



REPUBLIC OF KENYA



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Roswin Engineers & Builders v Osoro t/a Bramic Investment (Miscellaneous Civil Case E005 of 2024) [2025] KEHC 9723 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9723 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
MISCELLANEOUS CIVIL CASE E005 OF 2024
CM KARIUKI, J
JULY 3, 2025**

BETWEEN

ROSWIN ENGINEERS & BUILDERS APPLICANT

AND

FREDRICK OSORO T/A BRAMIC INVESTMENT RESPONDENT

RULING

06/06/2025

1. The Applicant, vide a notice of motion dated 08/11/2024, sought orders;
 - a. Spent.
 - b. That the honourable court grants leave to file an appeal out of time.
 - c. Spent.
 - d. That costs of this application be in the course.
2. The application is based on Order 42, Rule 6 of the Civil Procedure Rules, and Article 159(2) of *the Constitution*.
3. The application is based on the grounds set out on the face of the application and the supporting affidavit sworn by Rasmus Odongo Owino on 08/11/2024.

The background.

4. Judgment was delivered via CTS in favor of the respondent on 09/08/2024 in Kilgoris CMCC No. E029 of 2023.



5. The applicant was dissatisfied with the entire judgment of the court and intended to appeal; however, he accidentally developed chest pains on 12/08/2024, which have been recurrent, and he has been undergoing treatment at Mama Lucy Kibaki Hospital. The applicant's symptoms have recently improved, and he has brought this application to the court without further delay.
6. The applicant contends that the appeal is arguable with high chances of success.
7. The applicant contends that he is willing and ready to deposit some amount in court as security for costs pending the determination of the intended appeal.

The response.

The respondent's replying affidavit.

8. The respondent opposed the application vide replying affidavit sworn by Fredrick Osoro Bosire on 25/11/2024.
9. The respondent averred that he obtained a decree on 16/10/2024 from this court for the amount of Kshs. 1,150,000/= plus costs and interest.
10. The respondent contends that the delay is unreasonable and has not been explained.

Directions of the court.

11. Vide orders issued on 13/11/2024, this court issued an order of stay of execution on an interim basis until the date of the hearing of the application, when the deposit of security shall be discussed.
12. The application was canvassed by way of written submissions. The respondents have not filed.

The applicant's submissions.

13. The applicant submitted that the delay is not inordinate and can be justified. The applicant relied on *Mombasa County Government vs Kenya Ferry Services & Anor* (2019) eKLR, *Kamlesh Mansukhalal Damki Patni Vs Director of Public Prosecution & 3 Others* [2015] eKLR, *Stecol Corporation Limited v Susan Awuor Mudemb* [2021] eKLR, *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, *Butt v Rent Restriction Tribunal* [1982] KLR.
14. The applicant submitted that it was not mandatory that the application for leave be accompanied by a substantive appeal, and thus, the current application is not defective. The applicant relied on *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR.

Analysis and Determination.

15. This court considered the application, the supporting affidavit, the replying affidavit, and the respective parties' submissions.

Issues

16. The main issue for determination:
 - i. Whether the Applicant demonstrated sufficient cause to warrant leave to appeal out of time.
 - ii. Whether the applicant is entitled to an order of stay of execution pending appeal.



Leave to Appeal Out of Time

17. Section 79G of the *Civil Procedure Act* requires that appeals from the subordinate courts be filed within 30 days of the decree or order appealed from. The Court may, however, extend time where sufficient cause is shown.
18. The judgment was delivered on 09/08/2024. The present application was filed on 12/11/2024, more than three months later. The reason for the delay has been explained to be that he had recurrent chest pains since 12/08/2024 to 05/11/2024.
19. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231, the Court of Appeal held:

“It is now well settled that the decision whether or not to extend time... is discretionary and requires consideration of the length of the delay, the reason for the delay, the chances of the appeal succeeding, and the degree of prejudice to the respondent.”
20. Concerning the reasons for the delay, the court has considered the explanation given by the Applicant that the delay in filing the appeal within the statutory timelines was occasioned by illness. The delay has been explained to the satisfaction of the court. Also, a period of three months may not be categorized as inordinate.
21. In light thereof, the applicants are hereby granted leave to file an appeal within 21 days of this ruling.

Of stay of execution

22. ‘...the court to which...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...’ Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules.
23. In determining what ‘may seem just’, the court should be satisfied—
 - a. That substantial loss may result to the applicant unless the order is made;
 - b. That the application has been made without unreasonable delay; and
 - c. of 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.
24. The court has found that the delay herein is not inordinate. Similarly, the application for stay of execution was filed without unreasonable delay.
25. The bigger hurdle would be to establish that substantial loss would occur unless stay of execution is ordered; a loss of ‘real worth or value, as distinguished from a loss without value or loss that is merely nominal’. *Sewankambo Dickson Vs. Ziwa Abby* HCT-00-CC MA 0178 of 2005, High Court of Uganda at Kampala.
26. The saving grace, however, is in the fact that the applicants propose to provide some security for costs.
27. The question calls for a proportioned balance between the competing rights of the parties herein in a manner stated in *Absalom Dova vs. Tarbo Transporters* [2013] eKLR that:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that



the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court, in balancing the two competing rights focuses on their reconciliation, which is not a question of discrimination.

28. No right is the lesser. No party should suffer disadvantages or prejudice. Therefore, court the orders.
- i. It seems just in this case for the applicants to pay half of the decretal sum to the respondent within 30 days. The balance to abide by the result of the appeal. No orders as to costs
 - ii. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH TEAMS APPLICATION, THIS
3RD DAY OF JULY, 2025**

.....

CHARLES KARIUKI

JUDGE

