



**Mburu v Abdi (Civil Miscellaneous E046 of 2025)
[2025] KEHC 13463 (KLR) (29 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13463 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL MISCELLANEOUS E046 OF 2025
RN NYAKUNDI, J
SEPTEMBER 29, 2025**

BETWEEN

ISAAC MBURU APPLICANT

AND

FARDOSA ABDIRAHMAN ABDI RESPONDENT

RULING

1. Before this court is an application dated 8th April, day of 2025 seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That the Honorable court be pleased to stay execution pending the hearing and determination of the Application.
 - d. That the Honorable court be pleased to stay execution pending hearing and determination of the intended appeal.
 - e. That the Honorable court be pleased to grant the Applicant leave to Appeal out of time against the Judgement of the Honorable Magistrate Keyne Gweno delivered on 20th February 2025 in Eldoret Chief Magistrate's court case No. CMCC E301 of 2024.
 - f. That the costs of the application be provided for.
 - g. That the court may issue any further or just orders as may meet the ends of justice in this application.
2. Which Application is grounded upon the following grounds:



- a. The Judgement was entered against the Applicant herein on the 20th February 2025 whereof the Applicant was held 100% liable and general damages was assessed at Kshs. 2,000,000/- and Special damages of Kshs. 1,054,576/-hence a total sum of Kshs 3,254,576/=.
- b. Consequently, a stay of execution period for 30 days was granted to the Applicants during period which the Applicant's advocates on record sought further instructions from the Applicant's insurance Messers occidental on the way forward.
- c. Due to the bureaucracies and procedures of the said insurance the instructions to appeal against the decision of the trial came after the stay period had lapsed.
- d. The Applicant is aggrieved by the decision of the trial court as the award granted is excessively high in the circumstances and after consideration of the nature of the injuries sustained.
- e. The Applicant is further aggrieved by the fact that the trial court failed to consider his evidence as far as liability is concerned hence the trial magistrate erred in facts, law and principle in finding the Applicant 100% liable.
- f. The Respondent has since proceeded and extracted the warrants of attachment of movable property against the Applicant and 8th April 2025 Messers Razor Sharp Auctioneers proclaimed his motor vehicle registration number KCE 036H.
- g. The proclamation will lapse upon expiry of 7 days from 8th April 2025 hence it is in the interest of justice that the orders sought in this application are granted expeditiously to avert a miscarriage of justice.
- h. The time frame for filing an appeal lapsed on the 3rd of April 2025 and there is need for the Honorable Court to enlarge time to allow the Applicant to file an appeal out of time and also for the court to order for stay of execution pending hearing and determination of this application as well as hearing of the intended appeal.
- i. The Applicant's appeal which has very high chances of succeeding will be rendered nugatory unless the honorable court grants the Applicant orders for stay of execution pending hearing and determination of this application as well as the intended appeal.
- j. The Applicant stand to suffer substantial and irreparable harm if orders for stay of execution and enlargement of time are not issued urgently, as they may never recover the decretal sum from the Respondent whose source of income is unknown.
- k. The failure to file the Memorandum of Appeal within the prescribed time was not intentional but an inadvertent error the same having been caused by the non-communication of further instructions by the instructing insurance for and on behalf of the Applicant herein.
- l. The Applicant has an arguable and meritorious Appeal with a good likelihood of success as the award granted by the trial court is manifestly high and the same ought to be reviewed to avoid a miscarriage of justice.
- m. The Applicant is bound to suffer irreparable prejudice, loss and damage unless this Honorable Court grants the Orders sought herein.
- n. The Respondent shall suffer no prejudice if the application is allowed.
- o. It is the Applicant's case that this Application is merited and it is in the interest of justice that the application herein is heard expeditiously and the orders sought before the attachment



process proceeds on the 15th April 2025 threatened in the proclamation notice by Razor Sharp Auctioneers.

3. The application is supported by an affidavit sworn by the Applicant which he depones as follows:
- a. That I am well conversant with the matter before court.
 - b. That the Judgement was entered against me on the 20th February 2025 whereof I was held 100% liable and general damages was assessed at Kshs. 2,000,000/-and Special damages of Kshs. 1,054,576/-hence a total sum of Kshs 3,254,576/-. (Annexed herewith is a copy of the Judgment and decree marked Exhibits IM 1(a) and (b) respectively
 - c. That consequently, a stay of execution period for 30 days was granted to the Applicants during period which my advocates on record sought further instructions from my insurance Messers occidental on the way forward.
 - d. That due to the bureaucracies and procedures of the said insurance the instructions to appeal against the decision of the trial came after the stay period had lapsed.
 - e. That I am aggrieved by the decision of the trial court as the award granted is excessively high in the circumstances and after consideration of the nature of the injuries sustained.
 - f. That I am further aggrieved by the fact that the trial court failed to consider my evidence as far as liability is concerned hence the trial magistrate erred in facts, law and principle in finding me 100% liable.
 - g. That the Respondent has since proceeded and extracted the warrants of attachment of movable property against me and 8th April 2025 Messers Razor Sharp Auctioneers proclaimed my motor vehicle registration number KCE 036H. (Annexed herewith is a copy of the Proclamation Notice and Warrants of Attachment marked Exhibit IM 2 (a) and (b) respectively).
 - h. That the proclamation will lapse upon expiry of 7 days from 8th April 2025 hence it is in the interest of justice that the orders sought in this application are granted expeditiously to avert a miscarriage of justice.
 - i. That the time frame for filing an appeal lapsed on the 3rd of April 2025 and there is need for the Honorable Court to enlarge time to allow the of execution pending hearing and determination of this application as well as hearing of the intended appeal.
 - j. That my intended appeal which has very high chances of succeeding will be rendered nugatory unless the honorable court grants the Applicant orders for stay of execution pending hearing and determination of this application as well as the intended appeal.
 - k. That I stand to suffer substantial and irreparable harm if orders for stay of execution and enlargement of time are not issued urgently, as I may never recover the decretal sum from the Respondent whose source of income is unknown.
 - l. That the failure to file the Memorandum of Appeal within the prescribed time was not intentional but an inadvertent error the same having been caused by the non-communication of further instructions by the instructing insurance for and on my behalf.
 - m. That I have an arguable and meritorious Appeal with a good likelihood of success as the award granted by the trial court is manifestly high and the same ought to be reviewed to avoid a miscarriage of justice.



- n. That I am bound to suffer irreparable prejudice, loss and damage unless this Honorable Court grants the Orders sought herein.
- o. That the Respondent shall suffer no prejudice if the application is allowed.
- p. That my application is merited and it is in the interest of justice that the application herein is heard expeditiously and the orders sought before the attachment process proceeds on the 15th April 2025 as threatened in the proclamation notice by Razor Sharp Auctioneers.

Decision

4. The application for stay of execution is premised under Order 42 Rule 6 which provides as follows:
 - a. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such 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, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - b. No order for stay of execution shall be made under subrule (1) unless
 - (i) 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
 - (ii) 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.
 - c. Notwithstanding anything contained in Sub Rule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
5. Therefore, Courts typically considered the above conditions including the following before deciding whether to grant or decline stay of execution:
 - Substantial loss: the Applicant must show that they will suffer substantial loss or irreparable harm if the execution is carried out
 - Likelihood of success on appeal: the Applicant must have a reasonable chance of succeeding in their appeal.
 - Timely application: the Application for a stay of must be made in a timely manner, before execution can proceed
 - Preserving the subject matter: the court also considers whether the stay is necessary to preserve the subject matter of the dispute.
6. This application was filed timeously. Therefore, the Applicant has discharged the burden of proof as required by law under Section 107 (1) of the *Evidence Act*. The other crucial limb is on substantial loss. In the case of Tanzania Cotton Marketing Board vs Coget Cotton Co. S.A (1995-1998) E.A 312, the Court held that:

“The words substantial loss cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the code expressly prohibits stay of execution as an ordinary rule, it is clear the words substantial loss must mean something in addition to and different from.”



7. Similarly, the Court addressed this issue in the case of *Muhorro Town Council Versus Rutalihamu Jacob* (Miscellaneous App. No. 0016 of 2022) 2022 UGHCCD 90(6 May 2022) while defining substantial loss Byaruhanga Jesse Rugyema J stated that:

“The Applicant should go beyond the vague and general assertions of substantial loss in the event a stay is granted. It follows from the foregoing that to amount to substantial loss, the deprivation must be over and above the ordinary loss resulting from litigation.” See also *Butt V Rent Restriction Tribunal 1979* eKLR

8. This question of substantial loss has to be weighed alongside the principles laid down in *Stanley Kangethe Kimyanjui V Tony Ketter & 5 Others* [2013] eKLR in which the court expressed itself as follows:

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

9. The purpose of stay of execution as stated in the case of *RWW v EKW* [2019] eKLR 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 judgement. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

10. The other condition precedent of significance on stay of execution pending appeal is on deposit of security of costs as articulated by the court in *Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates* [2014] eKLR the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules Act as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

11. In the instance case the controversy is as premised in the memorandum of appeal and it becomes difficult without stay of execution for an appeal’s court to go through the procedural and substantive law to rule on the appeal without preserving the subject matter. It is for these reason I allow the relief on stay of execution pending appeal with a condition security for costs of Kshs. 500,000/= be deposited in court within 45 days of today’s ruling.

12. The other limb of this application is on enlargement of time under Section 79 (g) of the CPA. The guiding principles on what to consider to enlarge time for a party are addressed by the courts in the following authorities: *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR, *Henry Mukora Mwangi v Charles Gichina Mwangi Civil App. No. Nai 26 of 2004*, *Mwangi v Kenya Airways Ltd.* [2003] KLR 486 and *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi Civil Application No. Nai 255 of 1997*.



13. The exercise of jurisdiction to extend time is unfettered and cannot be limited given the anchor that the right of appeal is a constitutional imperative. From the following cases one can draw the measure and the yardstick to judiciously exercise discretion to enlarge time for a litigant desirous to pursue his right on appeal. Thus *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645 at paragraph 22 observed:

“It follows that when considering whether to grant an extension of time for an appeal against a final decision in a case of any complexity, the courts should consider “all the circumstances of the case” including:

- a. the interests of the administration of justice;
- b. whether the application for relief has been made promptly;
- c. whether the failure to comply was intentional;
- d. whether there is a good explanation for the failure;
- e. the extent to which the party in default has complied with other rules, practice directions and court orders;
- f. whether the failure to comply was caused by the party or his legal representative;
- g. the effect which the failure to comply had on each party; and
- h. the effect which the granting of relief would have on each party.

In the case of a procedural appeal the court would also have to consider item (g): “whether the trial date or the likely trial date can still be met if relief is granted”.

14. For emphasis purposes the Supreme Court of Kenya in *Salat v IEBC & others* [2014] eKLR the underlining principles that the Court should consider in exercise of principles of extension of time:

- a. Extension of time is not a right 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;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- f. Whether the application has been brought without undue delay; and
- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

15. The provisions on extension of time by an appeal’s Court are also underpinned on the right of appeal as a constitutional right expressly stipulated in the provisions to remind the Court that it stands out



as a fundamental right. This is what the Court in E.F.P. Co. Ltd V. N.D.I.C. (2007) 9 NWLR (Pt. 1039) P.216 held that:

“It is well settled that a right of appeal is constitutional as is provided in the Constitution. The right being Constitutional therefore, it stands to override most other negative principles aimed at its fore closing. The rider also stands clear that the exercise of this right is only permissible within limit as provided by law. In other words, the right is lost outside the prescribed statutory period allowed but will only be exercisable by leave of court; hence the reason seeking an order for leave and extending the time within which to appeal. While the Constitutional right cannot be extended if the applicant fails to adduce good and substantial reason for obliging the application, the court will not also hesitate to exercise its discretion in favour thereof provided sufficient materials and reason are contained in the affidavit to justify the exercise. The applicant must depose to facts on the affidavit which ought to state sufficient reasons explaining the delay. The relevant materials supporting such application must include the judgment/ruling of the court seeking to appeal and the proposed grounds of appeal.

16. On the totality of the evidence as pleaded in the affidavit the discretion is hereby exercised to indulge the Applicant to file his appeal out of time. In a nutshell the following orders shall abide:
- a. That a stay of execution pending the hearing and determination of the intended appeal is granted.
 - b. That further this Court do hereby grant leave to the Applicant to file his appeal out of time against the judgment of the honorable Court Magistrate Keyne Gweno delivered on 20th February 2025 in Eldoret Chief’s Magistrate’s Court Case No. CMCC E301 of 2024.
 - c. That the Applicant to file the record of appeal within 30 days from today’s date to enable protocols of the appeal process to commence in earnest so as to determine it within a reasonable time.
 - d. That the condition precedent of quantum deposit assessed at Kshs. 500,000/= be deposited by the Applicant to the Account of the Deputy Registrar of the High Court at Eldoret within the same period as prescribed in Clause (b) of this Ruling.
 - e. The costs of this application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED VIA EMAIL AND CTS AT ELDORET THIS 29TH SEPTEMBER 2025

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R. NYAKUNDI

JUDGE

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