respondent has not made it an issue, and is more concerned about security for costs. I shall not have to consider whether stay of execution ought to be granted and whether substantial loss would be suffered. On security for costs, I agree with the 1st respondent, that the documents exhibited, to support the case that the 1st respondent can provide such a guarantee, are not very helpful. They display an offer made by a bank, which the applicant accepted, but there is no evidence that any formal contract was entered into thereafter. That, of course, is not to say that the applicant does not have capacity to provide a bank guarantee to secure the judgement sum.
19. In view of everything said above, I will, as I hereby do, allow the application, dated 6th August 2024. Time to appeal is extended by 30 days from the date of this ruling. There shall be a stay of execution of the judgement in Busia CMCCC No. 329 of 2021, of 10th June 2024, on condition that the applicant either deposits the total judgement sum in court, or provides a bank guarantee for the said amount, within the next 30 days of the date of this ruling. The stay order shall lapse automatically, should the condition above not be met. The application, dated 6th August 2024, is disposed of in those terms. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED, AT BUSIA, THIS 14TH DAY OF MARCH 2025.

W. MUSYOKA

JUDGE

Arthur Etyang, Court Assistant.

Advocates

Ms. Theldred Wesonga, instructed by Kimondo Gachoka & Company, Advocates for the applicant.

Ms. Winnie Anono, instructed by Mukisu & Company, Advocates for the 1st respondent.

