



Matunda (Fruits) Bus Services Limited & another v SN (Minor Suing Through His Father and Next Friend PMN) (Miscellaneous Civil Application E118 of 2024) [2025] KEHC 8773 (KLR) (16 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8773 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E118 OF 2024**

JM NANG'EA, J

JUNE 16, 2025

BETWEEN

MATUNDA (FRUITS) BUS SERVICES LIMITED 1ST APPLICANT

NAIROBI BUS UNION 2ND APPLICANT

AND

SN (MINOR SUING THROUGH HIS FATHER AND NEXT FRIEND PMN) RESPONDENT

RULING

1. Vide Notice of Motion dated 15th April 2024 the Applicants crave the following reliefs;-
 - 1) Spent.
 - 2) This Honpurable Court be pleased to grant the Applicant leave to appeal out of time in respect to the Judgement/decree delivered in Nakuru CMCC NO. E839 of 2021 by Hon. B. Ochieng (Chief Magistrate) .
 - 3) Spent.
 - 4) This Honourable Court be pleased to grant an order of stay of execution of the judgement and/or decree delivered on 21/02/2024 and all consequential orders arising therefrom pending the hearing and determination of an intended appeal herein.
 - 5) This Honourable Court be pleased to sise an Order for provision of a Bank Guarantee of the entire decretal sum awarded by the trial court of Ksh. 258,860/= plus costs and interests only as security pending hearing and determination of the intended Appeal herein.(sic)



- 6) This Honourable Court be pleased to issue any other Order as it may deem just, appropriate and expedient in the interest of justice.
- 7) Costs of this application be provided for.
2. The application arises from judgement of the lower court (Hon. B. Ochieng- Chief Magistrate) in which the Respondent was granted Ksh. 258,860/= in damages together with costs and interest against the Appellant in the said Nakuru CMCC No. E839 of 2021 following a fatal road accident in which the named minor allegedly suffered bodily injuries. Aggrieved by the decision, the Applicants lodged a Memorandum of Appeal based on various grounds, as well as this application.
3. By Affidavit in Support of the Motion, the Appellant’s advocate (Cherotich Faith) inter alia avers that the delay to bring this application was occasioned by the Applicants’ Insurer’s Claims Manager leaving his employment before issuing necessary instructions to advocates. It is further contended that the Respondent has no known income based on the proceedings before the lower court and, therefore, the Applicant could be exposed to substantial loss and his intended appeal rendered nugatory if this application is not allowed..
4. The Applicant expresses willingness and readiness to furnish a bank guarantee for the entire decretal sum pending hearing and determination of the intended Appeal.
5. Through affidavit evidence in reply, the Respondent opposes the Motion contending that it is bad in law, brought in bad faith, inept, lacks merit, an afterthought and otherwise an abuse of the court process. The bank guarantee offered as security for performance of a decree that may eventually be issued is said to be not suitable. The application is therefore dismissed as lacking in merit and only intended to delay the Respondent’s enjoyment of fruits of litigation.
6. None of the parties made or filed submissions. I have perused against the application, the Respondent’s reply and all annexures to the parties’ rival affidavits.
7. Section 79 G of the Civill Procedure Act provides 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”.
8. Case law in Edith Gichungu vs Stephen Njagi Thoithi (2014) eKLR lists the following factors among others to be considered before determining whether or not to grant leave to file an appeal out time;
“ ... the period of delay; the reasons for the delay; the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance” .
9. The court is also enjoined to consider the overriding objectives of civil litigation to ensure a just, expeditious, proportionate, and affordable resolution of disputes (see case law in Kamlesh Mansukhalal Damki Patni vs Director of Public Prosecutions & 3 Others (2015) eKLR).
10. The court is further obliged to consider the competing interests of the parties to such an application with an eye to ensuring that the appeal is not rendered nugatory thereby exposing the Applicant to substantial loss, and the Respondent also gets consideration having a valid judgement in his favour. In



Daniel Chebutul Rotich & 2 Others vs Emirates Airlines, Civil Case No. 368 of 2001, substantial loss was explained as hereunder;

“substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum”.

11. In *Tropical Commodities Ltd. International (in liquidation) (2004) 2 EA 331* my brother (Ogolla J) explained that substantial loss is a qualitative concept. It refers to:-

“any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”

12. The question of “substantial loss” is therefore the cornerstone of the court’s jurisdiction and discretion to grant an order for stay of execution pending appeal (see case law in *Rhoda Mukuma vs John Abuoga (1988) KLR* alluded to by the Appellant’s advocates).

13. The issues for determination are whether the Applicant has shown that he deserves exercise of the court’s discretion in his favour to enlarge time to file appeal against the impugned judgement and obtain an order for stay of execution pending appeal.

14. In *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 Others (2015) eKLR* the following principles are laid down as guiding the court’s discretion whether or not to enlarge time;

- a) a) Extension of time is not a right but an equitable remedy only available to a deserving party.
- b. A party seeking extension has the burden of laying the basis to the satisfaction of the court.
- c. The court’s discretion depends on the circumstances of each case.
- d. The question of any prejudice that may be suffered by the respondent should be taken into account.

And

b. The court should also consider whether the application was brought without undue delay.”

15. In *Mohsen Ali & Another vs Priscillah Boit & Another, E& LC Case No. 2000 of 2012 (2014) eKLR* the court explained “unreasonable delay” as dependent on the surrounding circumstances of each case.

16. The Applicant has not satisfactorily explained the long delay of around 2 months to bring this application. The Applicants themselves or their concerned staff have not offered affidavit evidence to explain in relevant detail why this long period was taken to seek leave to appeal out of time. An advocate’s evidence from the bar is not sufficient to discharge this burden as it is only the Applicants that are privy to this information or circumstances that allegedly caused the delay. This delay is prejudicial to the Respondent who is unnecessarily being kept off the fruits of his judgement.

17. The Applicants do not therefore deserve extension of time to lodge appeal. This finding would be sufficient to dispose of the application since stay of execution cannot be granted without an appeal.



18. If only for academic purposes, Order 42 rule 6 (1) (2) of the Civil Procedure Rules 2010 governs disposal of an application such as before me for stay of execution pending appeal. The legal provisions stipulate that such order may not be granted;-
- “a. unless 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.”
19. In the circumstances, the delay is found to be unreasonable and inexcusable, therefore this legal condition has not been satisfied.
20. Provision of security for costs is a crucial condition precedent to grant of an order of stay of execution pending hearing and determination of an appeal. This is a mandatory legal requirement that has to be complied with. The court has power to determine the appropriate security for costs but the Applicant must first express willingness and readiness to offer security.
21. In *John Odungo vs Joyce Irungu Muhatia* [2014] eKLR the court observed that an Applicant does not have to actually make a deposit of security to obtain an order of stay of execution. It suffices if he shows “preparedness as well as readiness to provide security should one be called upon to do so”.
22. The Applicant has satisfied the requirement for offer security for costs, having expressed willingness and readiness to comply.
23. Determination of the application turns on the question of substantial loss, if any, the Appellant might suffer if stay of execution is not ordered. The case of *Nyatera vs Nyakundi* (Civil Appeal E033 of 2022) [2023]KEHC 3086 KLR) (16 March 2023) (Ruling) is relevant for the proposition that the Applicant ought to show the manner in which his appeal would be rendered nugatory if stay of execution is not ordered.. The court opined in the case that it is not enough to say that because the Respondent intends to proceed with execution, he should be stopped because of the appeal. The court is therefore required to tread a delicate balance of the parties’ interests. As it is now trite, this is the cornerstone of the court’s discretion to grant or refuse stay of execution pending appeal. The onus is on the Appellant to show on a balance of probability that the Respondent would not be able to refund the decretal sum if paid out and the appeal eventually succeeds.
24. In *RWW vs EKW* [2019] eKLR and *Re Global Tours & Travel Ltd HCWC No. 43 of 2000* In *Milimani HCMCA No. 1561 of 2007*, *Century Oil Trading Company Ltd vs Kenya Shell Ltd*, this court again explained that;-
- “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 when, 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.”



25. In *Shell Ltd vs Kibiru & Another* (1986) KLR 410 it was famously postulated that “substantial loss in its various forms is the cornerstone of the court’s jurisdiction to grant stay pending appeal. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”
26. Regarding the burden of proof, the Court of Appeal held in *National Industry Credit Limited vs Aquinas Francis Wasike & Another* [2006] eKLR that;

“once an applicant expresses a reasonable fact that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”
27. The legal position elucidated in the cited Case Law has been reiterated in several recent cases including *Matata & Another vs Rono & Another* (Civil Appeal No. E034 of 2024) [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling) and *Muinde Mulatya & Another* (2021) eKLR and *Kenya Commercial Bank Limited vs Sun City Properties Limited 7 & 5 Others* (2012) eKLR.
28. Based on the affidavit evidence of the parties neither of them has stated their financial position. The Applicants who shoulder the burden of proof have in particular not made out a prima facie case of the Respondent’s inability to pay back any decretal sum to warrant the latter to debunk the claim.
29. In the particular circumstances of this case, therefore, the Applicants have not satisfied the key substantial loss test as well as the requirement to institute such application without inordinate or unreasonable delay. The onus was on the Applicants to meet all the conditions stipulated hereinabove. The Applicants have not also shown necessary bonafides as they did not heed the court order issued on 26th April 2024 requiring them to pay out half of the decretal sum to the Respondent as a pre-condition for grant of interim stay of execution pending hearing of the application inter-partes . In any event, leave to appeal has been declined for the reasons given hereiabove.
30. The application is accordingly dismissed in its entirety with costs to the Respondent.

J. M. NANG’EA, JUDGE.

Ruling delivered virtually this 16th day of June , 2025 in the presence of:

The Advocate for the Applicants, Ms Chemutai for Ms Cherotich.

The Advocate for the Respondent, Ms Sitati

Court Assistant, Jeniffer.

