



REPUBLIC OF KENYA



Ontango v Mesa (Civil Appeal E228 of 2024) [2025] KEHC 12142 (KLR) (9 June 2025) (Ruling)

Neutral citation: [2025] KEHC 12142 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E228 OF 2024**

F WANGARI, J

JUNE 9, 2025

BETWEEN

BERYL ATIENO ONTANGO APPELLANT

AND

AMOS AGATA MESA RESPONDENT

RULING

1. This is a Ruling over an Application dated 30/07/2024. The prayers sought are as follows;
 - a. Spent
 - b. This Honourable court be pleased to grant the Applicant leave to lodge an appeal out of time.
 - c. Spent
 - d. There be stay of the execution pending appeal
 - e. Costs of the application
2. The grounds upon which the Application is made is that the Applicant being dissatisfied with the Judgment delivered on 09/05/2024 by Hon. J.W. Mwangi intends to appeal against the said Judgment.
3. It was stated that the delay was due to unforeseeable circumstances including delay in obtaining certified copies of judgment and proceedings. The Applicant was said to risk suffering prejudice and being driven out of the seat of justice if the orders being sought are not granted.
4. The Respondent in the Replying Affidavit dated 26/09/2024 opposed the application on the grounds inter alia that the 51 days after the Judgment delay was not only inordinate but inexcusable. Further, filing of Memorandum of Appeal does not require certified copies of proceedings, Judgment and Decree. It was prayed that the application be dismissed with costs.



5. The Applicant further filed a Further Affidavit dated 18/10/2024 without leave of court or seeking to have the same deemed as properly filed. In the absence of the above, the Further Affidavit is expunged from the court's records.
6. The application was canvassed by way of written submissions. Both parties filed their respective rival submissions which I have perused and considered.

Analysis

7. I have perused the Application, the response thereto and submissions filed by the parties, the issues for determination are;
 - a. Whether the delay in lodging a Memorandum of Appeal has been satisfactorily explained.
 - b. If the reason for delay is sufficient, whether stay orders should be granted.
 - c. Who bears the costs
8. In *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court of Kenya decision (M.K. Ibrahim & S.C. Wanjala SCJJ) held as follows:-
 - “(1) 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.
 - (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 - (3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
 - (4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.”
9. Further, the extension of time being discretionary, the party seeking the indulgence of the court must present materials before the court to enable the exercise of the said discretion. (See *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR). It follows therefore that the Applicant's explanation for the delay is key in guiding the Court's exercise of discretion on the issue of leave to appeal out of time.
10. Section 79 G of the *Civil Procedure Act* provides as doth: -

“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.”
11. The Applicant delayed for 51 days. The reason given is that there was delay on the part of the court to avail copies of proceedings, judgment and Decree. Letters of the Court Administrator, Mombasa Law Court dated 27/05/2024 and 14/06/2024 seeing to have the said documents availed were attached. Even though the Respondent stated that one does not need the said documents to file a Memorandum



of Appeal, I deem it necessary to have at least a copy of the Judgment in order to get a basis for the appeal. I find the reason for delay given is genuine and has been explained and leave to file appeal of time is hereby granted.

12. Having granted leave to appeal, I have to determine whether the Appellant has satisfied the conditions for the grant of stay of execution pending Appeal. 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—

- (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. An Applicant seeking stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely;

- (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and
- (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. (See *Antoine Ndiaye v African Virtual University* [2015] eKLR).

14. I have to ascertain whether the Applicant has demonstrated loss that it stands to suffer if the order of stay is not granted. From the affidavit in support of the Application, it is deponed that should the order be declined, the Applicant stands to suffer prejudice as she will be driven from the seat of justice.

15. Substantial loss for purposes of Order 42 rule 6 of the Civil Procedure Rules was discussed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“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 CPR. 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.”

16. Having considered the Application, I am of the considered view that the Applicant has not demonstrated that it will suffer substantial loss in the event the Appeal succeeds. It has also not been shown that the award for costs of Kshs. 10,000/= if executed and the appeal is successful, that the same cannot be recovered from the Respondent. I find that the Appellant has failed to meet the threshold for stay of execution of Judgment, and the same is denied.

17. On costs, this matter being at a preliminary stage costs to follow the outcome of the appeal.



Determination

18. The upshot of the foregoing is that the Notice of Motion dated 30/07/2024 is partially successful and on the following terms;
- a. The Memorandum of Appeal annexed to this application is hereby admitted out of time subject to the payment of the requisite court filing fees.
 - b. The court declines to issue stay of execution orders as prayed.
 - c. Costs shall abide the outcome of the Appeal.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9TH DAY OF JUNE 2025.

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F. WANGARI

JUDGE

In the presence of: -

Mr. Ajwang Advocate for the Appellant/ Applicant

Ms. Atieno Advocate for the Respondent.

Ms Getrude, Court Assistant

