



REPUBLIC OF KENYA



KENYA LAW
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**Bushuru v Charles (Miscellaneous Civil Application
E032 of 2024) [2025] KEHC 8686 (KLR) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8686 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E032 OF 2024**

**AC BETT, J
JUNE 19, 2025**

BETWEEN

HABIL NANJENDO BUSHURU APPLICANT

AND

MAXWEL AMUSALA CHARLES RESPONDENT

RULING

1. By a Notice of Motion dated 4th April 2024 and amended on 18th April 2024, the Applicant sought the following orders:-
 - (a) Stay of proceedings and execution of the decree in Kakamega CMCC No. 420 of 2013 pending the hearing and determination of the intended appeal.
 - (b) Extension of time within which the Applicant should file an appeal as against the Judgement/ Decree delivered on 8th January 2024.
 - (c) That the draft Memorandum of Appeal attached to the application be deemed duly filed upon payment of the requisite fees.
 - (d) That the costs of the application be in the cause.
2. The Applicant swore an affidavit in support of the application in which he averred that the impugned judgement was delivered without prior notice to the parties and that he came to learn of the same upon being served with the Respondent's bill of costs on 26th March 2024. The Applicant further depones that he was aggrieved with the entire judgement and had good grounds of appeal which he ought to be allowed to pursue.
3. In opposition, the Respondent filed a replying affidavit in which he deponed that the Applicant had not proffered a plausible reason for the delay in filing appeal as he had not annexed a copy of a request for court proceedings to prove that the delay was not occasioned by him. Additionally, he averred that



the Applicant should not be granted the orders of stay as he had not furnished security as required by law, the delay is excessive and so the Applicant is guilty of laches, the Appeal does not raise triable issues, and the application is ill motivated and will lead to prejudice to the Respondent.

4. The application was canvassed through written submissions. The Applicant has referred to Section 1A and 3A of the *Civil Procedure Act* and submitted that the Applicant will suffer substantial loss if the orders sought are not granted. He further submits that the delay is excusable as he only came to learn of the judgement when he was served with the Bill of costs. He further submits that he is willing to furnish a title deed for the performance of the decree.
5. On his part, the Respondent submits that the Applicant has not sufficiently accounted for the delay in filing appeal. He also states that the fact that the Applicant has not annexed an application for a copy of the proceedings means that even if he were allowed to file appeal, there would be further delay as the Applicant will be seeking more time to secure the proceedings. For that reason, it is the Respondent's submissions that the application is merely intended to derail and pervert the cause of justice by denying the Respondent the fruits of his judgement.
6. The Respondent further submitted that the Applicant had failed to meet the requisite conditions set out in Order 42 (6) 2. The rest of the Respondent's submissions go into the merit of the intended appeal and are in my view, irrelevant to the present application.
7. The application raises two issues for determination being:-
 - (a) Whether the prayer for extension of time to file appeal is merited.
 - (b) Whether the prayer for stay for execution is merited.
8. Section 79 (G) of the *Civil Procedure Act* provide as follows:-

“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 to the appellant 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.”
9. In the case of *Paul Musili Wambua v Attorney General & 2 others* [2015] eKLR, the Court of Appeal held that:-

“... it is now well 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 whims or caprice. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the 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.”
10. I have noted that the Respondent did not controvert the Applicant's averment that judgement was not delivered on the scheduled date but on a later date without prior notice to the parties and so he only learnt of the existence of the judgement upon being served with the Respondent's Bill of costs by which time the time within which an appeal should have been filed had long lapsed.



11. I note that the Bill of costs was served on 26th March 2024 and the present application filed 10 days later on 4th April 2024. I also note that the judgement is a monetary one and no prejudice will be caused by the intended appeal. Having perused the draft Memorandum of Appeal, I find that it raises triable issues. I am therefore inclined to allow the application for extension of time as the delay was not inordinate and sufficient reasons have been given for the delay.
12. The principles that guide the courts in granting orders of stay of execution pending appeal as codified in Order 42 6 (1) (2) Rules 1 of the Civil Procedure Rules state as follows:-
 - “(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.”
13. The conditions to be met by the Applicant can therefore be summarized as follows:-
 - (a) That substantial loss may result to him unless the order of stay is made.
 - (b) That the application has been made without unreasonable delay.
 - (c) Such security as the court shall order for due performance of the decree has been offered.
14. The substantial law in regard to orders of stay was elucidated by Kimaru J. (as he then was) in the case of *Century Oil Trading Company Ltd v Kenya Shell Limited* [2008] eKLR when the court stated:-

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”
15. The Applicant deponed that he is willing to deposit his title deed as security although he did not specify the land reference number of the title.



16. The power to grant orders of stay are discretionary. In the case of MFI Document Solutions Ltd v Paretto Printings Work Ltd Nairobi HC. Misc. Civil Application No. 85 of 2020 [2021] eKLR, H. I. Ongudi J., stated as follows:-

“35. In the case of Butt v Rent Restriction Tribunal [1982] KLR 417, the Court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

36. The decree herein is a monetary decree. Both parties are limited liability companies. The applicant has shown willingness to offer security for due performance of the decree.”

17. The decree that the Applicant intends to appeal against is a monetary decree arising from a contract to advance a friendly loan. It is a liquidated amount. The cause of action arose in the year 2012. In exercising its discretion, the court needs to be cautious lest in the event the intended appeal does not succeed, the Respondent who is the decree holder finds himself unable to execute.

18. Transactions in respect to land are fraught with many bottlenecks. If it is agricultural land there is need for consent from the Land Control Board under Section 6 (1) of the *Land Control Act*. If it is commercial land, there is need for consent from the Commissioner of Lands pertaining to conditions related to development and usage imposed on the government granted leases. Moreover, in both instances, spousal consent is imperative under Section 93 (3) of the *Land Registration Act*. In any event, converting the title into money can be tedious and lead to inordinate delay. It therefore follows that a title deed is not a suitable security.

19. Security should be able to serve its intended purpose of securing the decree. An unnamed and unvalued asset cannot be said to be good security. In the case of Geoffrey Gichura Mutuura v Royal Group



Industries Limited [2024] KEHC 5176 (KLR), the court dismissed an application that sought to deposit a title deed as security and substituted an order that the Applicant deposits the decretal amount.

20. The decretal sum is a substantial sum, and considering the issues raised in the draft appeal, the Applicant has demonstrated that he stands to suffer substantial loss if execution were to issue. The Applicant has made the application timeously and has expressed that he is ready to furnish security. He deserves the orders so that his appeal is not rendered nugatory in the event it is allowed.
21. In the end, I find that the application has merit and I therefore allow it and issue the following orders:-
 - (i) That time to file the appeal is extended. The appeal should be filed within 14 days.
 - (ii) There shall be stay of execution of the judgment and decree in Kakamega CMCC. No. 420 of 2013 on condition that the sum of Kshs. 1,200,000/= be deposited in an interest earning account in the names of the two law firms appearing for both parties within sixty (60) days.
 - (iii) In the event the Applicant fails to comply with any of the above orders No. (i) and (ii), the same will automatically be vacated.
 - (iv) The costs of the application shall be in the cause.
22. Those are the orders of the court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF JUNE 2025.

A. C. BETT

JUDGE

In the presence of:

No appearance for the Applicant

No appearance for the Respondent

Court Assistant: Polycap

