



REPUBLIC OF KENYA



KENYA LAW
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BOM Laboret Boys High School v Bedom Engineering Limited (Miscellaneous Case E010 of 2025) [2025] KEHC 9659 (KLR) (4 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9659 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CASE E010 OF 2025**

RN NYAKUNDI, J

JULY 4, 2025

BETWEEN

BOM LABORET BOYS HIGH SCHOOL APPLICANT

AND

BEDOM ENGINEERING LIMITED RESPONDENT

RULING

1. Before this court is an application dated 22nd day of May 2025 seeking the following orders:
 - a. That this honorable court be pleased to grant leave to the Applicant to file an appeal out of time against the judgment delivered on 28th March 2025 in Eldoret small claims court civil case no. E1312 of 2025
 - b. That the annexed Notice of appeal and memorandum of appeal be deemed as duly filed upon payment of the requisite court fees
 - c. That this honorable court be pleased to issue interim orders of stay execution of the judgment and decree issued on 28th March 2025 pending the hearing and determination of this application and the intended appeal
 - d. That costs of this application be provided for
2. The application is premised on the following grounds and the annexed supporting affidavit of Principal State Counsel Ruth J. Rop, and all other grounds to be adduced at the hearing:
 - a. That counsel on record handling this matter proceeded on leave from 17th March 2025 to 30th April 2025 to enable her seek medical attention in Nairobi
 - b. After the leave ended on 30th April 2025 counsel on record was still unable to resume duty as she had been put on bedrest from 3rd May 2025 to 17th May 2025



- c. The judgment was delivered on 28th March 2025 in the presence of another counsel holding brief for counsel on record
 - d. Counsel on record resumed duty on 19th May 2025 only to be informed by our client that execution had already been commenced
 - e. The delay in filing the appeal and application for stay was not intentional and has been explained
 - f. The intended appeal raises weighty and arguable issues
 - g. The execution process has already started and school property is under threat of attachment thereby occasioning irreparable harm to the school
 - h. The applicant school is a public institution and stands to lose public funds if this application is not allowed
 - i. That the inability of counsel on record at that time to file an appeal in time which has been explained should not be posted on the client
 - j. The respondent will not suffer any prejudice if the application is allowed
 - k. It is in the interest of justice that the applicant be granted an opportunity to be heard on appeal
3. In the affidavit in support of the application, the applicant made averments as hereunder:
- a. That I am the school principal/board of management secretary of AIC Laboret High school the respondent applicant herein thus competent to swear this affidavit
 - b. That I am informed by counsel on record that she proceeded on leave from 17th March 2025 to 30th April 2025 to enable her seek medical attention in Nairobi.
 - c. That I am informed by counsel on record that After her leave ended on 30th April 2025 she was still unable to resume duty as she had been put on bedrest from 3rd May 2025 to 17th May 2025.
 - d. That I am informed by counsel on record that ruling/judgment was then delivered on 28th March 2025 in the presence of another counsel holding brief for brief.
 - e. That I am informed by counsel on record that she then resumed duty on 19th May 2025 only to be informed that execution had already been commenced.
 - f. The delay in filing the appeal and application for stay was not intentional and has been explained
 - g. The intended appeal raises weighty and arguable issues
 - h. The execution process has already started and school property is under threat of attachment thereby occasioning irreparable harm to the school.
 - i. The applicant school is a public institution and stands to lose public funds if this application is not allowed
 - j. The respondent will not suffer any prejudice if the application is allowed
 - k. It is in the interest of justice that the applicant be granted an opportunity to be heard on appeal



- l. The applicant school is a public institution of learning and execution would not only disrupt school operations but also occasion irreparable harm to students and staff
 - m. That the intended appeal raises serious points of law including misapplication of the burden of proof, wrongful admission of new evidence at judgment stage and breach of fair hearing principles.
 - n. That unless this Honorable Court intervenes urgently, the Respondent has already instructed auctioneers who have commenced execution against the Applicant's school property.
 - o. That this application has been brought without undue delay and in good faith.
 - p. That it is in the interest of justice, fairness and the right to be heard that this Honorable Court allows the application.
4. In response to the application, the Respondent filed a replying affidavit in which it averred as follows:
- a. That I am the Respondent in this matter hence competent to swear this affidavit on my own behalf and duly authorized to swear on behalf Bedom Engineering Limited as the Director
 - b. That I have read and understood the tenor and import of the Application dated 22nd day of May 2025.
 - c. That the application is made in bad faith because the applicants have not demonstrated how they will suffer if execution proceeded.
 - d. That the vide a ruling issued on the 9th day of May 2025, Hon. Rodgers Otieno, RM, allowed the application by the applicant and stayed proceedings pending the hearing and determination of the intended appeal on condition that the applicant pays the claimant Kshs. 356,153.77 within ten days which the Applicant blatantly refused and or ignored to make the payment which is half of the decretal amount.
 - e. That the Applicant's prayer to file the appeal out of time is totally misleading as the counsel for the Applicant says that she was sick as those are games to deny me the amount owed to me by the Applicant.
 - f. That the allegations by the Applicant that he will suffer injustice, substantial loss undue, prejudice, or that he has been condemned unheard are false and misleading.

Decision

5. The applicant in this case seeks 3 prayers as premised in the notice of motion. First it is about exercise of discretion to extend time to file an appeal. It is trite law that any party who is aggrieved with a judgment of the trial court must file an appeal within 30 days as provided for under section 79 (g) of the Civil Procedure Act. However, notwithstanding these provisions, the court is clothed with unfettered discretion to extend time if the intended appellant satisfies the criterion outlined in the various jurisprudential decisions. In the case of *Cleophas Wasike v Mucha Swala* [1984] eKLR and in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No. NAI 255 of 1997 in which the courts made the following observations:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of the delay secondly, the reason for the delay, thirdly (possibly) the chances of the



appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted.”

6. In addition, the court in *Muringa Company Limited v Archdiocese of Nairobi Registered Trustees* [2020] eKLR William Ouko JA as he then was ruled that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

7. The court of appeal also in *Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company Civil Application No. Nai. 349 of 2005* held that:

“As the discretion to extend time is unfettered, there is no limit to the number factors the court would consider as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...in an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves....the ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant’s counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgment, no prejudice would be caused to the respondent who has enjoyed rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”

8. These being the principles to underpin my discretion, the affidavit evidence lays the foundation upon which sufficient cause has been established as to why the intended appellant was not able file the appeal within the set timelines of 30 days as expressly stated in section 79(g) of the civil procedure Act. The court must also bear in mind that the intended appellant is a public institution and therefore the protocols of decision making can sometimes occasion delay to file an appeal as stipulated in the law. This delay has been explained to the satisfaction of the court to exercise discretion to enlarge time in favour of the applicant.

9. The second limb of this notice of motion is on stay of execution pending the hearing and determination of the appeal. The import of Order 42 Rule 6(1) of the Civil Procedure Rules envisages that the application must be filed without unreasonable delay, that the applicant must ensure deposit of security in terms ordered by the court and that if the execution process is not stayed it will occasion irreparable harm to the intended appellant.



10. The approach to be taken by the court on application for stay of execution is outlined in this persuasive case law. In *Maria Makhoul and Marguerita Desir v Sabina James Alcide* SLUHCVAP No. 30/2011 held that:

“The general rule is for stay, as a successful litigant is entitled to the fruits of his judgment without fetter. Accordingly, there must be good reasons advanced for depriving or in essence enjoining a successful litigant from reaping the fruits of a judgment in his favor, particularly after a full trial on the merits.”

“The modern authority on the guiding principles the court employs in exercising its discretion to grant a stay is the case of *Linotype-Hell Finance Ltd v Baker* where Staughton L.J. opined that a stay would normally be granted if the appellant would face ruin without the stay and that the appeal has come prospect of success. It must be emphasized that it is not enough to merely make a bald assertion to the effect that an applicant will be ruined. Rather what is required is evidence which demonstrates that ruination would occur in the absence of a stay.”

11. The authority of *Hammond Suddard Solicitors v Agrichem International Holdings* is grounded in the same principle though formulated differently. In that case the court pointed out that the evidence in support of a stay needs to be full, frank and clear. They went on to state the principle thus:

“...whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a s risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand if a stay is refused and the appeal succeeds and the judgment is enforced in the meantime what are the risks of the appellant being able to recover any monies paid from the respondent?”

12. Similarly, in the *Marguerite Desir* case the court held inter alia as follows:

“The court’s jurisdiction to grant a stay is based upon the principle that justice requires that the court should be able to take steps to ensure that its judgments are not rendered valueless. The essential question for the court is whether there is a risk of injustice to one or both parties if it grants or refused a stay. Further, the evidence in support of the application for stay of execution should be full, frank and clear. The normal rule is for no stay and if a court is to consider a stay, the applicant has to make out a case by evidence which shows special circumstances for granting one. The mere existence of arguable grounds of appeal is not by itself a good enough reason.”

13. The question is whether the applicant will suffer substantial loss in terms of attachment of the school property which is likely to disrupt school operations and affect students’ welfare and best interests. The key parameters on this ground is clearly articulated in the case of *James Wangalwa & Another vs 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.”

14. I have carefully considered the pleadings filed together with the arguments of the parties on record. In the instant case there is no dispute whatsoever on the facts. What is being disputed is about the support execution process against the school property which is under the threat of attachment thereby occasioning harm to the school. In my view given the factual matrix of this case on the strength of the pending appeal which on the face of it is competent and arguable on its merits there is need to stay the execution process in order to preserve the res so as not to render the appeal nugatory.
15. Consequently, the application is granted as follows:
 - a. I hereby grant leave for extension of time to the applicant to file its appeal out of time.
 - b. That the draft memorandum of appeal be deemed as duly filed within time under section 79 (g) of the Civil Procedure Act.
 - c. That there shall be stay of further proceedings on execution and enforcement of the decree in SCC Comm Case No. E1312 of 2024 pending the hearing and determination of the appeal against the judgment of that court dated 25th day of February 2025.
 - d. That the Deputy Registrar of the High Court shall cause the typed proceedings to be supplied to the applicant within 21 days from today’s ruling.
 - e. The costs of this application shall abide the outcome of the appeal.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 4TH DAY OF JULY 2025.

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R. NYAKUNDI
JUDGE

