



Elijah v Nyakagwa t/a Fortunes Auctioneers (Miscellaneous Civil Application E043 of 2023) [2025] KEHC 9667 (KLR) (9 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CIVIL APPLICATION E043 OF 2023**

TA ODERA, J

JUNE 9, 2025

BETWEEN

BENARD O ELIJAH APPLICANT

AND

**JIMMY OMWENGA NYAKAGWA T/A FORTUNES
AUCTIONEERS RESPONDENT**

RULING

Introduction

1. The Applicant herein filed a chamber summons application dated 16th April, 2024, seeking;
 - a. Spent;
 - b. Pending the hearing and determination of this application Interpartes, there be an order of stay of execution of the ruling and order of the subordinate court Kisii dated and delivered on 4th March, 2021 and recovery proceeding of the assessed costs as per the certificate of cost dated 15th March 2021 and issued by the subordinate court Kisii in Kisii Msc. Civil APP. 22 of 2021 Jimmy Omwenga Nyakagwa T/A fortunes auctioneers Vs Benard O Elijah on such conditions if any as may be reasonable.
 - c. The sum of Kshs. 266,120 deposited in a joint interest earning account in the names of the parties advocates as security and as a condition for stay of execution pending appeal pursuant to the orders of this court in KISII HC MISC. E067 of 2022 between the parties herein does remain so deposited as a condition for stay of execution and security for satisfaction of the ruling and order of the subordinate court Kisii dated and delivered on 4th March, 2021 pending the hearing and determination of this application and pending the hearing and determination of the Applicant's intended appeal from that ruling and order.



- d. Pending the hearing and determination of the Application of the applicants intended appeal, there be stay of execution of ruling and order of the subordinate court, Kisii dated and delivered on 4th March, 2021 and or the proceedings of the recovery proceeding of the assessed costs as per the certificate of cost dated 15th March 2021 and issued by the subordinate court Kisii in Kisii Msc. Civil APP. 22 of 2021 Jimmy Omwenga Nyakagwa T/A fortunes auctioneers Vs Benard O Elijah on the basis of the security availed as per prayer 3.
 - e. There be an extension of time to the Applicant within which to file an Appeal by a chamber summon from the ruling and order of the resident magistrate pursuant to rule 55(3) and 4 of the auctioneers' rule 2009 in terms of the draft chamber summons filed herewith and which on time extended as prayed be deemed as duly filed upon payment of fees.
 - f. On such time as sought being extended the court be pleased to set period within which the said Appeal by way chamber summons as is prescribed shall be heard and determined.
 - g. The cost of this application be provided for.
2. The Application is based on the following grounds;
- a. The, respondent an auctioneer, has an Exparte order for costs assessed at Kshs. 266,120 and a certificate of such cost which he intends to recover from the Applicant through execution and or recovery proceedings inclusive of Application to this court and which execution has been levied partially by way of physical seizure registration KBJ 418M without any prior proclamation as is prescribed by law and which sum had been secured by being deposited into a joint interest earning in the names of the parties Advocates and an award of cost is intended to be challenged by way of an Appeal which appeal cannot be lodged without time being extended as the 7 day prescribed window has elapsed and the applicant prior appeal was struck for having been filed out of time.
 - b. The respondent took out a notice of motion Application for the assessment of his charges which the Applicant was never served with at all contrary to the law and the respondent filed a false affidavit of service of the Application upon the Applicant before the subordinate court hence the Exparte proceeding that resulted in the Exparte order which is sought to be challenged.
 - c. The applicant was never given a chance of being heard on the respondent's said Application.
 - d. The respondent's bill of cost was thus assessed exparte out of an abuse of court processes.
 - e. The amount assessed is colossal and huge and to say the least frankly some of the items allowed are not prescribed and are not proportionate to the decretal debt which the respondent executed for against the Applicant and which the respondent was awarded.
 - f. The intended appeal is arguable as appears from the draft chamber summons herewith.
 - g. The delay before filing the intended is not inordinate given the facts of this motion.
 - h. The delay in filing the appeal has been explained and the explanation given is satisfactory.
 - i. The applicant has been condemned unheard contrary to all the known principals of justice.
 - j. The Applicant was granted leave to appeal out of time in the prescribed manner which appeal was lodged but which appeal was struck out for having been lodged out of time on 13th March, 2024 and thus the delay in filing this Appeal was caused by this court.



- k. There is security which the Applicant in a joint interest earning account in the names of the parties advocates pending the filing hearing and determination of that prior now struck out appeal and which security remains in that account pending further orders.
 - l. The respondent will not be prejudiced irreparably if the orders sought are granted.
 - m. It will be both just and equitable in the interest of justice to grant the orders sought herein.
3. In response to the Application, the Respondent filed a Replying Affidavit dated 31st May, 2024 wherein he averred that applicant filed an appeal before this court which appeal was dismissed. He averred too applicant was a conditional stay of execution which has since lapsed by dint of the dismissal of the Appeal. He went on to aver that the applicant has approached this court again seeking orders of stay pending the intended appeal instead of moving to the court of appeal.
 4. He contended that by the determination of the appeal by this court, this court thus became functus officio and thus has no capacity to entertain matters subject to the Court of appeal. He decried that the continued holding of the funds in the account denied him the fruits of my judgment in which he is entitled to by law. He deposed that the applicant has not demonstrated before this court what prejudice and loss and damage he is likely to suffer in the event there is no stay granted by this court pending the intended Appeal.
 5. He averred equally that the order for deposit of security before this court were granted by consent of parties and therefore the applicant must seek extension of the consent and not drag this court into granting such orders without taking into account the circumstances under which it was deposited. He further argued that the orders dated 10th may, 2022 issued by this court by consent of the parties, the applicant failed to comply with the same and proceeded to prosecute a premature application in form of an Appeal which has since been struck by the court.
 6. It was also his averment that the period wasted by the applicant prosecuting an incompetent application in court confirms that indeed he was guilty of laches and therefore there was inordinate delay on his part. It was also his averment that the Application has not met the threshold or given a proper justification why he did not pursue proper proceedings in court within reasonable time.
 7. He also averred that this application is res judicata contrary to the provisions of section 7 of the [civil procedure act](#) by dint of the application dated 21st March, 2022.

Issues Of Determination

8. Upon perusal of the Application, the response thereto and the submissions of the parties the issues for determination are whether
 - a. Whether the applicant is entitled to an extension of time to file his intended Appeal,
 - b. Whether the applicant entitled to stay of execution based on the conditions that were granted in Misc App. No. E066 of 2024,
 - c. Whether the application is Res judicata,



ANALYSIS AND DETERMINATION OF THE ISSUES

Whether the applicant is entitled to an extension of time to file his intended Appeal

9. Rule 55 (5) of the Auctioneers Rules allows a window of 7 days within which to file an appeal after the decision is made. 3 years had lapsed by the time this Application was filed the applicant filed this Application to file the appeal out of time.
10. The Supreme Court in the case of Nicholas Kiptoo Korir arap Salat vs 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 bycase 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.
11. Similarly in the case of Paul Musili Wambua vs 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.”
12. Having stated hereinabove that this application was filed 3 years after delivery of the ruling that the applicant was to appeal against it is outright that there was inordinate delay in filing this Application. However, this court has discretion to extend time for filing an appeal out of time if the delay explained to its satisfaction. Has the Applicant satisfactorily explained the delay in filing his application?
13. In order to answer this question, it is important to outline the background of that led to the filing of this case as averred by the parties. It is common ground that the Applicant did file a notice of motion Application being Misc. App. No. E067 of 2022 which relates to this case seeking stay and extension of time to file the appeal against the ruling of the lower court delivered on 4th March, 2021. It is also



not disputed that this court vide its order dated 10th May, 2022 by consent of the parties granted leave to the Applicant to file his Appeal within 21 days from the date thereof and in default execution to issue. The said 21 days given by these court expired on 31st May, 2022. However, after the expiry 21 day window, the Applicant proceeded to file an Appeal without leave and his Appeal was struck out on 13th March, 2024. A month later on 16th April, 2024, the Applicant filed the instant Application seeking leave to file his appeal out time.

14. The applicant, claims that the delay in filing this Application was occasioned by this court. One wonders how the court comes to play in the delay in filing the appeal as it is not a party herein. The applicant did not explain why he choose to appear in this court one month after this court struck out his appeal. A diligent person would have been expected to move the court immediately after the appeal was struck out.
15. From the forgoing therefore, I find that the Applicant has not given any sufficient reason for the inordinate delay in filing this application. He is thus not entitled to extension of time to file his intended appeal.

Whether the applicant entitled to stay of execution based on the conditions that were granted in Misc. App. No. E067 of 2024

16. The applicant has sought stay of execution the ruling the lower court issued on 4th March, 2021 and the certificate of cost issued 15th March, 2021 pending the hearing and determination of intended Appeal. He has also prayed that the security that he had deposited pursuant to the consent order issued on 10th May, 2022. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:-

“No order for stay of execution shall be made under subrule (1) unless—

- i. 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
- ii. 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.

17. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

Substantial loss

18. Substantial loss was clearly explained in the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is



the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure rules. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

19. The applicant contends that he stands to suffer irreparably if the respondent levies execution against him. The respondent on the other argues that the applicant has not demonstrated the prejudice, loss and damage he is likely to suffer in the event there is no stay granted by this court pending the intended Appeal. On perusal of the applicant's affidavit, I have noted that the applicant indeed not demonstrated how he stands to suffer substantial loss if the orders sought are not granted. The applicant merely states the respondent has an Exparte order for costs assessed at Kshs. 355,215 and a certificate of such cost which he intends to recover from the Applicant through execution and or recovery proceedings inclusive of Application of this court.
20. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory. The Applicant has revealed that the decretal sum that was deposited as security in the joint account in relation to the issues raised in this Application has not recovered by the applicant despite the consent agreement of 10th May, 2022 providing that the same was recoverable in case the Applicant failed to file his appeal within 21 days. A decree holder is entitled to enjoy the fruits of his judgment and in deciding whether to grant stay of execution the court must balance the right of appeal and the right of the decree holder. It is now about 3 years since the orders of stay were issued and the appeal has not been filed and hence the respondent will suffer substantial loss if the orders are granted.

Unreasonable delay.

21. The ruling the Applicant intends to appeal against was delivered on 4th March, 2021. This Application was filed 16th April, 2024, which is more than 3 years after the said ruling was delivered. The applicant was expected to file an appeal within 7 days and thus a 3 year delay is unreasonable.
22. As I have stated hereinabove the Applicant had in 2022 sought leave to file an appeal against the ruling of the lower court out of time. Vide a consent of the parties recorded on 10th May, 2022 he was given 21 days within he could file the appeal after depositing the decretal sum in the joint interest earning account of the advocates representing the parties. However, he 21 day period expired without him filing the Appeal. In June, 2022 several days after the expiry the 21 days he without leave filed the said Appeal. This court vide its ruling delivered on 13th March, 2024 struck out the appeal for having been filed outside the 21 days without leave of the court.
23. It is outright that the Applicant who was given leave to file his appeal within 21 days squandered the said opportunity by filing and prosecuting an incompetent Appeal filed without leave of the court for a period 2 years. It goes without saying that there was unreasonable delay in filing this application which delay has not been sufficiently been explained.

Security

24. The Applicant has prayed that the sum of Kshs. 266,120 deposited in a joint interest earning account in the names of the parties advocates as security and as a condition for stay of execution pending appeal



pursuant to the orders of this court in KISII HC MISC. E067 of 2022 between the parties herein remains so deposited as a condition for stay of execution and security for satisfaction of the ruling and order of the subordinate court Kisii dated and delivered on 4th March, 2021. In response the respondent averred that the order for deposit of security before this court was granted as a result of the consent of the parties to only operate for 21 days and therefore the applicant must seek extension of the consent from the respondent. He averred that the applicant failed to comply with the same and proceeded to prosecute a premature Appeal which was struck out by this court.

25. As correctly submitted by the respondent, a consent can only be varied by consent until it is shown that the same was entered into by fraud, collusion or by an agreement which is against public policy which are the same grounds for vitiating a contract. The security that the applicant wants to apply to this case was part of the consent order which was voluntarily entered into by both parties. In the case of Board of Trustees National Social Security Fund v Micheal Mwalo [2015] KECA 782 (KLR) it was held that: “To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.” Also, in the case of Kenya Commercial Bank Ltd V Specialized Engineering Co. Ltd [1982] KLR 485, Harris J correctly held inter alia, that –
26. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
27. There are no allegations that the consent was obtained by fraud, mistake or collusion or by an agreement against public policy in this case. The applicant defaulted on the terms of the consent and only avenue remaining for him is to obtain a consent to vary the terms of the consent. The parties herein entered into a valid consent whose terms this court lacks jurisdiction to vary. This court cannot thus order that the security be applied herein out of the agreed time.
28. On Res judicata, the respondent submitted that the intended appeal is Res judicata under Section 7 of the *Civil Procedure Act*.
29. It was also his averment that the period wasted by the applicant prosecuting an incompetent application in court confirms that indeed he was guilty of laches and therefore there was inordinate delay on his part. It was also his averment that the Application has not met the threshold or given a proper justification why he did not pursue proper proceedings in court within reasonable time.
30. He in the end averred that this application is res judicata contrary to the provisions of section 7 of the *civil procedure act* by dint of the application dated 21st March, 2022.

Issues Of Determination

31. Upon perusal of the Application, the response thereto and the submissions of the parties the issues for determination are whether:
 - a. Whether the applicant is entitled to an extension of time to file his intended Appeal.
 - b. Whether the applicant entitled to stay of execution based on the conditions that were granted in Misc App. No. E066 of 2024.



Analysis And Determination Of The Issues

Whether the applicant is entitled to an extension of time to file his intended Appeal

32. Rule 55 (5) of the Auctioneers Rules allows a window of 7 days within which to file an appeal after the decision is made. 3 years had lapsed by the time this Application was filed the applicant filed this Application to file the appeal out of time.

33. The Supreme Court in the case of Nicholas Kiptoo Korir arap Salat vs 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.

34. Similarly in the case of Paul Musili Wambua vs 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.”

35. Having stated hereinabove that this application was filed 3 years after delivery of the ruling that the applicant was to appeal against it is outright that there was inordinate delay in filing this Application. However, this court has discretion to extend time for filing an appeal out of time if the delay explained to its satisfaction. Has the Applicant satisfactorily explained the delay in filing his application?

36. In order to answer this question, it is important to outline the background of that led to the filing of this case as averred by the parties. It is common ground that the Applicant did file a notice motion Application being Msc. App. No. E067 of 2022 which relates to this case seeking stay and extension of time to file the appeal against the ruling the lower court delivered on 4th March, 2021. It is also not



disputed that this court vide its order dated 10th May, 2022 by consent of the parties granted leave to the Applicant to file his Appeal within 21 days from the date thereof and in default execution to issue. The said 21 days given by these court expired on 31st May, 2022. However, after the expiry 21 day window, the Applicant to file an Appeal without leave and his Appeal was struck out on 13th March, 2024. A month later on 16th April, 2024, the Applicant filed this Application seeking leave to file his appeal out time.

37. The applicant, claims that the delay in filing this Application was occasioned by this court. One wonders how the court comes to play in the delay in filing the appeal as it is not a party herein. The applicant did not explain why he choose to appear in this court one month after this court struck out his appeal.
38. In any event, the respondent has strenuously opposed the application and argued that the consent agreement having been rendered in operative, the Applicant cannot purport to seek to extension of time in this matter.
39. As per the consent, the appeal was to be filed within 21 days from 10.5.22 which is the date of the consent. In the case of Board of Trustees National Social Security Fund v Micheal Mwalo [2015] KECA 782 (KLR) it was held that: “To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.” Also in the case of Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd [1982] KLR 485, Harris J correctly held inter alia, that –
40. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

There are no allegations that the consent was obtained by fraud, collusion or by an agreement which is against public policy. This court lacks jurisdiction to vary the terms of the consent to allow extension of time within which to file the appeal

41. On Res judicata, the respondent submitted that the intended appeal is Res judicata under Section 7 of the Civil Procedure Act. Section 7 of the Civil Procedure Act enacts- that:

“No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court of competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Bernard Mugo Ndegwa v James Githae & 2 Others [2010] e KLR it was held that the applicant alleging resjudicata must show that;

- a) That the matter in issue is identical in both suits;
- b) The parties in the suit are substantially the same;
- c) There is concurrence of jurisdiction of the court;
- d) The subject matter is the same; and
- e) That there is a final determination as far as the previous decision is concerned.



The judgment dated 13.3.24 the appeal was struck out for being filed without leave of the court but not dismissed. This court did not go to the merits and demerits of the appeal. The effect of striking out of pleadings is that a party can still move the court to file another appeal as the previous one was not determined on merit. The intended appeal is thus not Res judicata

42. From the forgoing therefore, I find that the Applicant has not given any sufficient reason to grant extension of time herein. He is thus not entitled to extension of time to file his intended appeal.

Whether the applicant entitled to stay of execution based on the conditions that were granted in Misc App. No. E067 of 2024

43. The applicant has sought stay of execution the ruling the lower court issued on 4th March, 2021 and the certificate of cost issued 15th March, 2021 pending the hearing and determination of intended Appeal. He has also prayed that the security that he had deposited pursuant to the consent order issued on 10th May, 2022. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:-

“No order for stay of execution shall be made under subrule (1) unless—

- iii. 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
- iv. 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.

44. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

- 1. Substantial loss may result to him/her unless the order is made;
- 2. That the application has been made without unreasonable delay; and
- 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

Substantial loss

45. Substantial loss was clearly explained in the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure rules. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.



46. The applicant contends that he stands to suffer substantial loss if the respondent levies execution against him. The respondent on the other argues that the applicant has not demonstrated the prejudice, loss and damage he is likely to suffer in the event there is no stay granted by this court pending the intended Appeal. On perusal of the applicant's affidavit, I have noted that the applicant indeed not demonstrated how he stands to suffer substantial loss if the orders sought are not granted. The applicant merely states the, respondent has an Exparte order for costs assessed at Kshs. 355,215 and a certificate of such cost which he intends to recover from the Applicant through execution and or recovery proceedings inclusive of Application of this court.
47. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory. The Applicant has revealed that the decretal money sum that was deposited as security in the joint account in relation to the issues raised in this Application has not recovered by the applicant despite the consent agreement of 10th May, 2022 providing that the same was recoverable in case the Applicant failed to file his appeal within 21 days. A decree holder is entitled to enjoy the fruits of his judgment and in deciding whether to grant stay of execution the court must balance the right of appeal and the right of the decree holder. It is about 3 years since the orders of stay were issued and the appeal has not been filed and hence the respondent will suffer substantial loss if the orders are granted.

Unreasonable delay.

48. The ruling the Applicant intends to appeal against was delivered on 4th March, 2021. This Application was filed 16th April, 2024, which is more than 3 years after the said ruling was delivered. The applicant was expected to file an appeal within 7 days and thus a 3 year delay amounts to unreasonable.
49. As I have stated hereinabove the Applicant had in 2022 sought leave to file an appeal against the ruling of the lower court out of time. Vide a consent of the parties recorded on 10th May, 2022 he was given 21 days within he could file the appeal after depositing the decretal sum in the joint interest earning account of the advocates representing the parties. However, he 21 day period expired without him filing the Appeal. In June, 2022 several days after the expiry the 21 days he without leave filed the said Appeal. This court vide its ruling delivered on 13th March, 2024 struck out the appeal for having been filed outside the 21 days without leave of the court.
50. It is outright that the Applicant who given leave to file his appeal within 21 days squandered the said opportunity by prosecuting an incompetent Appeal filed without leave of the court for a period 2 years. It goes without saying that there was unreasonable delay in filing this application which delay has not been sufficiently been explained.

Security

51. The Applicant has prayed that the sum of Kshs. 266,120 deposited in a joint interest earning account in the names of the parties advocates as security and as a condition for stay of execution pending appeal pursuant to the orders of this court in Kisii High Court Misc No. E066 of 2022 between the parties herein remains so deposited as a condition for stay of execution and security for satisfaction of the ruling and order of the subordinate court Kisii dated and delivered on 4th March, 2021. In response the respondent averred that the order for deposit of security before this court was granted as a result of the consent of the parties to only operate for 21 days and therefore the applicant must seek extension of the consent and not drag this court into granting such orders without taking into account the circumstances under which it was deposited. He averred too that the applicant failed to comply with



the same and proceeded to prosecute a premature application in form of an Appeal which was struck out by this court.

52. As I have already found hereinabove, the applicant has not obtained consent of the respondent to vary the consent and allow security to be deposited herein. The security deposited in Kisii Misc Application no. E067 of 2022 cannot thus be used as security herein.
53. From the above analysis I find that application dated 16.4.24 is not merited and thus I proceed to dismiss the same with costs to the respondent.

T.A ODERA

JUDGE

9.6.25

DELIVERED VIRTUALLY VIA TEAMS PLATFORM ON THIS 9TH DAY OF JUNE 2025 IN THE PRESENCE OF:

Mr Kiarianki hold brief for Mr. Nyambati for the Applicant

N/A for the Respondent

Court Assistant - Kinya

