



REPUBLIC OF KENYA



KENYA LAW
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**Kerogo v Nabwire (Miscellaneous Application E132 of 2024)
[2025] KEHC 11201 (KLR) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS APPLICATION E132 OF 2024**

S MBUNGI, J

JULY 24, 2025

BETWEEN

ELIJAH ONSONGO KEROGO APPLICANT

AND

MWANATENA NABWIRE RESPONDENT

RULING

1. This ruling is in respect of the application dated 12/08/2024 seeking for orders of leave to file an appeal out of time against the judgement in Busia CMCC Case No. E329 of 2021 delivered on 20/06/2024.
2. The applicant further seeks for orders of stay of execution in respect of the said judgment delivered on 20/06/2024 pending the hearing and determination of the appeal.
3. The applicant being aggrieved with the said judgment, lodged an appeal against the said judgment but the statutory period within which to file appeal has already lapsed.
4. The applicant contends that the appeal was not lodged within the requisite time due to internal process of transmission of communication from the instructing client, Directline Assurance Company Limited to the Advocates on record
5. The applicant avers that it has an arguable appeal with high chances of success and the same ought to be heard on merit. The applicant further states that the respondent does not stand to suffer any prejudice upon grant of the orders sought.
6. The applicant submits that he filed the appeal in good faith and that the appeal is arguable and that he stands to suffer irreparably if the respondent levy execution against him since he is a man of straw and it would be difficult to refund the decretal sum if paid to him.



7. The applicant also argues that he has satisfied the conditions set out in order 42 rule 6 for stay of execution pending appeal and is ready, able and willing to provide security for the entire decretal sum in the form of bank guarantee to be issued by Family Bank Limited.
8. The respondent is opposing the said application.
9. The respondent avers that the application is destitute of merit, misplaced and brought in bad faith with the aim of delaying the course of justice as the delay is inordinate
10. The respondent avers that the applicant failed to state that after the stay period issued by the court, no execution was done and the decree which the applicant intends to appeal against remains unsettled.
11. The respondent submits that the applicant was liable for the accident and so liable for the pain suffered by the respondent thus the respondent should not be denied the enjoyment of the fruits of his judgement.
12. 12.The respondent avers that if the court is to allow the application, the applicant should deposit the entire decretal amount plus cost in a joint interest earning account in the names of the counsel on record pending the hearing and determination of the appeal.

Analysis and Determination

13. I have fully considered the application before this court and the response there to and set out the following issues for determination
 - i. Whether the Applicant has met the threshold to be granted leave to file an appeal out of time.
 - ii. Whether the Applicant has satisfied the conditions for grant of stay pending appeal as set out in Order 42 Rule 6(1& (2) Civil Procedure Rules if time is enlarged
14. On the first issue of Whether or not the Applicant has met the threshold to be granted leave to file an appeal out of time.
 Section 79G of the *Civil Procedure Act* states:-"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 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."
15. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time.
16. The Court of Appeal in the case of Edith Gichungu Koine v Stephen Niagi Thoithi [2014] eKLR, Odek JJA observed that the several facts which the court has to reckon with, when considering an application for extension of time, were that:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”



17. The Supreme Court in the case of Nicholas Kiptoo Kerir arap Salat vs. JEBC and 7 Others (2014) eKLR enunciated the principles applicable in an application for leave to appeal out of time:-
18. The court stated inter alia that-
- “The underlying principles a court should consider in exercise of such discretion include;
1. 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;
 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 a case- to-case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
 6. Whether the application has been brought without undue delay.
19. The test for extension of time was set out in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231, where the Court of Appeal emphasized discretion governed by:
- i. length and reason for delay,
 - ii. prospect of success, and
 - iii. degree of prejudice.
20. Concerning the reasons for the delay, the court has considered the explanation given by the Applicants that the delay in filing the appeal within the statutory timelines was occasioned by the internal process of transmission of communication from the instructing client, Directline Assurance Company Limited to the Advocates on record.
21. Upon perusal of the record I have, I have observed that the judgement was delivered on 10/06/2024 and the applicant filed the current application on 12/08/2024. This is about forty five(45) days outside the time limit for filling an appeal. While the delay is not negligible, it is not inordinate either
22. The Court is persuaded that the delay does not manifest abuse of process or intentional procrastination. Guided by the pronouncements in *Nicholas Kiptoo arap Salat v IEBC* (supra), where the Supreme Court emphasized that each case must be decided on its peculiar facts and that reasonable causes for delay merit judicial leniency, I find that the Applicant has laid a valid foundation warranting invocation of the Court’s discretion.
23. On the prospects of success, the Applicant has asserted that the appeal raises arguable issues. Although this Court cannot delve into the merits of the appeal at this interlocutory stage, the threshold is not whether the appeal will necessarily succeed, but whether it raises triable and non-frivolous issues. Further, as observed in *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR, an arguable appeal is not necessarily one that will succeed, but one that is not frivolous. I accordingly find that the applicant has shown “good and sufficient cause” within the meaning of Section 79G of the *Civil Procedure Act*. In *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR, the Court



of Appeal affirmed that even a solitary arguable point suffices. Considering the liability and quantum issues involved, and the Applicant's submissions, this Court finds that the appeal is not frivolous and raises contestable questions deserving appellate determination.

24. Regarding potential prejudice to the Respondent, I am mindful of the principle set out in *Bhutt v Khan* [1982-88] 1 KAR 1, that while the right to enjoy fruits of judgment is protected, it must be balanced against the right to fair trial and appeal. The Respondent will not suffer irreparable harm if the appeal is allowed to proceed, especially given the Applicant's undertaking to furnish security by way of a bank guarantee. This mitigates concerns about delay or execution. On balance, I am satisfied that the prejudice to the Respondent is not disproportionate or incapable of being addressed through appropriate orders for security.
25. The second issue is of whether the Applicant has satisfied the conditions for grant of stay pending appeal as set out in Order 42 Rule 6(1& (2) Civil Procedure Rules if time is enlarged;
26. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010, sets out the conditions for granting an order of stay of execution pending appeal. The relevant provisions state:
 6.
 - (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 appealed from may apply to the court to which an appeal is preferred to set aside or vary such order.
 - (2) No order for stay of execution shall be made under subrule
 - a. 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."
27. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
28. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.



29. I have proceeded to determine whether the conditions stipulated for grant of stay have been met. On whether the appellant will suffer substantial loss, I am reminded of the sentiments of Gikonyo J in *James Wangalwa & another v Agnes Naliaka Cheseto Misc Application No 42 of 2011 [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 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein Vs .Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma Vs. Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

30. 24. In the case of *RWW v EKW [2019] KEHC 6523 (KLR)* the court stated that demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal. 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 that applicant is therefore forced to pay the decretal sum. – See the decision of Musinga J (as he then was) in the case of *Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001*.
31. In the present application, the Applicant has averred that he is a "man of straw" and it would be difficult to recover the decretal amount if execution proceeds. The Respondent has not rebutted this assertion with any evidence of financial capacity or willingness to refund if the appeal succeeds.
32. The other condition for granting stay orders is on the security to be offered. In the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & Another [1986] eKLR*, the Court of Appeal held that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. I am of the considered view that in the circumstances of this cause, the Applicant has undertaken to provide a bank guarantee from Family Bank Limited covering the entire decretal amount. This is not merely adequate, it demonstrates good faith and readiness to protect the Respondent's interests
33. I will allow the application dated 12/08/202, in the following terms:
- a. Leave is hereby granted to the Appellant to file their Appeal out of time within the next 14 days.
 - b. The applicant is to file and serve his Memorandum of Appeal within fourteen (14) days hereof.
 - c. There shall be a stay of execution of the judgment in Busia CMCC Case No. E329 of 2021 delivered on 20th June 2024, pending the hearing and determination of the appeal, on condition that the Applicant provides a bank guarantee from Family Bank Limited for the entire decretal sum plus costs within 14 days from the date of this Ruling.



- d. In default of providing the security as ordered in paragraph (c) above, the order for stay of execution shall automatically lapse.
- e. The said conditions are to be met within 14 days from the date of this ruling, and in default, the appeal shall be deemed to have been dismissed with costs.
- f. The applicant to pay respondent thrown away costs
- g. Mention , 2025.
- h. Right of Appeal 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 24 DAY OF JULY 2025

S. MBUNGI

JUDGE

In the presence of:-

Court Assistant-Elizabeth Angong'a

