



**Kembu & another v Rono (Miscellaneous Civil Application  
E232 of 2025) [2025] KEHC 13238 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13238 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CIVIL APPLICATION E232 OF 2025  
RN NYAKUNDI, J  
SEPTEMBER 25, 2025**

**BETWEEN**

**EDWIN KEMBU ..... 1<sup>ST</sup> APPLICANT**

**SIGINON FREIGHT LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**BARNABAS RONO ..... RESPONDENT**

**RULING**

1. What is pending before this Court for determination is a Notice of Motion Application dated 21<sup>st</sup> August 2025 in which the Applicants are seeking the following orders:
  - a. Spent
  - b. Spent
  - c. That this Honourable Court be pleased to extend and/or enlarge the time within which to file an appeal against the judgment of the Honourable Keyne Gweno delivered on 4<sup>th</sup> July 2025 in Eldoret CMCC No. 326 of 2018.
  - d. That this Honourable Court be pleased to grant an order of stay of execution of the judgement and/or decree of the trial Court in Eldoret CMCC No. 326 of 2018 entered on 4<sup>th</sup> July 2025 pending the hearing and determination of the intended appeal.
  - e. That the costs of this application be provided for.
2. The Application is made on the following grounds on the face of it among others: -
  - a. That the Respondent herein filed a Civil Suit at Eldoret CMCC No. 326 of 2018 for special damages for material loss of motor vehicle registration number KBK 396U, together with loss of user, costs and interests.



- b. That on 4<sup>th</sup> July 2025, the trial Magistrate delivered judgement in which the Court awarded the Respondent double compensation and being aggrieved by the judgement, the Applicants did instruct their counsels to lodge an appeal.
  - c. That due to an inadvertent administrative error in the process of bringing up and diarizing the file within the Applicants' advocate's chambers, the appeal was not filed within the stipulated statutory period.
  - d. That due to the lapse of the prescribed statutory period of appeal, leave of the court is required for the filing of the appeal.
  - e. That the Respondent/Decree-Holder has proceeded to instruct an auctioneer to proclaim the Applicant's properties which will render the intended appeal nugatory, if the orders of stay of execution are not granted.
  - f. That the intended appeal is meritorious with a high probability of success.
  - g. That the Respondent's financial means are unascertainable and he may not be in a position to make good any loss/damage suffered if the decree herein is enforced and the appeal ultimately succeeds and the decision of the trial court is overturned and/or set aside.
  - h. That the Applicants are willing and able to furnish such security as this Honourable Court may order for the due performance of the decree.
  - i. That the Respondent will not be prejudiced in any way if the orders sought herein are granted.
  - j. That no prejudice shall be occasioned to the Respondent if the orders sought herein in the application are granted.
3. The application is supported by the annexed affidavit dated 21<sup>st</sup> August 2025 sworn by Muma Nyagaka who deponed as follows: -
- a. That I know of my own knowledge that the Applicants were represented by our law firm in a matter which was filed by the Respondent at Eldoret CMCC No. 326 of 2018 claiming for special damages for material loss of motor vehicle registration number KBK 396U together with loss of user, costs and interests.
  - b. That I know as of personal knowledge that the judgement was delivered on 4<sup>th</sup> July 2025.
  - c. That I further know from my learning of the law that the judgment sought to be appealed against having delivered on 4<sup>th</sup> July 2025 and the statutory period within which to file the appeal having lapsed on 4<sup>th</sup> August 2025 the delay in filing the appeal is not inordinate but rather excusable in the circumstances of the case.
  - d. That the said omission was neither deliberate nor due to indolence but was occasioned by bona fide circumstances within the law firm and the Applicants should not be penalized for the same.
  - e. That the Respondent has instructed an auctioneer to proclaim the Applicants properties which will render the intended appeal nugatory, if the orders of stay of execution are not granted.
  - f. That I verily believe that the intended appeal is meritorious with a high probability of success.



## **Response to the Application**

4. The Application is opposed vide a Replying Affidavit dated 11<sup>th</sup> September 2025 sworn by the Respondent who deponed as follows: -
- a. That I am informed by my advocates on record the applicants are seeking for equitable orders yet they are guilty of inordinate delay in filing the application as the impugned judgement was delivered way back on the 04/07/2025 and the instant application filed about 2 months later.
  - b. That I am aware the Applicants are only being economical with the truth and their instant application and supporting affidavit thereto are full of misinformation that are meant to mislead the court into granting the orders sought.
  - c. That I am aware that contrary to the allegations raised in the supporting affidavit the applicants attribute their delay solely to an error of bringing up and diarizing the matter which is an internal administrative error. However, no evidence has been tendered to show exactly how the error occurred.
  - d. That I am advised that the applicants have a legal duty to provide the court with tangible proof/ evidence of their anticipated loss and/or the inability to recover the decretal sums from the respondent in the event the appeal succeeds and as such, rendering the appeal nugatory.
  - e. That I am further advised by my advocates on record that the applicants have a legal duty to demonstrate and/or 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 applicants as the successful parties in the appeal.
  - f. That I confirm that I am a man of means and shall be ready, willing and able to refund the decretal sum paid to me in the event the appellate court finds otherwise.
  - g. That I am therefore aware that the intended appeal as attached does not raise arguable grounds and as such, shall not be rendered nugatory if the decretal sums owed by the defendant/ applicant are paid to me.
  - h. That in the event the court is constrained to grant an order for stay of execution, I am advised that the court ought to exercise its unfettered discretion judiciously and fairly in line with the mandatory provisions of order 42 Rule 6.
  - i. That I am advised that the applicants have a legal duty to provide security to the court hence it is fair and just that the applicants be ordered to pay the respondent's advocates half of the decretal sum and the remainder be deposited in a joint interest earning account in the names of both firms appearing for the parties herein or in the alternative to pay the entire decretal sum in a joint interest earning account.
  - j. That I am aware that it is a litigation principle that a successful party is entitled to the fruits of his or her judgement without unreasonable delay.

## **Analysis and Determination**

5. I have read and considered the Notice of Motion Application, the grounds in support, the affidavit in support of the same and the rival replying affidavit in opposition of the application. There are 2 issues manifest for determination as follows;



- a. Whether the Applicants have established good and sufficient cause to justify this Court exercising its discretion to extend time for filing the intended appeal; and
- b. Whether a stay of execution should be granted pending the intended appeal.

Whether the Applicants have established good and sufficient cause to justify this Court exercising its discretion to extend time for filing the intended appeal.

6. It is well established that the Court has a discretion to extend time for doing procedural acts, including filing an appeal, and that such discretion must be exercised judicially and judiciously. The exercise is not automatic and is fact-sensitive. The court will ordinarily consider among other relevant factors: -
  - a. The length of the delay and whether it is inordinate
  - b. The explanation for the delay and whether it is reasonable and bona fide
  - c. Whether the application was brought promptly once the applicant became aware of the delay
  - d. Whether the intended appeal has reasonable prospects of success (i.e., is arguable)
  - e. Whether the respondent would be prejudiced by the grant and
  - f. The public interest.
7. Waki JA (as he then was) in *Seventh Day Adventist Church East Africa Ltd. & Another v M/S Masosa Construction Company* Civil Application No. 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.”

8. The extension of time for appeal is undoubtedly an exercise of discretion. In the Supreme Court’s Decision (*M.K. Ibrahim & S.C. Wanjala SCJJ*) in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR it was 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.
9. There must be some material before the Court to enable its discretion to be so exercised. In the case of *Dilpack Kenya Limited Vs William Muthama Kitonyi* [2018] eKLR the Court 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 v Cumarasamy* [1964] 3 All ER 933; *Savill v Southend Health Authority* [1995] 1 WLR 1254 at 1259.”
10. The judgment sought to be appealed against was delivered on 4<sup>th</sup> July 2025 and the statutory time for lodging an appeal (as pleaded by the Applicants) expired on 4<sup>th</sup> August 2025. The Applicants filed this Notice of Motion on 21<sup>st</sup> August 2025 roughly seventeen (17) days after the expiry of the appeal period. On the face of it the delay is short. Short delays of this character are frequently treated as not inordinate where a satisfactory explanation exists and the application is brought promptly.
  11. The Applicant herein was under a duty to show the reasons for the delay. However short or long, the period of delay must be explained. In *Alfred Iduvagwa Savatia Vs Nandi Tea Estate & another* [2018] eKLR the court stated as follows;-
 

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show .... the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”
  12. Section 79(g) of the *Civil Procedure Act* provides that appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree. It states as follows: “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.
  13. On one hand, this court has no jurisdiction to extend time without a valid reason. On the other hand, the court should exercise discretion where there is a valid reason and explanation for the delay. The Applicants attribute the delay to an inadvertent administrative error within their advocates’ chambers specifically a failure to diarize and bring up the file in time. The affidavit of Muma Nyagaka avers that the omission was neither deliberate nor due to indolence but arose from bona fide circumstances within the law firm. The law has on numerous occasions accepted that bona fide administrative errors or genuine mistakes by counsel may constitute reasonable explanations where they are not the product of deliberate neglect or inexcusable indifference; the court retains a discretion to excuse such lapses in appropriate circumstances. See *Fakir Mohamed Vs Joseph Mugambi & 2 others* [2005] KECA 340 (KLR)



14. In the present instance, the explanation is not controverted and on the material before the Court, I accept it as bona fide.

Whether a stay of execution should be granted pending the intended appeal.

15. The principles to be considered by this court in determining whether or not to grant an order staying the execution of the order of this court are set out in Order 42 Rule 6(2) which provides as follows:

2. No order to stay of execution shall be made under sub rule (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.”

16. An applicant for 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 vs. African Virtual University [2015] eKLR.

17. In *Butt Vs Rent Restriction Tribunal* [1982] KLR 417 at page 419 Madan JA (as he was then) held as follows:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 459:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

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

19. The Applicants assert that the intended appeal is meritorious with a high probability of success and the affidavit reflects specific complaint that the trial court awarded “double compensation”- a matter which, if substantiated, may amount to a substantive error of law or fact capable of forming the basis of an arguable appeal. The Court is not required on an application for extension to determine the appeal



finally; it must, however, be satisfied that the intended appeal is not frivolous or hopeless. Having considered the materials placed before me, I find that the Applicants have raised arguable grounds which justify a full appellate ventilation; their claim of error in the award amount is not so plainly untenable as to justify dismissal of the present application for want of prospects.

20. The Applicants have adduced evidence that the Respondent has instructed an auctioneer to proclaim the Applicants' properties conduct which if acted upon would very likely render the intended appellate remedy futile. The Applicants have offered to furnish security for the due performance of any decretal sum in the event the appeal fails; this willingness goes directly to protect the Respondent's interests. The risk that the appeal will be rendered nugatory by execution, coupled with the Applicants' readiness to give security, weighs strongly in favour of granting temporary preservation of the appellate right.
21. With regard to security for costs, the court in *Absalom Dova Vs. Tarbo Transporters* [2013] eKLR, stated:

“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...”
22. From the above decision it is clear that the issue of security is discretionary and it is upon the court to determine the same. I take note that that the Applicants deponed that they are willing and able to furnish such security as this Honourable Court may order for the due performance of the decree.
23. In view of the foregoing and in the interest of justice, the following orders shall abide: -
  - a. That the Applicants shall provide security in the nature of a bank guarantee (specific to, and directly relating to this case) from a reputable bank for the entire Decretal Amount of Kshs 1,130,000/= in judgment/Decree in Civil Suit at Eldoret CMCC No. 326 of 2018, within the next fifteen (15) days from the date hereof.
  - b. The Applicants shall file and serve the Notice of Appeal and lodge the Record of Appeal and Memorandum of Appeal within fourteen (14) days from the date of this ruling. Time for filing is hereby extended accordingly.
  - c. Execution of the judgment and decree in Eldoret CMCC No. 326 of 2018 delivered on 4th July 2025 is stayed pending the hearing and final determination of the intended appeal subject to condition (a) above.
  - d. Pending compliance with (a) the auctioneer instructed by the Respondent shall not proceed to auction or otherwise dispose of the Applicants' properties. The Respondent is directed to notify the auctioneer and the Registrar of this order immediately.
  - e. Costs of this application shall abide the outcome of the appeal.
  - f. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET VIA CTS THIS 25TH DAY OF SEPTEMBER 2025**

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**R. NYAKUNDI**  
**JUDGE**

