



Kan Travellers Limited v Sikuku & another (Suing as the Legal Representative of the Estate of Joan Namwenga Sikuku (Deceased)) (Miscellaneous Civil Application E187 of 2024) [2025] KEHC 4487 (KLR) (4 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4487 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E187 OF 2024**

**AC BETT, J
APRIL 4, 2025**

BETWEEN

KAN TRAVELLERS LIMITED APPLICANT

AND

ELIZABETH NAFULA SIKUKU 1ST RESPONDENT

SIKUKU REUBEN CHELOTI 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOAN
NAMWENGA SIKUKU (DECEASED)**

RULING

1. By way of notice of motion application dated 13th December, 2024, the Applicant sought the following orders;
 - a. That this Application be certified urgent and be heard *ex parte* in the first instance (spent)
 - b. That this Honorable court be pleased to grant interim orders for stay of execution of the judgment and/ or decree delivered on 29/10/2024 for Kshs. 1,350,000/=together with costs, interests, and taxation proceedings in Butali CMCC NO. 93 of 2023 pending the hearing and determination of this Application interparties.
 - c. That this Honorable court be pleased to grant a stay of execution of the judgment and/ or decree delivered on 29/10/2024 for Kshs. 2,682,264/= together with costs, interests, and taxation proceedings in Butali CMCC NO. 93 of 2023 pending hearing and determination of the intended appeal.



- d. That the Honorable court be pleased to grant leave to the Applicant to file an appeal out of time from the judgment and decree of the honorable trial court delivered on 29/10/2024 from Kshs. 2,682,264/= together with costs and interest in Butali CMCC NO. 93 of 2023.
 - e. That the costs of this application be provided for.
2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn on the same date by the Applicant's counsel, who stated that she was aware of the judgment in Butali CMCC NO. E093 of 2023, which awarded the Respondent Kshs. 2,682,264/= and a 30-day stay of execution which had already lapsed, and the Respondents intend to execute.
 3. She acknowledged having been notified of the judgment delivered on 29th October 2024 whereby she informed their clients who instructed them to file leave to appeal out of time since the time for filing the appeal had lapsed.
 4. She averred that their client had several court battles, leading to their shareholders tampering with the server, and the communications were disconnected.
 5. She stated that she reached out to the Respondents' Counsel informing them of the challenges from the loss of server communication and pleading with them not to execute and when the system was restored on 10th December 2024, they received communication from the Claims Director of Direct Line Assurance Company who instructed them to seek leave to file the appeal out of time.
 6. She averred that the delay was occasioned by the internal process of transmission of communication of judgment from the advocate to the client and the transmission of instructions from the client to the Advocate.
 7. She stated that the application was filed without any delay and that the appeal has a high chance of success.
 8. The Applicant averred that it will suffer substantial loss if the order of stay is not granted and the decree is executed, and the intended appeal eventually succeeds, since the decree holders had not availed their financial status to demonstrate their ability to repay if the appeal succeeds.
 9. The Applicant stated that it is willing to provide a bank guarantee from Family Bank as security for stay of execution pending appeal.
 10. The Respondents filed their grounds of opposition dated 21st January 2025, averring that the Applicant had not met the conditions set for stay of execution under Order 42 Rule 6 of the Civil Procedure Rule, nor the principles for granting leave to file an appeal out of time.
 11. On the condition of security, they assert that the bank guarantee is not sufficient since the Applicant has many pending claims in court, and so they should produce a specific inventory of the files/appeals secured by the bank guarantee.
 12. On emphasizing the importance of the conditions to be met, they relied in the case of Victory Construction v BM (a minor suing through next friend, one PMM) [2019] eKLR, Justice G.V. Odunga and Machira T/A Machira & Co Advocates vs. East African Standard (No. 2) [2002] KLR 63.

Applicant's Submissions

13. The Applicant filed its submissions dated 15th February 2025. On the first ground of whether leave should be granted to the applicant to file the appeal out of time, it relied on Section 79 G of the *Civil*



Procedure Act and stated that its failure to appeal was because it had relayed instructions to appeal after the statutory period had lapsed.

14. It urged the court not to deny it the right to appeal due to procedural technicalities of timelines, since the delay was explained and was not inordinate. It relied on the case of Samuel Mwaura Muthumbi vs. Josephine Wanjiru Ngugi & another (2018) eKLR.
15. It further asserted that the appeal has high chances of success and stated that it had four (4) grounds of appeal which have merit.
16. On the prayer of stay pending appeal, it relied on the order 42 rule 6 (2). On the first ground of substantial loss, it stated that the Respondent had failed to present their source of income or their capability of refunding the decretal sum.
17. It maintained that the Respondents had not produced an affidavit of means to confirm their financial status, and they risk not being compensated should the appeal succeed. It quoted the case of G.N. Muema P/A Mt. View Maternity & Nursing Home v. Miriam Maalim Bishar & another (2018) eKLR.
18. The Respondents did not file their submissions.

Analysis and Determination

19. The two issues that the court ought to consider are, first, whether the Applicant has met the conditions to warrant the court to issue a stay of execution pending appeal, and the second issue is whether the court should grant leave for the Applicant to file the appeal out of time.
20. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish for the court to order a 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:-

“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.

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; 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.”
21. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the court that:-
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and



3. 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.
22. According to the Applicant, they risk their motor vehicle registration number KBJ331X being proclaimed and sold. The Applicant further avers that the Respondents have not demonstrated that they can refund the sum if the appeal succeeds. The Applicant has also asserted that it can comply with any order as to security of costs, as it has secured a bank guarantee from Family Bank.
23. Substantial loss was clearly explained in the case of *James Wangalwa & Another v 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.”
24. In this case, the Respondents have not given any material as to their ability to repay the decretal sum in case the appeal succeeds, and in light of the depositions by the Applicants’ Counsel that the Applicant stands to shall suffer substantial loss if the stay is not granted. Accordingly, I am persuaded that the risk of a substantial loss has been proved.
25. On whether there was inordinate delay in filing the instant appeal and application, I note that the memorandum of appeal was filed on 13th December 2024, which is one month and 15 days after the delivery of the judgment.
26. The Applicant avers that there had been a breakdown in communication between them and the Claims Director, and they had not yet received instructions to appeal within the requisite period. I note that the delay was occasioned by delayed communication between the advocate and the Applicant. Without evidence to the contrary from the Respondents, I am unable to find carelessness or inordinate delay in the actions of the Applicant; hence, the explanation offered for the delay is sufficient.
27. As to security for the orders of stay of execution, the Applicant has made provision for a Bank Guarantee, meaning they are able and willing to comply with that condition on security for the due performance of the decree appealed from. However, this court is not bound by the type of security offered by an Applicant. It can make appropriate orders that serve the interest of justice.
28. In *Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, the court observed that;

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree to enjoy the fruits of his judgment in case the appeal fails.



Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal, there could be no return to the status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order the release of the deposited decretal amount to the respondent in the appeal ... Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay the execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of the decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for the due performance of the decree.”

29. The issue of security is discretionary and it is upon the court to determine the same. I have perused the court record and the Respondents are opposed to the security that was offered by the Applicant since the Bank guarantee does not specifically cover the decree in Butali CMCC. No. E093 of 2023.
30. The court, in granting the orders of stay, has to carry out a balancing act between the rights of the two parties. This court shall exercise its discretion regarding the security of costs to be offered by the Applicant and direct that the Applicant deposit half the decretal sum in a joint interest-earning account if they intend to proceed with the Appeal.
31. The Applicant has also prayed for leave to file the memorandum of appeal out of time on the basis that the intended appeal has merit, and thus the appeal has a high chance of success.
32. Section 79G of the *Civil Procedure Act* states: -

“Every appeal from a subordinate court to the High Court shall be filed within 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.”

33. In the Supreme Court in Civil Application No. 3 of 2016 - County Executive of Kisumu –vs- County Government of Kisumu & 7 Others at page 5, the court stated that:-

“... 23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court. Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the NICHOLAS SALAT case to which all the parties herein have relied upon. The court delineated the following: “the underlying principles that a court should consider in the exercise of such discretion:

- 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 that 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-by-case basis;
- 4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.”

34. 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.”

35. The Applicant’s Advocate claims that the delay was due to a lack of communication between them as a result of some internal challenges facing their client at the material time.

36. They claim that they filed the appeal immediately they received the instructions.

37. It is my considered view that the delay of one month and fifteen days is not inordinate in the circumstances.

38. Having regard to the findings that I have made in this ruling and in balancing the interests of both parties, I will allow the instant application in the following terms: -

1. There shall be a stay of execution of the decree/judgment in Butere CMCC No E 093 of 2023, which was delivered on 29th October 2024, but on condition that: -
 - a. The Applicant is granted fourteen (14) days leave to file and serve its memorandum of appeal.
 - b. The Applicant is hereby ordered to deposit in a fixed joint interest earning account in the names of both counsel for the parties the sum of Kenya Shillings of Kshs 1,341,132/ = being half the decretal sum.
 - c. The Appellant shall, within forty five (45) days from the date of this ruling, deposit the aforesaid sum and in the event of failure to comply with the conditions in (a) herein above, the stay orders issued herein shall automatically lapse and the Respondent shall be at liberty to proceed with the execution process.
 - d. The Respondents shall have the costs of this application.

40. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 4TH DAY OF APRIL 2025.

A. C. BETT

JUDGE

In the presence of:



Ms. Wesonga holding brief for Ms. Musando for Applicant
Ms. Omondi holding brief for Ms. Cheloti for Respondents
Court Assistant: Polycap

