



Musungu & 3 others v Namatsi; Preferred Auctioneers (Interested Party) (Civil Appeal E047 of 2025) [2025] KEHC 10731 (KLR) (21 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10731 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E047 OF 2025**

**JM NANG'EA, J
JULY 21, 2025**

BETWEEN

**DR EUGENE MUSUNGU 1ST APPELLANT
KABARAK UNIVERSITY MEDICAL CENTRE 2ND APPELLANT
KABARAK HIGH SCHOOL 3RD APPELLANT
NELI CHENGWO 4TH APPELLANT**

AND

JOSPHAT OMUTULA NAMATSI RESPONDENT

AND

PREFERRED AUCTIONEERS INTERESTED PARTY

RULING

1. Vide Notice of Motion dated 25th February 2025 the Applicants crave the following reliefs;-
 - 1) Spent
 - 2) Spent
 - 3) That there be stay of execution of Judgement, Decree and consequential proclamation issued in Nakuru CMCC No. 155 of 2018 pending hearing and determination of an intended appeal.
 - 4) Leave to appeal the Judgement and Decree out of time.
 - 5) That the court does issue further orders that may be deemed as appropriate.
 - 6) That the costs of this Application be in the cause.



2. The application arises from Judgement of the lower court in which the Respondent was granted in damages together with costs and interest against the Appellants in the said Nakuru CMCC No. E155 of 2018 following death of a student while receiving emergency medical care. Aggrieved by the decision, the Appellants lodged this appeal relying on a number of grounds of appeal as per Memorandum of Appeal also dated 25th February 2025.
3. By Affidavit in Support of the Motion, the 2nd Applicant's Deputy Vice Chancellor- Finance and Administration (Prof. Donald K. Chepkilot) inter alia avers that their property has been proclaimed by the Interested Party over an alleged irregular claim of Kshs. 5,597,407 plus costs of the proclamation stated as ksh. 844,000. The proclaimed property is said to be essential school vehicles which have the effect of impairing services offered by the Appellants including transportation of students and staff. The Appellants further lament that the court's decree was extracted late and was only served upon them together with the Proclamation Notice.
4. It is also contended that there is no inordinate delay to bring this application. The court is urged to take into account the University's Calendar during Christmas festivities and the fact operations in the institution resumed in January 2025 as cause for the delay.
5. The Applicants fear that they could be exposed to substantial loss and his intended appeal rendered nugatory if this application is not allowed. Business and operations of the Applicants are likely to be adversely affected as by breaching of third parties' rights to education, according to the Applicants.
6. The Applicants express willingness and readiness to deposit required security for costs that may ultimately be binding upon them.
7. Through affidavit evidence in reply, the Respondent opposes the Motion contending inter alia that it is misconceived, bad in law and otherwise an abuse of the court process. The Applicants are said to be guilty of inordinate and unreasonable delay of about 5 months to bring the application.
8. The Respondent further avers on advice by her lawyers that the appeal herein is incompetent having been filed out of time without leave. The application is also attacked as deceitful, the Respondent pointing out that the Certificate of Urgency in respect thereof was purportedly issued by Prof. Ojienda SC of Odhiambo & Odhiambo Advocates yet Prof. Ojienda is said to practise in Nairobi under the name and style of Prof. Ojienda & Associates.
9. The Respondent simultaneously filed Notice of Preliminary Objection dated 11th March 2025 impugning the appeal and the application on the legal ground that leave is sought to bring the appeal yet the appeal has already been filed. The court is urged to strike out the appeal for being an abuse of the court process.
10. Learned Counsel for the parties filed written submissions which the court has perused against the application, the Respondent's reply and all annexures to the parties' rival affidavits. Counsel for the Appellants maintain that their clients merit leave to appeal out of time and that stay of execution pending appeal is warranted as well. It is argued that the Appellant's delay of about around 5 months to bring this application is not inordinate or unreasonable in the circumstances.
11. The court is referred to the proviso to section 79 G of the *Civill Procedure Act* which 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”.



12. Furthermore, Counsel cite and rely on case law in *Omar Sburie vs Marian Rashe Yafar* (2020) eKLR in which the Court of Appeal lists the following factors among others to be considered before determining whether or not to grant leave to file an appeal out time;
- “ ... the length of delay; the reason for the delay; the chances of the appeal succeeding if the application is granted; degree of prejudice to the respondent if the application is granted....”.
13. In a nutshell the Respondent through his advocates’ submissions wants the appeal to be thrown out as a nullity having been filed out of time without leave The court is told that this application cannot validate such a defective appeal as held in many cases including the Supreme Court’s decisions in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 Others* (2015) eKLR and *Gilbert Mwangi Njuguna vs Judicial Service Commission & Another* (2020) eKLR.
14. The following issues arise for determination;
- a. Whether the court has jurisdiction to entertain the appeal and the application before it.
 - b. Whether the application has merit.
 - c. The orders commending themselves to the court on the application.
15. It is indisputable that the Appellants have already filed this Appeal No. E047 of 2025 out of time without seeking and obtaining the leave of the court. I accordingly concur on the authorities cited by the Respondent that the purported appeal is a nullity and cannot be validated by this application. The Applicants ought to have first filed a Miscellaneous Application for leave to bring the appeal out of time for the court’s consideration whether or not to grant leave.
16. I would in the circumstances strike out the appeal on this ground alone.
17. If for academic purposes only, I will consider the merits of the application. Would the Applicants be deserving of the exercise of the court’s discretion in their favour to enlarge time to file appeal against the impugned judgement and obtain an order for stay of execution pending appeal?
18. In *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 Others* (2015) eKLR *supra* 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.”



19. In *Mobsen Ali & Another v. 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.
20. The Applicants have not satisfactorily explained the long delay of around 5 months to bring this application as pointed out by the Respondent. It is not shown that the University was not undertaking operations during this period or was otherwise incapacitated as not to institute the appeal. The Respondent was not concerned with the Applicants’ internal operations as it was their duty to act diligently.
21. The Applicants would not therefore deserve extension of time to lodge appeal.
22. 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.”
23. The Applicants contends 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 5 months to bring this application for the reasons given hereinabove.
24. In the circumstances, the delay is found to be unreasonable and inexcusable, therefore this legal condition has not been satisfied.
25. 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.
26. 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”.
27. The Applicants have satisfied the requirement for offer security for costs, having expressed willingness and readiness to comply.
28. 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.



29. 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.”

30. 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.”

31. 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.”

32. 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.

33. 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.

34. In the particular circumstances of this case, therefore, the Applicants have not 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 meet all the conditions stipulated hereinabove. In any event, the prayer for leave to appeal out of time has been found to be defective and/or unmerited.

35. In the end, the purported appeal and the application dated 25th February 2025 are accordingly struck out in their entirety with costs to the Respondent.

J. M. NANG’EA, JUDGE.

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

The Advocate for the Applicants, Mr Kairu.

The Advocate for the Respondent, Mr Wangai

Court Assistant, Jeniffer

J. M. NANG’EA, JUDGE.

