



**Simon v Oira (Civil Appeal 215 of 2024) [2025] KEHC 7211 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 7211 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 215 OF 2024**

**TA ODERA, J**

**APRIL 8, 2025**

**BETWEEN**

**JANET ABISI SIMON ..... APPELLANT**

**AND**

**SOSPETER NYATUKA OIRA ..... RESPONDENT**

**RULING**

1. The Applicant filed application dated 4.12.24 (Under Order 42 Rule 6(1) (a) (2) and (6) and Order 51 Rule I of the Civil Procedure Rules 2010, Sections IA, 1B,3A of the *Civil Procedure Act*, Article 159 (2) (a) of *the Constitution* and all other enabling provisions of Law seeking stay of judgment dated 14.10.24 by Hon C. Ocharo (Chief Magistrate) in MCCC No 612 of 2021 pending hearing and determination of the appeal intended appeal herein also leave to file the intended appeal.
2. The application proceeded ex- parte as the respondent did not appear or respond despite service.

**Issues For Determination:**

3. I have carefully considered the application and the law. The following issue arises for determination:
  - a) whether the applicant has met conditions for leave to appeal out of time.
  - b) Whether the Applicants have satisfied the conditions for grant of stay of execution under Order 42 Rule 6 of the Civil Procedure Rules.

**Disposition Of The Issues**

4. On whether the applicant has met conditions for grant of leave to appeal out of time. 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.

5. 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 that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018] eKLR where it was emphasized that 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.
6. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others* [2014] eKLR outlined the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:

“The underlying principles a court should consider in exercise of such discretion should include: -

- 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.

7. Similarly in the case of *Paul Musili Wambua v 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.”

8. Applying the above principles to the present case, the judgment herein was delivered on 14.10.24. The Applicant was granted 30 days stay which expired on 14.11.24. However, the applicant filed the current application for leave to file the appeal out of time on 13.12.24. This is 2 months out of the time limited for filing an appeal. The applicant has attributed the delay in filing his appeal was due to delay in getting typed proceedings which he said he applied for on 18.10.24 and was not issued within good time.



9. The Court of Appeal in the case of *Ngoso General Contractors Ltd. v Jacob Gichunge Civil Appeal No. 248 of 2001 [2005] 1 KLR 737* that:

“The failure by the Superior Court Judge in an application for extension of time to file an appeal, to consider, as a matter of law, whether the Appellant, who was admittedly absent when the Judgement was delivered, was served with notice of delivery of the Judgement was a misdirection...The law under Order 20 r 1 is explicit in terms and mandatory in tone that a Judgement which is not delivered *ex tempore* must be delivered on a subsequent date only upon notice being given to all parties or their advocates and where only the successful party in the Judgement had prior knowledge of the delivery of the Judgement and no apparent reason was advanced for the failure to serve or to attempt to serve the Appellant or his advocate, the Appellant’s right of appeal was grossly compromised...An order was made by the Magistrate granting a right of appeal within 28 days and directing the party in attendance to inform the other side does not cure the flagrant breach of the mandatory procedural rule which accords with fundamental rules of natural justice and the right to be heard which *the Constitution* safeguards.”

10. This court takes judicial notice that 1 ½ months cannot be termed as an inordinate delay considering that we have inadequate number of typists in this station. The application was also filed without undue delay and no prejudice would be occasioned to the respondent if the prayer for leave to file appeal out of time is allowed. I allow the said prayer and I direct that the intended appeal be filed and served within 14 days from today.
11. On the issue of stay pending appeal, Order 42 of the civil procedure rules provides that “1. 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 order set aside.(2). No order for stay of execution shall be made under subrule (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
12. It is thus clear that the conditions to be satisfied by parties seeking stay pending appeal to wit;
- Substantial loss may result to the applicant unless the order is made
  - The application has been made without undue delay.
  - Such Security for due performance of the decree as the court may deem fit to order.
13. On substantial loss the applicant said that the decree was for general damages and that execution is imminent and thus it is important to grant stay pending appeal so that the appeal is not rendered nugatory. This has not been challenged and I find that substantial loss will be occasioned to the applicant unless the orders sought are granted.
14. On whether the application has been made without undue delay. I have already found that there was no undue delay in filing of the application.



15. On security, the applicant offered to deposit any portion of the decretal sum as the court may deem fit to grant in a joint interest earning account in both names of the advocates firms on record herein. This is not opposed. I find that the security offered by the applicant is fair in the circumstances. I proceed to order that the applicant deposits half of the decretal sum in a joint interest earning account in both names of the advocates firms on record herein within 45 days from today.
16. In the upshot I find that the application is merited and I allow it as prayed.

**T.A ODERA**

**JUDGE**

**8.4.25**

Delivered Virtually via teams Platform in the presence of:

Mr. Mulaku for applicant/appellant.

No appearance for respondent.

Court Assistant - Oigo

**T. A ODERA**

**JUDGE**

**8.4.25**

ORDER

Record of appeal be filed and served within 60 days from today. Mention on 23.6.25 before the deputy registrar for compliance.

**T. A ODERA**

**JUDGE**

