

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT LODWAR
CIVIL APPEAL NO. E002 OF 2025**

BETWEEN

PETER LOLEM

EKUWOM.....APPL

ICANT

VERSUS

LYDIA WANGARE

CHEGE.....1ST

RESPONDENT

PLATINUM CREDIT

LIMITED.....2ND

RESPONDENT

EAGLE EYE

AUCTIONEERS.....3RD

RESPONDENT

RULING

Introduction

1. Peter Lolem Ekuwom (hereinafter the “Applicant”) filed a Notice of Motion dated 19th March 2025 expressed to be brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules and Article 50 (1) (q) of the Constitution of Kenya, alongside all other enabling provisions of the law. In the Motion, the Applicant seeks to be granted, in the main, the following orders:

- a) That leave be granted to the Applicant to file an appeal out of time.
- b) That this honourable court be pleased to issue orders of stay of execution of the ruling delivered on 8th June 2022, and to restrain the Respondents, their agents, servants, representatives,

employees and/or anyone dealing through them, from attaching and selling the Applicant's motor vehicles, registration number KBN 546N and KCC 633L, pending the hearing and determination of this intended appeal.

2. The Application arises from the dismissed of the case by the lower court for want of prosecution on 27th April 2022. The Applicant avers that he only discovered the outcome upon a personal visit to the court registry, claiming his former advocate had been unresponsive to his calls.
3. Following the dismissal, the Applicant engaged new counsel who filed an application for reinstatement of the suit. That application was also dismissed on 8th June 2022, for want of prosecution. The Applicant avers that the significant delay in filing the current intended appeal was a direct and unavoidable consequence of a serious health crisis. That in April 2021, he was involved in a serious accident that resulted in lung injuries, and was subsequently diagnosed with Covid-19, which worsened his condition. The illness, he claims, left him incapacitated and unable to effectively communicate or provide instructions to his advocate, constituting a good and sufficient reason for the delay.
4. It is further stated that the trial court issued a decree dated 10th October 2024 followed by a warrant of attachment and sale dated 23rd January 2025. On 19th February 2025, the Applicant states to have been flagged down by Mallard Auctioneers, who served him with documents regarding their intent to sell motor vehicles registration number KBN 546N and KCC 633L to recover costs and auctioneer charges. It is this action that prompted the filing of the present application on 19th March 2025.
5. The Applicant further alleges that on 4th March 2025, the Directorate of Criminal Investigations Officer (DCIO), Lodwar informed him that a forensic report had been completed regarding the alleged fraudulent transaction and transfer of motor vehicle KBN 546N. he then adds that the DCIO is ready to produce the report in court to show that the transfer of

the motor vehicle from him in favour of the respondent was fraudulent. he then contends that the intended appeal, a draft memorandum of appeal is annexed to the application, cite specific legal grounds, including the allegations that the trial magistrate erred by dismissing the suit on procedural technicalities, ignoring evidence of fraud, and thus denying the Applicant the right to be heard.

6. The Applicant's case for a stay of execution is predicated on the principle that if the stay is not granted, he will suffer irreparable loss and the intended appeal will be rendered nugatory. He emphasizes that the impending sale of the motor vehicles, which are the very subject matter of the dispute, would defeat the purpose of the appeal, as the vehicles could not be restored to him even if the appeal were to succeed. The Applicant has expressed his willingness to provide security as directed by the Court.
7. The application was opposed by the respondent on the basis of the Replying Affidavit sworn by Richard Simbala on 16th June 2025. In that affidavit it is contended that the delay was inordinate and never explained as much as there was never material to support the grounds in the proposed appeal. In addition, it was contended that the grounds of the proposed appeal disclose potential for prejudice upon the respondent.
8. There was equally filed written submissions dated 01.09.2025 which not only set out the four elements for consideration in applications seeking extension of time duly backed by decided cases. The court has read all the material presented to it and given due consideration to all without the need to reproduce the same in this decision

Issues

9. The court has anxiously considered the prayers sought in the Application as well as the response thereto together with the submissions filed by both parties. From that consideration the court identifies the issue for its determination to be whether the applicant has established a case for enlargement of time to file an appeal out of time.

Analysis and Determination

10. The timely institution and prosecution of an appeal, and indeed all court cases, is central to every case because it speaks to the constitutional dictate that court business be conducted timeously and promptly.
11. In dealing with an application for extension of time, the court is guided by the principle that the discretion to extend time is unfettered and is not a right of a party but an equitable remedy available only to a deserving party. A party who seeks an extension of time has the burden of laying a basis to the satisfaction of the court by placing relevant material before the court to enable its discretion to be exercised judiciously.
12. Section 79 G of the Civil Procedure Act accords this court the discretion to admit appeal lodged out of time if the court is satisfied that the appellant has adduced good and sufficient cause for not filing the appeal in time.
13. In the case of **Seventh Day Adventist Church East Africa Ltd. & Another v M/S Masosa Construction Company Civil Application No. Nai. 349 of 2005**, the court held that the factors to consider are not exhaustive, but include the period of delay and an explanation for the same, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent, and the importance of compliance with timelines set by the court.
14. On its part, the Supreme Court in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others eKLR** affirmed that the delay should be explained to the satisfaction of the court and that the consideration to extend time is made on a case-to-case basis. The court 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.”**

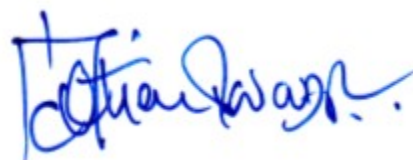
15. In the circumstances of this case, the delay from the date of the ruling on 8th June 2022 to the filing of this application on 19th March 2025 is indeed substantial, spanning nearly three years. However, the Applicant explains the same to have been caused by a serious health condition that left him incapacitated and unable to effectively run his personal affairs and engage with his legal counsel. The court finds the account regarding hospitalization for lung injuries and a Covid-19 diagnosis, coupled with his former advocate’s unresponsiveness, provides a coherent and sufficient explanation for the long delay.

16. Having found so, the next question then becomes whether the intended appeal is arguable. The Applicant challenges the trial court’s decision on the basis of a denial of the right to be heard and the dismissal on procedural technicalities. These are substantive legal issues that go to the heart of a fair trial. Even though it is noted that the applicant and his counsel displayed dilatoriness in handling the business of the court, that the dispute was never heard on the merits when coupled with the allegations that the applicant lost the motor vehicle to the 1st respondent courtesy of an alleged fraud militate against any order that would curtail the right of the applicant to be heard on the merits.

17. It is thus the court’s view that no prejudice will visit the respondent if the appeal is given the green light to be heard to give the parties an opportunity to argue the appeal on the merits or demerits before the appellate court. If any prejudice visits the respondents, the same is capable of compensation by an award of costs in the event the appeal gets dismissed.

18. The court is thus satisfied that the Applicant has demonstrated a plausible explanation for the delay and that the intended appeal is arguable and deserving of consideration. The grant of leave to appeal will not cause undue prejudice to the Respondents, as they will have an opportunity to defend their case on the merits during the appeal. To deny the application would be to condemn the Applicant to a permanent loss of his chose in action, potentially without a fair opportunity to be heard.
19. The Application having been allowed, and for purposes of case management, the appellant is granted a period of 7 days to file the Memorandum of appeal and a period of 30 days to file and serve the Record of Appeal as well as written submissions. Thereafter the respondent shall have 14 days to file own submissions.
20. Having extended the time as aforesaid and to preserve the substratum of the said appeal, the court considers it only just that there be stay of execution pending the hearing and determination of the appeal. In granting the order of stay at this juncture, the court is minded to have the appeal, when filed, to be fast tracked, by avoiding prospects of having to hear and determine an application for stay.
21. However, stay is only granted on terms as are sufficient to guarantee that should the appeal fail, the appellant shall have furnished security as is sufficient to satisfy the due performance of the decree appealed against. In this matter, because the suit was dismissed with costs, the only debt the applicant owes is the costs of the dismissed suit. The court thus directs that as a condition for the stay granted, the applicant shall within 21 days from today deposit into court the costs of the suit giving rise to this application.
22. Parties shall attend court on 06.11.2025 to confirm compliance and for the court to give directions on a judgment date.

Dated, signed and delivered virtually this 24th day of September, 2025

A handwritten signature in blue ink, appearing to read 'John Swann', is written over the text of the judgment.

Patrick J O Otieno
Judge