



REPUBLIC OF KENYA



**Rutto & another v Segoo (Miscellaneous Application  
E273 of 2024) [2025] KEHC 4434 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4434 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS APPLICATION E273 OF 2024**

**E OMINDE, J**

**APRIL 8, 2025**

**BETWEEN**

**ABRAHAM KIPTUM RUTTO ..... 1<sup>ST</sup> APPLICANT**

**ELDORET SHUTTLE SACOO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ALIAS FRANK KIPTOO SEGO ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 18/10/2024, the Applicant seek the following orders:
  1. Spent.
  2. That he Honourable Court be pleased to extend time for lodging of a Memorandum of Appeal against the Judgment of the Hon. Peter Areri delivered on 25<sup>th</sup> June, 2024 in Eldoret CMCC E594 OF 2022 Francis Koima Segoo Alias Frank Kiptoo Segoo v Abraham Kiptum Rutto & Eldoret Shuttle Sacco.
  3. That the draft Memorandum of Appeal dated 18/07/2024 be deemed as properly filed.
  4. Spent.
  5. That pending the hearing and determination of the appeal herein, there be a stay of execution of the judgment made on 25/06/2024 in Eldoret CMCC E594 OF 2022 and of all subsequent orders entered against the appellants/applicants emanating therefrom.
  6. That pending the hearing and determination of the intended appeal the Applicant herein do avail security by way of Bank Guarantee from Family Bank for the whole judgment sum of Kshs.1,178,764/=.
  7. That the costs of the present Application be borne by both parties.



2. The application is anchored on several grounds that are on the face of the application and the Supporting Affidavit of Erick Anyamba Mwale sworn on 18/10/2024.
3. He deposed that Judgment was delivered in Eldoret CMCC E594 of 2022 on 25/06/2024 whereby the Respondent was awarded a net award of Kshs. 1,178,764/-, that being dissatisfied with the Judgment, he instructed his Advocates to institute an Appeal against the said judgment which they did by lodging a Memorandum of Appeal dated 18/07/2024 and that it was assessed and assigned assessment reference number E3H23A9L. He further deposed that his insurer, Ms Directline Assurance Co. Ltd was undergoing internal strife at management level which strife prompted the intervention and/or an audit by the Insurance Regulatory Authority hence there was difficulty in handling the approval, release and/or payments of any monies and/or smooth running of the company.
4. He contended that after the Insurance Company sorted its management issues and monies were released for purposes of filing the Appeal and the Application for stay and extension of time the Applicants' Counsel's Law firm lost access, to their servers on 10/09/2024 thereby paralysing the running of the firm and that because the law firm is essentially paperless all its files and documents are in a virtual system. That as a result they were not in a position to prepare this instant Application in time. That the Applicants' law firm regained access to their servers on 14/10/2024 whereupon they prepared the instant Application seeking for extension of time to lodge the Appeal and stay of execution pending the hearing and determination of the Appeal and that the time period in which the Judgment dated 25/06/2024 can be appealed according to statute lapsed on 24/07/2024 hence the need to seek an extension of time within which to lodge the instant Appeal.
5. He further deposed that since stay of execution has lapsed, the Applicants are apprehensive that the Respondent will move to execute the Judgment to the detriment of the Applicant. He maintained that the delay in filing this appeal was not deliberate as has been explained and that the 30 days stay of execution granted by the trial court has since lapsed and unless the stay of Execution herein sought is granted the Appellant/Applicant's Application and consequently the intended Appeal will be rendered nugatory and the Applicants will suffer irreparable loss and damage. He deposed that the Applicants are ready and willing, to either avail a bank Guarantee or Deposit the monies in a joint interest earning account as a condition for stay pending determination of the intended Appeal. That this Application is made in good faith and will not occasion any prejudice to the Respondent.
6. The Application is opposed. The Respondent filed a Replying Affidavit dated 8/11/2024 wherein he deposed that the Application is an afterthought, lacks merit and thus ought to be dismissed with costs at first instance. That whereas it is true that judgment was delivered in Eldoret CMCC E594 of 2022 on 25/06/2024 in favour of the respondent and the court awarded him general damages of Kshs.1,178,764/=, the trial court granted the Applicants 30 days stay of execution on the same date of 25/06/2024, during the pendency of this Stay, the Applicants did not lodge their Memorandum of Appeal, contrary to provisions of the Civil Procedure Rules and that they have not attached any evidence to show that their accounts were closed and thus unable to pay filing fees for the appeal.
7. Further, that as far as this case is concerned, Directline Assurance has been operating and there has been no moratorium and/or notice of receivership in place to indicate that it is no longer in business. That he instructed his advocate to apply for execution of decree in Eldoret CMCC E594 OF 2022 on 21<sup>st</sup> August 2024, close to four weeks after the stay of execution lapsed on 25/07/2024 and that if indeed the Applicants were serious about filing their appeal, they would have already lodged the same during the intervening period and before they applied to court for execution.
8. The Respondent maintained that as the successful party in the case herein he is entitled to enjoy the fruits of his judgment and that with the above series of events, it is unfair to allow the Applicants to



lodge their appeal out of time as they have not given plausible reasons. Further, that the deponent has not attached any evidence to prove that the proclaimed vehicle is his and/or registered in his name. That the delay in filing this application for extension of time is in any case inordinate and the Applicants have not given any reasonable explanations on delaying to file their appeal by 3 (three) months.

### **The Submissions**

9. The Application was canvassed by way of written submissions. The Applicants filed their submissions on 18/11/2021 while the Respondent filed on 9/12/2024.

### **The Applicant's submissions**

10. On the issue of the delay Counsel for the Applicants submitted that time stipulated for filing an Appeal from the lower court is provided under section 79 G of the Civil Procedure Act which is within 30 days after the delivery of the Decree and/or order. Counsel relied on the case of Leo Sila Mutiso vs Rose Hellen Wangari Mwangi-Civil Application No Nai.255 of 199(unreported) where the court stated thus;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of the time are: first, the length of delay; secondly the reason for delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

11. Counsel reiterated the contents of the Affidavit made in support of the Application explaining the reason for the delay in the submissions and urged the Court to be guided by the decision in Silas Kanyolu Mwatha v Josephine Kavive James [2021] eKLR, where Justice Nyakundi addressed the issue of inordinate delay allowed an extension of time to file an Appeal out of time for a delay of six months and that the delay in the Instant Application is only four months, which in Counsel's opinion is not inordinate. Counsel urged that the intended Appeal is meritorious with very high chances of success and the delay in filing the Appeal is occasioned by circumstances beyond the Applicants control and the same should not be visited upon them. Counsel maintained that if the Application is not allowed, the Applicants will be denied the right to be heard since the intended appeal raises triable issues and this therefore means that they will suffer irreparable loss if the instant Application is not allowed.
12. Regarding substantial loss, Counsel relied on the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012]eKLR and Century Oil Trading Company Limited vs. Kenya Shell Limited Nairobi [2008] eKLR and contended that if the orders sought are not granted, the Respondent will proceed to conclude the process of execution of the decree in his favour and the Applicants shall be forced to settle the decretal sum despite the intended Appeal having very high chances of success. Counsel further contended that the Respondent's financial standing is unknown and the judgment being of a substantial amount, is unlikely to refund the decretal sum if paid to him and so in order to protect the substratum of the intended appeal, it would be in the interests of justice that an order of stay of execution does issue.
13. Counsel maintained that the Respondent in his Affidavit, has not expressed how he will suffer prejudice if the orders sought are allowed. Counsel cited the Court in National Industrial Credit Bank



Limited v Aquinas Francis Wasike & Anor (UR) C.A. 238/2005 which was cited with approval in Victor Ogola vs Mary Waithe Kihui [2021] eKLR where the Court of Appeal judges observed thus:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because the respondent would be unable to pay 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 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. Counsel further contended that the Respondent has placed absolutely nothing in his Replying Affidavit and has not averred that he is a person of means and would be in a position to refund the decretal sum should the intended appeal succeed.
15. In light of the foregoing reasons, Counsel urged the Court to grant stay of execution pending the hearing and determination of the intended Appeal and that the Applicants be allowed to deposit security.

### **The Respondent’s Submissions**

16. Regarding enlargement of time, Counsel for the Respondent cited Section 79 G of the *Civil Procedure Act*, Cap 21 Laws of Kenya. Counsel submitted that an Applicant seeking enlargement of time to file an appeal must demonstrate sufficient cause in doing so. He the cited the case of Daphne Parry vs. Murray Alexander Carson (1963)EA 546 which case was cited by Odunga J in Diplock Kenya Limited v William Muthama Kitonyi [2018] KEHC 4858 (KLR) where it was held that:

The interpretation of “sufficient cause” should be liberal and in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

17. Additionally, Counsel submitted that the other principles to be considered in exercising discretion on whether or not to enlarge time are; the explanation of the delay, if any, the merits of the contemplated action, whether the matter is an arguable one deserving a day in court or whether its frivolous and whether or not the Respondent can adequately be compensated in costs for any prejudice he may suffer as a result of favourable exercise of discretion in favour of the Applicant
18. Counsel reiterated the depositions in the Replying Affidavit on the period of time the applicant had to file the Appeal after the delivery of judgement and contended that if indeed the Applicants were experiencing financial constraints as they have alleged, they ought to have lodged this application immediately Stay of Execution lapsed on 25/07/2024. That the mere fact that they waited to lodge this application after being served with Proclamation Notices is an indication of a possible indifference and frivolous conduct. According to Counsel this delay is unjustifiable and that this Honourable Court should not allow their application. Counsel cited the case of Salkas Contractors Limited V Kenya Petroleum Refineries Limited [2004] KECA 121 (KLR) where the Court of Appeal pronounced itself as follows;

“The principle that pervades these decisions is that the court has to be satisfied that the inordinate delay is excusable and if so satisfied, then the court has to consider whether justice



can still be done to the parties notwithstanding the inordinate delay. If the court is satisfied that justice can still be done then it will, in the exercise of its discretion, refuse the application for dismissal for want of prosecution. It follows that if the court is not satisfied that the inordinate delay is excusable, and then it will, again in its discretion, allow the application and dismiss the suit for want of prosecution."

19. Counsel also cited the case of Cell Tours & Travel Limited V Charles Maina Muriithi & Real Insurance Limited [2021] KEHC 6658 (KLR).
20. With regard to orders of stay, Counsel submitted that the Applicants invoked provisions of Order 42 Rule 6 of the Civil Procedure Rules in their application. Counsel contended that stay of Execution under this rule is only invoked where there exists an appeal, which is not the case herein. Counsel urged the Court to disallow this prayer. He then relied on the decision in Unicool International Limited V Arnold Kabogo Ndegwa [20220 KEHC 1320 (KLR) where Kasango J specifically pronounced on this issue as follows;

"As correctly stated in the respondent's submission stay of execution pending hearing and determination of an appeal is brought under Order 42 Rule 6 of the Civil Procedure Rules. The provisions of that Rule does not envisage stay of execution being granted pending a yet to be filed appeal Stay of execution is granted pending the hearing and determination of an existing appeal. in this case, there is no appeal in existence and therefore, the prayer for stay of execution must and does fail."

21. According to Counsel, Courts must lean in favour of a successful litigant in allowing them to enjoy the fruits of their judgment, particularly where there is considerable delay in seeking stay and all the evidence stands as uncontroverted. Counsel cited the case of Ronoh & 2 Others V Consolidated Bank of Kenya Limited; Kigen & 2 Others (interested parties) [2024] KEHC 14299 (KLR).
22. In the end, Counsel submitted that the interim order of Stay issued by this court on 11/11/2024 has disadvantaged the Respondent who was intending to apply for execution of decree and in the event the Court is inclined to allow the Applicants application, the Applicants should pay the trial court costs in full together with half the decretal sum while the remainder half be deposited in a joint interest earning account pending hearing and determination of their appeal.

### **Determination**

23. I have considered the application, grounds in support thereof, the respondent's replying affidavit, submissions by counsel and the applicable law. I have also considered the provisions of the law under which the Application is stated to have been brought. In my considered opinion, the issue for determination is

whether the Applicants have laid any basis upon which time to lodge an appeal can be extended and whether the Applicants have met the prerequisite for grant of stay of execution pending appeal;

24. Section 79G of the *Civil Procedure Act* states:-

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 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.

25. It is clear from the wording of section 79G of the *Civil Procedure Act*, that before the Court considers extension of time, the Applicant must satisfy the Court that she has good and sufficient cause for seeking extension of time. This principle was enunciated in the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018]eKLR. An Applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

26. The threshold for the granting of leave to appeal out of time was set out in the case of *Nicholas Kiptoo Salat v Independent Electoral and Boundaries Commission and 7 others* (2014) eKLR where the Supreme Court held that:

“... 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.”

27. The Supreme Court then went ahead to establish the following principles to guide the Courts when entertaining applications for extension of time:

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
- c. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.

28. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules which stipulates that: -

“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.”

29. From the foregoing, it is clear that an Applicant for stay of execution pending appeal must satisfy the above conditions namely, (a) that he will suffer substantial loss unless the order is granted, (b) the Application has been made without unreasonable delay, and (c) such security as the Court orders for



the due performance of such decree or order as may ultimately be binding on the Applicant has been given.

30. As to what encompasses “substantial loss”, I find the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR to be relevant and with regard to security for costs, the court relies on the decision in the case of Absalom Dova vs. Tarbo Transporters [2013] eKLR
31. On arguability of the intended appeal, the Court herein is guided by the decision in the case of Athuman Nusura Juma Vs. Afwa Mohamed Ramadhan [2016] eKLR wherein the Court held as follows:

“whether the intended appeal has merits or not is not an issue to be determined by a Court when dealing with an Application of this nature but by the Court dealing with the merits of the appeal, that is why the requirement that the intended appeal be arguable is preferred with the word “possibly”.
32. All the above considered, I am satisfied that the explanation given by the applicant on the reasons for the delay in filing the Appeal after the same was assessed as herein above summarised has sufficiently explained the delay and which delay in light of these reasons I find was not inordinate for reasons that these circumstances were beyond the control of the applicants. I am also satisfied that the said application has been made without unreasonable delay and that if not granted, the Applicant stands to suffer substantial loss for reasons that the respondent has not in any way demonstrated that he will be able to pay back the decretal sum in the event the applicant is successful on appeal. I am therefore satisfied that the application has merit and the same is allowed as follows;
  - a. That the time for the lodging of a Memorandum of Appeal against the Judgment of the Hon. Peter Areri delivered on 25<sup>th</sup> June, 2024 in Eldoret CMCC E594 OF 2022 Francis Koima Sego Alias Frank Kiptoo Sego v Abraham Kiptum Rutto & Eldoret Shuttle Sacco be and is now hereby granted.
  - b. That the draft Memorandum of Appeal dated 18/07/2024 be and is now hereby deemed as properly filed.
  - c. That pending the hearing and determination of the appeal herein, an order of stay of execution of the judgment made on 25/06/2024 in Eldoret CMCC E594 OF 2022 and of all subsequent orders entered against the appellant/applicant emanating therefrom be and is now hereby issued.
  - d. That the applicant is to deposit the entire decretal amount in a joint interest earning account in the names of both Advocates for the parties within 45 days from the date of this judgement failure to which the orders of stay herein granted shall be deemed to have lapsed.
  - e. That the Application is to bear the costs of the Application.

**READ DATED AND SIGNED AT ELDORET ON 8<sup>TH</sup> APRIL 2025**

**E. OMINDE**

**JUDGE**

