



REPUBLIC OF KENYA



**Premier Kenya Limited & another v Ongera (Miscellaneous Application E295 of 2022) [2023] KEHC 27433 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 27433 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
MISCELLANEOUS APPLICATION E295 OF 2022**

**JN MULWA, J**

**FEBRUARY 16, 2023**

**BETWEEN**

**PREMIER KENYA LIMITED ..... 1<sup>ST</sup> APPLICANT**

**KARANJA KAMAU ROBERT ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DANIEL OTWORI ONGERA ..... RESPONDENT**

**RULING**

1. By an application dated May 19, 2022, the Appellants sought leave of court to file an appeal out of time from the judgment of the trial court in Milimani Commercial Courts No 10361 of 2018 delivered on February 9, 2022 pending hearing and determination of the intended appeal; and upon such order being grounded, for a stay of execution order pending hearing and determination of the appeal. It is premised on provisions of Order 42 Rule 6 and Order 51 Rules 1 and 3 of the *Civil Procedure Rules*; and upon grounds stated at the face thereof, and supporting affidavit sworn on May 19, 2022 by one Martha Mugo, Advocate having conduct of the matter for the Appellants.
2. In opposing the application, the Respondent swore a replying Affidavit on June 7, 2022.  
Both parties have filed submissions to buttress their rival positions.  
I have considered the affidavits and the submissions.
3. The issues for the court's determination are whether the Applicants have tendered reasonable explanation for the delay to the satisfaction of the court; and if answered in the affirmative, whether an order for stay of execution pending hearing and determination of the appeal should be granted.



## Extension of time

4. Section 79 G of the [Civil Procedure Act](#) provides for the time to file an appeal as 30 days from the date of the judgment, decree or ruling.

A proviso thereto also allows an appeal to be admitted out of time if the Applicant satisfies the court that he has good and sufficient cause for the delay.

5. In this application, the period of delay outside the Statutory 30 days is 70 days.

The reasons stated for the delay as seen from the supporting affidavit to the application are that it took longer for the Advocates to obtain a copy of the judgment and obtain instructions from the Applicants. To the above, the Respondent avers in the replying affidavit that it is a constructed mode of delaying the Respondent from enjoyment of his judgment fruits, and an abuse of court process.

6. The court notes that the decretal sum is Kshs 1,008,143.33/- out of which 50% was deposited into court as a conditional stay of execution pending hearing and determination of this application.

7. The principles governing grant of leave to file appeal out of time are now settled; the Applicant must demonstrate good and sufficient cause and reasons as stated in the case of *Mutiso v Mwnagi* (1997) KLR 630 thus:

1. The length of the delay
2. Reasons for the delay
3. Chances of appeal succeeding
4. Decree of prejudice to the respondent if application is granted.

8. Further the Supreme Court of Kenya in [Nicholas Kiptoo Korir v IEBC & 7 others](#) (2014) eKLR emphasized that the party seeking extension of time has the burden of laying a basis to the satisfaction of the court.

9. Upon consideration of the reasons tendered by the Applicant, I find no plausible reasons for the 70 days delay. The court agrees with the Respondent that the Applicant is out to frustrate the Respondent by locking away his well-earned judgment fruits. Indeed, the 50% deposit into court denies the Respondent use of the same.

The draft Memorandum of Appeal dated May 19, 2022 has been considered.

10. The Applicants appeal is against both liability and quantum following injuries sustained by the Respondent in a road traffic accident wherein the Respondent was injured. It has not been stated what role the Respondent played in the causation of the accident and therefore the trial court cannot be faulted for holding the Respondent to blame as a passenger in the Applicants' vehicle. To that extent, the court is not persuaded that the intended appeal has chances of success particularly in the matter of liability.

11. The Applicants failed to provide the court with a copy of the judgment for reasons known to themselves. By denying the Respondent the judgment sum there is no doubt that he will be prejudiced while waiting for the appeal to be heard and determined. It is therefore the court's view that the Applicants have not satisfied the court that they are deserving of the court's discretion to allow the application.



12. However, and despite the above, the court is obligated to balance the interests and rights of both parties to achieve justice to both. The overriding objective under Section 1A, 1B, and 3A of the Civil Procedure Act, and Article 159 (2) (d) of the Constitution dictates that substantial justice be done as opposed to reliance on technical procedural dictates that may deny a party its right to be heard to the highest level.
13. To deny a party a right to appeal would in essence be denying it access to justice that is guaranteed under Article 50 (1) of the Constitution which cannot be limited under Article 25 of the Constitution.
14. The prejudice that may be occasioned to the Respondent can be compensated by an award of costs – see the Nicholas Kiptoo case (supra). I shall therefore grant leave to the Applicants to file their appeal out of time, upon conditions that shall appear at the tail end of this ruling.

**Stay of execution pending hearing and determination of the intended appeal.**

15. Order 42 Rule 6(2) of the Civil Procedure Rules sets out the conditions that an Applicant must comply with for a grant of the order.
  - a. No order of stay of execution shall be made under sub-rule (1) unless;
  - b. That the court is satisfied that substantial loss may result to the Applicant unless the Order is made and the application has been made without unreasonable delay; and
  - c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on him has been given by the Applicant. The conditions have been repeatedly cited in numerous decisions among them Halal & another v Thornton & Timpin (1963) KLR and (1990) eKLR; RWW v EKW (2019) eKLR.
16. The purpose for stay of execution pending appeal is to preserve the subject matter in dispute so that the Appellants' rights of appeal are safeguarded should the appeal be successful, and not rendered nugatory – RWW v EKW (Supra).
17. Having considered the entirety of both parties' rights, I shall exercise my discretion, but within the confines of the law and allow that arm of the application, albeit upon conditions.

Consequently, the application dated May 19, 2022 is allowed upon the following conditions: -

- a. The applicants shall file the Memorandum of Appeal and serve within 7 days of this order.
- b. The Record of Appeal shall be filed and served within 60 days.
- c. The 50% of the decretal sum deposited in court (Kshs. 646,675/-) shall be released to the Respondents' Advocates for onward transmission to the Respondent within 30 days of this order.
- d. In default of any of the above orders, the stay of execution orders pending hearing and determination of the intended appeal shall lapse automatically.
- e. The cost of this application shall be borne by the Applicants; and payable to the Respondents.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023.**



**J. N. MULWA**  
**JUDGE**

