



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kabogo & another v Keya (Civil Miscellaneous E326 of 2025)  
[2025] KEHC 12197 (KLR) (Civ) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12197 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL MISCELLANEOUS E326 OF 2025**

**TW CHERERE, J**

**MAY 15, 2025**

**BETWEEN**

**GABRIEL KABOGO ..... 1<sup>ST</sup> APPLICANT**

**CHARLES KORI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**LUCAS KEYA ..... RESPONDENT**

**RULING**

“The wheels of justice do not grind to a halt at the convenience of the indolent. Courts exist to do justice, but justice itself demands vigilance, timeliness, and respect for process.”

1. The Court is seized of a Notice of Motion application dated 12<sup>th</sup> March 2025 and expressed to be brought under Sections 3 and 3A of the *Civil Procedure Act*, Order 22 Rule 22, Order 42 Rules 4, 6 and 7, and Order 51 Rules 1 and 3 of the Civil Procedure Rules. By the said Motion, the Applicants seek the following primary reliefs:
  1. That the Honourable Court be pleased to grant leave to file an appeal out of time against the judgment delivered on 13<sup>th</sup> January 2025 in Milimani CMCC No. E2404 of 2024
  2. That there be an order of stay of execution of the said judgment pending the hearing and determination of the intended appeal.
2. The application is anchored upon the supporting affidavit of Joyce Chichi, Advocate, sworn contemporaneously with the application, and is premised on the following grounds:



1. That the Applicants are aggrieved by the judgment of the lower court;
  2. That the Applicants intend to file an appeal challenging the said decision;
  3. That instructions to appeal were received belatedly;
  4. That the decretal sum is substantial and, in the Applicants' view, may not be recoverable from the Respondent should the appeal succeed.
3. The Respondent opposes the application and has filed a replying affidavit sworn by Munyoki Muthangya, Advocate, on 12<sup>th</sup> April 2025. The Respondent avers that:
1. The delay in filing the application is inordinate and remains unexplained;
  2. The Applicants only approached the Court after the Respondent had proclaimed their goods on 07<sup>th</sup> March 2025, an indication that they were not vigilant.
  3. The application is a mere ploy to frustrate execution and deny the Respondent the fruits of a lawful judgment.

#### **Issues for determination**

4. I have considered the affidavits filed on behalf of the parties and I have identified the following issues for determination:
1. Whether the Applicants have demonstrated sufficient cause to warrant extension of time to file an appeal out of time
  2. Whether the Applicants have satisfied the legal threshold for the grant of a stay of execution pending appeal.

#### **Extension of time**

5. The starting point in the determination of the first issue is Section 79G of the [Civil Procedure Act](#), which provides that:

“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... 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.”

6. The principles guiding the exercise of this discretion were first articulated in *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi* [1999] 2 EA 231, where the Court of Appeal stated:

“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 time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding; and fourthly, the degree of prejudice to the respondent if the application is granted.”



7. These criteria were reaffirmed and elaborated upon by the Supreme Court in the landmark case of *Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others* [2014] eKLR, where the Court held:

“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... The underlying principles a court should consider include: the reason for the delay; the length of the delay; the degree of prejudice to the respondent; whether the matter raises issues of public importance; and whether the application has been brought without undue delay.”

8. In the present case, the judgment sought to be appealed against was delivered on 13<sup>th</sup> January 2025, whereas the present application was filed on 12<sup>th</sup> March 2025. This represents a delay of fifty-eight (58) days, a period clearly in excess of the 30-day window contemplated under Section 79 G.

9. The explanation proffered by the Applicants, namely, that instructions to appeal were received belatedly, is, with respect, wholly unsatisfactory. The Court has not been told when the Applicants became aware of the judgment, nor when the alleged instructions were given. It bears emphasis that judicial discretion to extend time is not dispensed as a matter of course; it is an equitable remedy grounded in diligence and candour. In the absence of a credible explanation, the delay remains wholly unexplained and unjustified.

### **Stay of Execution**

10. Turning to the prayer for stay of execution, the Court is guided by the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, which stipulate that:

“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
- (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 him has been given by the applicant.”

11. The above requirements are cumulative, and the applicant must satisfy each limb for the Court to exercise its discretion in favour of a stay. This position was articulated by the Court of Appeal in *Carter & Sons Ltd. v. Deposit Protection Fund Board & 2 Others*, Civil Appeal No. 291 of 1997, where the Court stated at page 4:

“The mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. The applicant must establish a sufficient cause; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

12. On the issue of substantial loss, the Applicants contend that the decretal sum is substantial and that recovery from the Respondent may be uncertain. In *National Industrial Credit Bank Ltd v. Aquinas Francis Wasike & Another* [2006] eKLR, the Court of Appeal clarified the evidentiary burden as follows:

“While the legal duty is on the applicant to prove that the respondent will not be able to repay the decretal sum, it is unreasonable to expect the applicant to know the resources available



to the respondent. Once the applicant expresses a reasonable fear founded on acceptable grounds, the evidential burden then shifts to the respondent to show that he would be in a position to refund.”

13. In the present case, while the apprehension raised by the Applicants is general, it is not without merit, and the Respondent has not attempted to demonstrate financial capability or willingness to refund the decretal sum. The Court is therefore prepared to find that the Applicants have met the threshold of demonstrating substantial loss within the meaning of Rule 6(2)(a).
14. However, the satisfaction of one limb alone does not entitle the Applicants to reliefs sought for the reason that this application was brought almost two months after judgment and only in reaction to the proclamation by the Respondent on 07<sup>th</sup> March 2025. The application was thus reactive, belated, and not pursued with diligence, thereby failing the test under Rule 6(2)(b).
15. Furthermore, the Applicants have neither offered nor proposed any form of security for the due performance of the decree. This requirement is mandatory, and failure to satisfy it is fatal. See Carter & Sons Ltd (supra). It was incumbent upon the Applicants to at least demonstrate a willingness to deposit part of the decretal sum or provide a bank guarantee, but no such effort has been made.

### **Disposition**

16. In conclusion, while the Court is persuaded that the Applicants have raised a reasonable apprehension of substantial loss, they have not provided a satisfactory explanation for the delay in seeking leave to appeal, nor have they made any effort to offer or propose security. The conditions for the grant of stay under Order 42 Rule 6(2) are cumulative, and the failure to satisfy even one is sufficient to render the application incompetent.
17. Consequently, the Notice of Motion dated 12<sup>th</sup> March 2025 is determined in the following terms:
  1. Leave to file an appeal out of time is declined
  2. Stay of execution of the judgment delivered on 13<sup>th</sup> January 2025 in Milimani CMCC No. E2404 of 2024, pending the determination of the intended appeal, is similarly declined
  3. Respondent is awarded the costs of this application
  4. This being a miscellaneous file, it is hereby closed

**DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MAY 2025.**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Abdirizack

For Applicants - Mr. Wanyama for Kimondo Gachoka & Co. Advocates

For Respondent - Mr. Munyoki for TMJ Advocates LLP

