



REPUBLIC OF KENYA



**Birgen v Nic Bank Limited (Miscellaneous Application E1053 of 2024)
[2025] KEHC 11070 (KLR) (Commercial and Tax) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11070 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E1053 OF 2024**

PM MULWA, J

JULY 24, 2025

BETWEEN

NELLY JEPKOSGEI BIRGEN APPLICANT

AND

NIC BANK LIMITED RESPONDENT

RULING

1. The application before the Court is the Notice of Motion dated 3rd December 2024, brought by the Applicant pursuant to Sections 1A, 1B, 3A and 79G of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*. The Applicant seeks two primary orders: firstly, a stay of execution of the decree issued on 24th June 2019 in Milimani CMCC No. 4744 of 2015; and secondly, leave to file an appeal out of time against the ruling delivered by Hon. C.A. Ogweno on 12th September 2024.
2. The application is supported by the grounds on its face and the affidavit of the Applicant sworn on even date. The Applicant avers that judgment was entered against her ex parte on 1st March 2019 and a decree issued on 24th June 2019 for the sum of Kshs. 13,053,274.49. She states that the Respondent has since commenced execution proceedings and a Notice to Show Cause has been issued for the enhanced sum of Kshs. 18,711,549.00 which she contends is grossly exaggerated and disputed.
3. The Applicant further deposes that she has made several unsuccessful attempts to set aside the ex parte judgment and attributes the delay in filing an appeal to those proceedings. She contends that the failure to appeal within time is neither deliberate nor inordinate but was occasioned by her genuine efforts to have the trial court revisit the judgment. She asserts that unless the orders sought are granted, she will suffer substantial loss and irreparable harm.
4. In opposition, the Respondent filed a Replying Affidavit sworn on 20th January 2025 by one Christine Wahome. It is deposed that the application is incompetent, an abuse of court process, and is designed



solely to frustrate the Respondent from enjoying the fruits of a lawful judgment. The Respondent avers that the Applicant has demonstrated indolence and a pattern of delay, having failed to prosecute her previous applications with diligence despite enjoying interim orders from 20th June 2022. The court eventually delivered a ruling on 12th September 2024, setting aside those interim orders due to the Applicant's inaction.

5. It is the Respondent's position that the Applicant has not offered sufficient or satisfactory explanation for the delay in filing the intended appeal. The Respondent also contends that since no appeal has yet been filed, there is no basis upon which stay of execution can be granted, and in any event, the decree being a money decree, it does not render the intended appeal nugatory nor would it cause irreparable loss to the Applicant. The Respondent maintains that prejudice continues to accrue as the decretal sum remains unpaid since 2019.

Analysis and determination

6. I have carefully considered the application, supporting affidavit and the Respondent's replying affidavit. The two main issues for determination herein are:
 - i. Whether the court should exercise its discretion to grant the applicant leave to file her appeal out of time.
 - ii. Whether the applicant has met the prerequisite for grant of stay of execution pending appeal.
7. Section 79G of the *Civil Procedure Act* 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, 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 a good and sufficient cause for not filing the appeal in time.”

9. The principles governing the exercise of the court's discretion under Section 79G were set out by the Court of Appeal in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 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...”

8. In exercising that discretion, the court must consider the length of delay, the reason for the delay, the degree of prejudice to the Respondent if the application is granted, and whether the intended appeal is arguable.
9. In the present case, the impugned ruling was delivered on 12th September 2024. The present application was filed on 3rd December 2024, a delay of approximately 81 days. The explanation offered is that the Applicant had previously mounted applications to set aside the judgment, and it was only after the latest ruling declined that relief that the option of an appeal was considered.



10. The importance of giving a sufficient reason for the extension of time to appeal was also discussed in the Court of Appeal case of *Susan Ogotu Oloo & 2 Others v Doris Odindo Omolo* [2019] eKLR where it was held:

“In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously.”

11. This Court accepts that a litigant who has made genuine efforts to seek redress through proper legal channels should not be locked out of the seat of justice on account of procedural delay.

12. While the delay is not inordinate, the Applicant has not attached a draft memorandum of appeal or demonstrated prima facie arguable grounds. Even so, the court is mindful that the right to be heard on appeal is a constitutional right under Article 50(1) of the *Constitution* and must be balanced against the need for finality in litigation.

13. On balance, I find that the explanation offered for the delay, though marginal, is plausible in the context of the prior litigation steps.

14. On the issue of stay of execution pending appeal, it is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6 of the *Civil Procedure Rules* which stipulates:

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 orders set aside.
2. No order for stay of execution shall be made under sub rule 1 unless:
 - a. The Court is satisfied that substantial loss may result to the 1st 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.

15. It is well settled that the burden lies on the Applicant to demonstrate that she will suffer substantial loss if the order for stay of execution is not granted. In *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR, the Court of Appeal emphasized that:

“...Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

16. The decree sought to be stayed is a money decree. The Applicant has not tendered any evidence to show that the Respondent is incapable of refunding the decretal sum in the event the intended appeal is successful. Furthermore, no security has been offered in satisfaction of the requirements under Order 42 Rule 6(2)(b) of the *Civil Procedure Rules*. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR, the Court of Appeal emphasized that the burden of proving



substantial loss rests squarely with the Applicant, and bare assertions without evidentiary support are insufficient.

17. It is also trite that the mere commencement or prospect of execution, in and of itself, does not constitute substantial loss. Execution is a lawful process of enforcing a valid judgment and cannot, without more, form the basis for stay. The Applicant must show exceptional circumstances warranting the exercise of the Court's discretion in her favour.
18. In the present case, the Applicant has not demonstrated any cogent basis upon which the Court can infer that the Respondent is incapable of refunding the decretal sum. Additionally, no proposal or undertaking as to security has been made, which is a mandatory requirement under Order 42 Rule 6(2)(b). The Court is therefore not satisfied that the Applicant has met the requisite threshold for the grant of stay pending appeal.
19. In the premises, while the Court is inclined to allow the Applicant an opportunity to ventilate her grievance on appeal, the prayer for stay of execution cannot be sustained in the absence of evidence of substantial loss and security.
20. In light of the foregoing, I make the following orders:
 - i. The Applicant is granted leave to file an appeal out of time against the ruling of Hon. C.A. Ogweni delivered on 12th September 2024. The Memorandum of Appeal shall be filed and served within 14 days from the date hereof.
 - ii. The prayer for stay of execution is declined.
 - iii. Costs of this application shall abide the outcome of the intended appeal.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI

THIS 24TH DAY OF JULY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Mwinzi for Applicant

Mr. Ngugi for Respondent

Court Assistant: Carlos

