



Kipsongor & another v Towett & another (Suing on Behalf of the Estate of Japheth Kiprotich Kirui) (Miscellaneous Civil Application E011 of 2025) [2025] KEHC 11340 (KLR) (21 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11340 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E011 OF 2025**

JM NANG'EA, J

JULY 21, 2025

BETWEEN

MUSA KIPSONGOR 1ST APPLICANT

DIANA KHALAI MOHAME 2ND APPLICANT

AND

GILBERT KIPLANG'T TOWETT 1ST RESPONDENT

CHESANG RUGUT 2ND RESPONDENT

SUING ON BEHALF OF THE ESTATE OF JAPHETH KIPROTICH KIRUI

RULING

1. Vide Notice of Motion dated 16th January 2025 the Applicants crave the following reliefs;-
 - 1) Spent
 - 2) Leave to appeal Judgement and Decree in Nakuru CMCC NO. E273 of 2023 out of time.
 - 3) Spent.
 - 4) That there be stay of execution of the judgement and all consequential orders made in Nakuru CMCC No. E273 of 2023 pending the hearing and determination of an intended appeal .
 - 5) That the the entire decretal sum of Ksh. 2, 323, 560 plus costs and interest be deposited into court pending hearing and determination of the intended appeal.
 - 6) That the court does issue any other order deemed fit.
 - 7) That the costs of the application be provided for.



2. The application arises from Judgement of the lower court (Hon. Bernard Kipyegon - PM) in which the Respondent was granted damages together with costs and interest against the Applicants in the said Nakuru CMCC No. E273 of 2023 following a fatal road accident. Aggrieved by the decision, the Appellant lodged this appeal relying on a number of grounds of appeal as per Memorandum of Appeal also dated 16th January 2025.
3. By Affidavit in Support of the Motion, the Applicants' Advocate (Cherotich Faith) inter alia avers that the the delay to bring this application was occasioned by delay to give instructions to Counsel after the Claims Manager of the Applicants' insurer (Directline Assurance Limited) quit employment. It is further contended that the Respondent has no known income and, therefore, the Applicants could be exposed to substantial loss and their intended appeal rendered nugatory if this application is not allowed..
4. The Applicants express willingness and readiness to deposit required security for costs that may ultimately be binding upon him.
5. Moreover, the Applicants aver that the appeal would be rendered nugatory if stay of execution is not granted and they later succeed as the financial means of the Respondent are unknown.
6. Through affidavit evidence in reply, the Respondent opposes the Motion contending that it is misconceived, vexatious and otherwise an abuse of the court process. The Applicants are said to have initially failed to respond to correspondence requiring them to settle the decretal sum. When a belated reply came, the Applicants indicated that payment was being processed but it was not forthcoming. An offer to negotiate was also made by the Applicants, which according to the Respondents implied the latter's satisfaction with the lower court's judgement.
7. The Applicants are further said to be guilty of inordinate and unreasonable delay of about 6 months to bring the application. The application is therefore dismissed as lacking in merit and only intended to delay the Respondents' enjoyment of fruits of litigation. The Respondents in a nutshell aver that on advice by their lawyers, the Applicants have not satisfied the threshold stipulated in Order 42 Rule 6 of the *Civil Procedure Rules 2010* for grant of the relief of stay of execution pending appeal. Neither have they satisfied the court that they deserve its discretion to grant leave to appeal out of time, according to the Respondents.
8. Learned Counsel for the parties filed submissions which the court has perused against the application, the Respondents' reply and all annexures to the parties' rival affidavits. Counsel maintain that their clients' respective positions on the application for leave to appeal out of time and stay of execution pending appeal It is argued that the Applicants' delay of about around 6 months to bring this application is not inordinate or unreasonable in the circumstances.
9. 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”.
10. Furthermore, case law in *Edith Gichungu vs Stephen Njagi Thoithi* (2014) eKLR which 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” .



11. 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 Mansukhbalal Damki Patni vs Director of Public Prosecutions & 3 Others](#) (2015) eKLR])
12. The court is 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 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”.
13. Further 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.”
14. The question of “substantial loss” is 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).
15. The issues for determination are whether the Applicants have 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 in the circumstances of this case.
16. In [Nicholas Kiptoo Arap Korir Salat vd 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) 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.”
17. 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.
18. The Applicants have not satisfactorily explained the long delay of around 5 months to bring this application. The Applicants themselves have not sworn an affidavit 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 information or circumstances that allegedly caused the delay. This delay is prejudicial to the Respondents who are unnecessarily being kept off the fruits of their judgement after the demise of their relative.
19. The Applicants do not therefore deserve extension of time to lodge appeal. This finding is sufficient to dispose of the application, but I will comment on its merits, if only for academic purposes.
 20. Regarding the prayer for stay of execution, 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.”
 21. The Applicants contend that they have brought the Motion without unreasonable delay. It is should, however, be noted that even delay of one day, if unexplained, is bad enough. The Applicants have not satisfactorily explained the long delay of about 6 months to bring this application for the reasons given hereinabove.
 22. In the circumstances, the delay is found to be unreasonable and inexcusable, therefore this legal condition has not been satisfied.
 23. 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.
 24. In [John Odungo vs Joyce Irungu Mubatia](#) [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”.
 25. The Applicants have satisfied the requirement for offer security for costs, having expressed willingness and readiness to comply.
 26. Determination of the application would turn on the question of substantial loss, if any, the Applicants 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.



27. 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.”

28. 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.”

29. 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.”

30. 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.

31. Based on the affidavit evidence of the parties neither of them has stated their financial position. The Applicants who shoulder the burden of proof has 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.

32. In the particular circumstances of this case, therefore, the Applicants have not quite 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 satisfy all the requisite conditions.

33. The application is accordingly dismissed in its entirety with costs to the Respondent.

RULING DELIVERED VIRTUALLY THIS 21ST DAY OF JULY, 2025 IN THE PRESENCE OF:

J. M. NANG’EA, JUDGE.

The Advocate for the Applicant, Ms King’ori for Ms Cherotich.

The Advocate for the Respondent, Ms Omao

Court Assistant, Jeniffer

J. M. NANG’EA, JUDGE.

