



**Tahmeed Express Limited v Orange (Miscellaneous Civil Application
E228 of 2024) [2025] KEHC 12315 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12315 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E228 OF 2024**

F WANGARI, J

JULY 17, 2025

BETWEEN

TAHMEED EXPRESS LIMITED APPLICANT

AND

MADELINE ORENGE RESPONDENT

RULING

1. This is a Ruling over an Application dated 05/08/2024. The Applicant prayed for stay of execution orders against the Judgment and Decree in Mombasa CMCC No. E1022 of 2023 delivered on 04.07/2024 pending the hearing and determination of this application and the intended appeal. The Applicant also prayed for leave to file appeal out of time. The Applicant is ready to give a Bank Guarantee of Kshs. 1,445,322/= being the decretal sum.
2. The grounds upon which the application is made is that copy of the Judgment subject to this application was delayed to be released from the Chambers and the Applicant only got hold of it on 25/07/2024. Upon discussions with the Applicant's insurers, the insurance company gave instructions for the appeal on 05/08/2024.
3. The Applicant stated that the appeal has good chances of success and if the stay orders are not granted, it will suffer irreparable damage as the decretal sum may not be recovered in the event the appeal is a success.
4. The Respondent filed Replying Affidavit dated 16/09/2024 and averred that the Applicant's counsel was present when the Judgment was delivered and 45 day stay of execution granted. The Applicant is said to have ample time to file the appeal after receiving the copy of judgment on 25/07/2024 which was within the time of filing the appeal. did not explain the delay between when the ruling in issue was delivered and the time when this application was filed.



5. Further, Notice of Entry of Judgment and Tabulation of costs dated 05/07/2024 was served upon the Applicant. It was further deponed that an Objector had filed a similar application in the trial court dated 04/09/2024 seeking for stay of execution orders in respect to the impugned Judgment. This application was therefore not made in good faith.
6. The Auctioneer/ Interested Party filed a Replying dated 25/09/2024 seeking to be paid his fees of Kshs. 356,000/= as he was acting under duly issued Warrants of Attachment by the Court.
7. Parties were directed to file written submissions. The Applicant and the Auctioneer/ Interested Party were in compliance of the same.

Analysis

8. I have perused through the application, response and the submissions filed. The issues before me are;
 - a. Whether the delay in lodging a Memorandum of Appeal has been satisfactorily explained.
 - b. If the reason for delay is sufficient, then the issue as to whether proceedings should be stayed will be determined.
9. Waki, JA 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 of factors the Court would consider so long 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 judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”
10. I have perused the Application and the Supporting Affidavit. The Applicant justifies the delay in filing the appeal and this application on the reason that the copy of Judgment was received late and the Insurance company gave instructions to appeal on 05/08/2024, which was out of time.
11. It is imperative to note the Supreme Court of Kenya decision (*M.K. Ibrahim & S.C. Wanjala SCJJ*) in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR* where the learned Judges held as follows:-
 - “(1) Extension of time is not a right of a 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 on a case to case basis.
- (4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

12. In *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR Odunga J. observed that:-

“In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman vs. Cumarasamy* [1964] 3 All ER 933; *Savill vs. Southend Health Authority* [1995] 1 WLR 1254 at 1259.

13. It follows therefore that the Applicant’s explanation for the delay is key in guiding the Court’s exercise of discretion on the issue of leave to appeal out of time.

14. Section 79 G of the *Civil Procedure Act* provides as doth: -

“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 to the appellant 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. This application was filed a day out of the period of filing the appeal. There was no inordinate in filing this application. I find that the explanation for the delay in filing of the appeal is valid and genuine. Leave to appeal out of time is hereby granted as prayed.

16. In *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR stated that:-

“There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR this Court stated:-

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

17. Having granted leave to appeal, the next determination is whether the Appellant has satisfied the conditions for the grant of stay of proceedings pending Appeal.

18. The Respondents submitted that if stay of proceedings are granted, it would deny her the fruits of her judgment.



19. On stay of proceedings, the exercise of that discretion should be premised on conscientious and judicious decision based on defined principles which were expounded by Ringera J in *Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000*:-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justicethe sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

20. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules which provides:

“No order for stay of execution shall be made under subrule (1) unless—

- (a) 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. Therefore, an Applicant seeking stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely;

- (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) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. (See *Antoine Ndiaye v African Virtual University* [2015] eKLR).

22. As to what substantial loss is, it was observed in *James Wangalwa & Another v 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.”



23. In the instant case, the Applicant aver that it stands to suffer substantial loss as it is likely not to recover the money from the Respondent. On the other hand, the Respondent contends that the Applicant is likely not to pay the decretal amount, and the security offered is not solid for the alleged appeal.
24. In determining this Application, the main objective is to achieve justice for both parties. In *Kamlesh Mansukhalal Damki Patni Vs Director of Public Prosecution & 3 Others* [2015] eKLR, the Court of Appeal articulated that:

“It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of *the Constitution* which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of *the Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting *the Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.

For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.” (emphasis added).

23. The Court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“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.

9. 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.”

23. There is an intended appeal against the judgment delivered by the lower court. This court must balance the interest of the Applicant in the event the appeal is determined in their favour. On the other hand, the interests of the Respondent being the decree holder must be considered as she must not be denied the fruits of his judgment. The grant of stay of execution of judgement being discretionary, the court orders the decretal sum be deposited as security
24. On costs, the same follows the event. However, the court retains discretion whether to award the same or not. There being an intended appeal, costs to follow the outcome of the appeal



Determination

23. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- a. That leave is hereby granted to file appeal out of time.
 - b. That the Record of Appeal be filed and served within next 45 days.
 - c. That stay of execution order is hereby granted on condition that the decretal sum of Kshs. 1,445,322/= be deposited as security in an escrow account in the names of both counsels on record, within the next 30 days.
 - d. That in default of (c) above, the stay orders granted lapses and the Respondent is at liberty to execute without further reference to this court.
 - e. Auctioneers costs be taxed against the Appellant
 - f. Costs to abide the outcome of the appeal.
 - g. This file is hereby closed

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 17TH DAY OF JULY, 2025.

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HON. F. WANGARI

JUDGE OF THE HIGH COURT

In the presence of:-

N/A by the Applicant

Ms. Munene Advocate for the Respondent.

Mr. Muriithi Advocate h/b for Mr. Masore Advocate for the Auctioneer

Ms. Norah, Court Assistant

