



**Rotich v Obiri (Suing as the Legal Representatives of the Estate of
Ambrose Magoma Nyachweya (Deceased)) (Miscellaneous Application
E165 of 2024) [2025] KEHC 4618 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4618 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION E165 OF 2024
HI ONG'UDI, J
APRIL 8, 2025**

BETWEEN

PHILIP KIPKORIR ROTICH APPLICANT

AND

MAGDALINE MORAA OBIRI RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF AMBROSE
MAGOMA NYACHWEYA (DECEASED)**

RULING

1. This ruling is in respect of two applications. The first one is dated 18th May, 2024 while the second one is dated 16th September, 2024.
2. In the application dated 18th May, 2024 the applicant prays for the following orders;
 - i. & ii Spent.
 - iii. That this honourable court pleased to enlarge time for lodging an appeal arising out of the ruling in Molo Chief Magistrate Civil Suit No. 78 of 2020 delivered on 9th May, 2024.
 - iv. That the draft Memorandum of Appeal dated 18th June, 2024 be deemed as duly and properly filed subject to payment of requisite fees.
 - v. That this honourable court be pleased to grant an order of stay of execution and/or further execution of the Judgment dated 12th May, 2022 and the consequential decree and/or orders in Molo Chief Magistrate's Court Civil Suit No 78 of 2020 pending the hearing and determination of the intended appeal.
 - vi. That cost of this application be provided for.



3. The application is based on the grounds on its face and the applicant's affidavit sworn on even date. He deponed that being dissatisfied with the ruling delivered on 9th May, 2024 his advocates wrote a letter dated 13th May, 2024 requesting for a copy of the ruling and proceedings. The said letter did not elicit any response from the court until the 14th of June, 2024 when his advocates got a copy of the ruling. Further, that despite his advocates receiving a copy of the ruling after the required time lines of filing an appeal, they have drafted a draft memorandum of appeal. He urged the court to extend time within which the same could be filed to enable him prosecute an appeal against the aforementioned ruling.
4. He further deponed that his advocates on record had learnt that the respondent was in the process of commencing full execution of the judgment and had sought for warrants of attachment to issue against him vide the letter dated 17th May, 2024. Thus, unless the court intervened and issued an order of stay of execution pending the intended appeal, the respondent would proceed with execution and the appeal would be rendered nugatory as the decretal amount would have been settled.
5. In response to the said application the respondent filed a replying affidavit dated 20th September 2024. She averred that the applicant's application was bad in law, made in bad faith, inept, lacked merit, an afterthought and otherwise amounts to an abuse of the court process. Further, that the applicant had not given any sufficient reason for failure to file the appeal within the required time to warrant granting of the orders sought. Furthermore, that the applicant had not provided any security. Thus, his application was aimed at delaying and frustrating her from enjoying the fruits of her judgment. She added that there was no sufficient reason given to warrant granting of the orders sought and she would be greatly prejudiced if the application herein is allowed as she was yet to enjoy the fruits of her judgment.
6. The application dated 16th September 2024 and filed by the applicant and seeks the following orders;
 - i. Spent.
 - ii. That time within which to comply with the orders made by Justice Nyaga on 13th July 2024 be extended.
 - iii. That this court be pleased to vary order Number 4 on the directions issued by Hon. Justice Nyaga Heston Mbogo on 13th July, 2024 and in its place direct that:

“There shall be a stay of further execution of the decree of the lower court on condition that the applicant deposits a security whose value is equivalent to the entire decretal sum in the lower court within 21 days from the date hereof. Evidence of such deposit to be provided.”
 - iv. That directions numbers 1-3 to be preserved as they are.
 - v. That the cost of this application be in the cause.
7. The application is based on the grounds on its face and the applicant's affidavit sworn on even date. He deponed that his application for stay of execution vide the notice of motion dated 18th May 2024 was allowed on condition that deposit the entire decretal sum to the lower court within 21 days from the date of the issue of the directions. That he was willing to comply with the conditional order for stay and had tried all that was humanly possible to raise the entire decretal sum but his efforts have not borne any fruits. He urged the court to vary the orders in place and to allow him deposit security in place of the decretal sum.



8. In response to the said application the respondent filed a replying affidavit dated 10th October 2025. She averred that the application was bad in law, made in bad faith, inept, lacked merit, an after-thought, and otherwise amounted to an abuse of the court process. That the applicant had failed to satisfy the judgment delivered 12th May 2022 and instead filed an application dated 11th August 2023 seeking stay of execution and setting aside of the said judgment among other orders, which application was dismissed by the trial court vide its ruling on 9th May, 2024.
9. She further averred that applicant filed an application dated 18th May, 2024 to this honourable court seeking stay of execution and leave to file an appeal on the court's ruling out of time. That the court issued stay of execution orders on condition that the applicant deposits the entire decretal sum in the lower court within 21 days from 13th July, 2024. Further, that the applicant had more than sufficient time to comply with the court's directions but has deliberately failed to do so. In addition, that the applicant had not taken any steps towards complying with the court's directions or presented any cogent reason for granting the orders sought.
10. Both applications were canvassed by way of written submissions.

Applicant's submissions

11. These are dated 30th October, 2024 and filed by Gordon Ogola Kipkoech & Company Advocates. Counsel identified three (3) issues for determination. On the first issue on whether the court should grant stay of execution, counsel submitted that if execution is allowed to proceed, it would negate the very essential core of the applicant's appeal for reasons that they will not have a subject matter to prosecute in their intended appeal. He placed reliance on Order 42 rule 6(2) of the Civil Procedure Rules and the decisions in *Desbro (Kenya) Limited v General Printers Limited*; *NCBA Bank Kenya PLC & Another Objectors* [2021] eKLR where the court referred to the case of *Tropical Commodities Suppliers Ltd v International Credit Bank in Liquidation Kampala* Miscellaneous Application No. 379 of 2003 where Justice Ogola held:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

See also;

- i. *Susan Wanjiru & Another v Lucy Gathoni & Another* [2015] eKLR.
- ii. *David Kihara Murage v Jacinta Karuana Nyangi & Another* [2015] eKLR.

12. The second issue is whether the court should grant an enlargement of time for the filing of the appeal. Counsel submitted that the applicant had sufficiently explained to the court the reason for delay which was also not inordinate. In support of his argument he placed reliance on the decision in *Paul Musili Wambua v Attorney General & 2 Others* [2015] eKLR, where 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.”

See also; Njoroge v Kimani (Civil Application Nai E049 OF 2022) [2022] KECA 1188 (KLR).

13. Lastly, on whether the court should vary order no. 4 in the directions of 13th July, 2024, counsel cited Order 45 Rule 1 of the Civil Procedure Rules and submitted that the applicant was willing and ready to comply with orders of the court. However, it proved difficult for him to do so due to his deplorable financial situation. That the alternative he had offered was adequate for the performance of the decree in case the need arose post the intended appeal. Further that the respondent would not be prejudiced by the said alternative while the applicant pursues their right to appeal.
14. In conclusion, he urged the court to allow the applicant’s applications and grant the prayers.

Respondent’s submissions

15. These are dated 23rd January, 2025 and filed by Gekonga & Company Advocates. Counsel gave a brief background of the case and identified three (3) issues for determination.
16. On the first issue on whether the applicant is entitled to an order for stay of execution, counsel cited Order 42 rule 6 (2) (a) and submitted that the applicant had failed to specify the loss he would suffer as is required by the said order. He placed reliance on the decision in Equity Bank Limited v Taiga Adams Company Limited Civil Appeal No. 722 of 2000 as cited in the case of Luxus Woods (K) Limited v Patrick Amungune Kamadi [2016] eKLR where it was held as follows;

“In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent - that if execution is carried out - in the event the appeal succeeds the respondent would not be in a position to pay - reimbursement as he/it is a person of no means. Here, no such allegation is made much less established by the appellant/applicant.”

17. On the second issue on whether the defendant/applicant had given any security, counsel submitted that the applicant had failed to do so or to liquidate the asset intended to be used as security for the benefit of both parties. Regarding the third issue on whether the court should extend the time within which to comply with stay conditions, counsel submitted that from the evidence put before this court it was clear that the applicant was not in any financial distress. He was trying to bring up unsubstantiated reasons to avoid complying with the court orders and the same should not be condoned by this court.
18. On whether the court should review its order for stay and allow the applicant to deposit a security whose value is equivalent to the entire decretal sum, counsel reiterated his submissions on the third ground. He urged the court to dismiss the applicant’s applications with costs.

Analysis and determination

19. I have considered the two applications together with the affidavits sworn in support, the replying affidavits and the submissions by the respective parties. The issue I find falling for determination is whether both applications or either of them is merited.
20. I will first deal with the one dated 18th May 2024 which seeks for stay of execution orders and enlargement of time for lodging an appeal.



21. Regarding stay of execution pending appeal, the guiding principles are well settled. The same are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides 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.

22. In *RWW vs. EKW* [2019] eKLR, the court addressed the purpose of a stay of execution order pending appeal as follows;

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the appellant with those of the respondent.”

23. From the law and the above decision, it is clear that the purpose of stay of execution is to preserve the substratum of a case pending the hearing and determination of an appeal. Further, a successful litigant has a right and expectation to enjoy the fruits of the decision rendered in his or her favour by the court, and a respondent who has lost a case also has a right of appeal to ventilate his or her displeasure with the said decision of the court. The court has a duty to weigh and balance both situations.

24. This position was affirmed in the case of *Regional Institute of Business Management v Lucas Ondong' Otieno* [2020] eKLR where the court observed as follows;

“ 20. Weighing the Applicants' right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of *the Constitution* of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of *the Constitution* of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicants if they were denied an opportunity to ventilate their Appeal on merit in the event an order for stay of execution was not granted”.

25. The application herein was filed on 27th June 2024 after delivery of the impugned ruling on 9th May 2024. There was a delay of approximately one and a half months in the filing of the application. The applicant did not explain the delay and/or proffer a reason why he failed to file the said application timeously. Notably, delay must not only be inordinate, it must also cause prejudice to the opposing party. In my humble view, the delay herein appeared not to be inordinate and it also did not cause the respondent to suffer prejudice or injustice.



26. On substantial loss, the appellant/applicant argued that if the stay orders are not granted, the said appeal would be rendered nugatory. The respondent on her part argued that no sufficient reason had been given by the applicant to warrant granting of the orders sought. Further, that she would be greatly prejudiced if the application is allowed as she was yet to enjoy the fruits of her judgment.
27. In the case of *Silverstein vs. Chesoni* [2002]1 KLR 867, the court observed that substantial loss was the cornerstone of both jurisdictions and the same had to be prevented by preserving the status quo because such loss would render the appeal nugatory.
28. On security the applicant averred that he was willing to deposit security which whose value is equivalent to the decretal amount. In the directions issued by Justice Nyaga on 13th July 2023 the applicant was required to deposit the entire decretal amount in the lower court within twenty-one (21) days. However, out of the decretal sum which amounts to kshs. 1,000,000/= the applicant has deposited kshs. 300,000/=. He claims to be in a serious financial crisis and that he is undergoing dialysis. He did not produce any financial statements to prove the same but only a letter from the facility where he allegedly goes for dialysis.
29. As earlier noted, the grant of stay of execution is discretionary and the court will exercise this discretion on a case by case basis depending on the circumstances of the case. This court has the duty to balance rights to ensure that justice is served
30. The above being the position, I allow the prayer for stay of execution of the Ruling delivered on 9th May, 2024 on condition that the applicant prosecutes his appeal within twelve (12) months from the date of this ruling.
31. Regarding extension of time to lodge the appeal, In *County Executive of Kisumu vs. County Government of Kisumu & 8 Others* [2017] eKLR, the Supreme Court expressed itself therein as follows:
 - “It is trite law that in an application for extension, the whole period of delay should be declared and explained satisfactory to the court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time. The court delineated the following as:
 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 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 respondent of the extension is granted;
 6. Whether the application has been brought without undue delay...”
32. In view of the above exposition, it is clear that the factors to be taken into consideration when determining an application of this nature are namely; the length of the delay, reasons for the delay,



possibility of the arguability of the intended appeal, prejudice to be suffered by the opposite party if the relief sought were granted, any public policy issues that may be involved and the right of access to appellate justice which the current jurisprudential trend crystalizing this position state explicitly that being constitutionally entrenched, it can only be denied in exceptional circumstances

33. Looking at the first principle as stated above; the length of the delay, the application under consideration was presented one and half (1 ½) months from the date of the delivery of the impugned ruling. The applicant stated that the main reason for failure to timeously comply with the timelines set in the Rules is the delay in receiving a copy of the ruling and proceedings.
34. I take judicial notice that at times there can be such delays occasioned to a party especially the proceedings due to the workload. I therefore decline to place that fault on the applicant especially when the period forming the length of delay is only one and a half (1½) months and therefore, not inordinate.
35. Looking at the principle of the arguability of the intended appeal, the applicant has annexed a memorandum of appeal with a number of grounds of appeal. In *Sammy Mwangi Kiriethe & 2 Others vs. Kenya Commercial Bank [2020] eKLR* the court was of the view that an arguable appeal need not be one that must succeed, but one that not only warrants the court's interrogation but also demonstrates sufficient basis for the court to invite the opposite party to make a response thereto. My opinion on the grounds of appeal the applicant intends to bring on appeal is that they are all arguable irrespective of their ultimate success or otherwise.
36. On whether the respondent would suffer prejudice should the relief sought be granted, she argued saying that she would be greatly prejudiced if the application herein is allowed as she was yet to enjoy the fruits of her judgment. The applicant on the other hand contends that his intended appeal is arguable and would therefore be prejudiced if the same is not allowed.
37. In my humble view, fairness and justice in the circumstances prevailing herein would demand that this court balances the interests of both parties. This principle was enunciated in the decision of the Court of Appeal in *Absalom Dova vs. Tarbo Transporters [2013] eKLR*, where it stated:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...” (emphasis mine).
38. The upshot is that the application dated 18th May 2024 is merited and the same is allowed in terms of prayers 3, 4 and 5 on the following terms:
 - i. The Appeal to be prosecuted within 12 months from today's date.
 - ii. The deposit of Ksh 300,000/= to remain in place. However, the Applicant shall deposit before the trial court security for the balance of the decretal sum within 21 days.
39. In consideration of the orders sought in the application dated 16th September, 2024, I find that the same have been subsumed in the findings in the application dated 18th May, 2024. The application is thus overtaken by events.
40. Each party shall bear its own costs.



41. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 8TH DAY OF APRIL, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

