



**Mwobionga v Onkoba (Miscellaneous Civil Case E005 of 2025)  
[2025] KEHC 13281 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13281 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
MISCELLANEOUS CIVIL CASE E005 OF 2025  
WA OKWANY, J  
SEPTEMBER 25, 2025**

**BETWEEN**

**RICHAD MWOBIONGA ..... APPLICANT**

**AND**

**PHILIS MONYANGI ONKOBA ..... RESPONDENT**

**RULING**

1. This ruling is in respect to the Application dated 10<sup>th</sup> March 2025 wherein the Applicant seeks the following Orders: -
  1. Spent
  2. Spent
  3. That there be a stay of execution of the Judgment in Keroka SPMCC No. 114 of 2017 pending the hearing and final determination of this Application and the intended appeal.
  4. That the Applicant herein be granted leave to appeal out of time against the whole of the judgment of the Honourable Ombija C.A. (SRM) delivered on the 2<sup>nd</sup> day of October 2024 in Keroka Senior Principal Magistrate's Civil Suit No. 114 of 2017.
  5. That the draft Memorandum of Appeal annexed to the Application be deemed as duly filed and served upon payment of the requisite fees.
  6. That upon grant of prayers No. 3 and 4 above, this Honourable Court be pleased to order that the judgment sum be deposited into a joint interest earning account in the names of both counsel to stand as security.



7. That costs of the Application be in the cause.
2. The Application is brought under Sections 1A, 3A, 79G of the *Civil Procedure Act*, Order 42 Rule 6 (1) (2) and (6), Order 50 Rule 5, Order 51 Rules 1 & 3, and Order 22 Rule 22 of the *Civil Procedure Rules*.
3. The Application is supported by the Applicant's Affidavit dated 10<sup>th</sup> March 2025 wherein he avers that the trial court's judgment of 2<sup>nd</sup> October 2024 condemned him to pay Kshs. 307,350/= plus costs and interests to the Respondent but that his advocates could not trace him for further instructions because he had travelled out of the country to seek medical treatment and only returned in February 2025. He states that he is dissatisfied with the said judgment and desires to lodge an appeal against it even though the time for lodging an appeal has already lapsed.
4. The Applicant states that the delay in filing the appeal was neither deliberate nor inordinate and that the intended appeal raises arguable issues with a high chances of success. He further states that he is willing to furnish security by depositing the entire decretal amount in a joint interest earning account.
5. Even though the Respondent indicated that he had filed a replying affidavit, no such affidavit was placed on the court or the CTS. Be that as it may, the court is still minded to determine the Application based on the pleadings and the parties respective written submissions.
6. I find that the main issue for determination is whether the Applicant has made out a case for the granting of the orders sought in the Application.
  - i. Leave to Appeal Out of Time.
7. Section 79G of the *Civil Procedure Act* provides 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 a good and sufficient cause for not filing the appeal in time.
8. In the case of Nicholas Kiptoo Korir arap Salat vs. IEBC and 7 Others [2014] eKLR, the Supreme Court outlined six (6) considerations to be made by a court in exercising its discretion on an Application for leave to appeal out of time thus: -

“The underlying principles a court should consider in exercise of such discretion should include: -

  - a. Extension of time is not a right of any 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 by 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 respondent if the extension is granted;
  - f. Whether the application has been brought without undue delay.
9. In *Thuita Mwangi vs. Kenya Airways Ltd* [2003] eKLR the Court of Appeal in set out the parameters to be considered as follows: -
- “
- “i) The period of delay;
  - ii) The reason for the delay;
  - iii) The arguability of the appeal;
  - iv) The degree of prejudice which could be suffered by the Respondent if the extension is granted;
  - v) The importance of compliance with time limits to the particular litigation or issue; and
  - vi) The effect if any on the administration of justice or public interest if any is involved.”
10. In this case, judgment was delivered on 2<sup>nd</sup> October 2024 and the present Application is dated and filed on 10<sup>th</sup> March 2025. There was therefore a delay of approximately 4 months and not 6 months as submitted by the Respondent. The Applicant attributed the delay to his absence from the country on account of medical treatment abroad.
11. The Respondent, on the other hand, submitted that the Applicant did not tender any cogent reason for the delay and that no attempts were made to file the Appeal. It was submitted that the Applicant is guilty of laches and substantial indolence. Reference was made to the decision in *National Super Alliance (NASA) Kenya vs. Independent Electoral and Boundaries Commission* (2017) eKLR where it was held that the court must exercise its discretion judiciously.
12. My finding is that even though the Applicant did not furnish medical or travel documents to show that he had travelled out of the county for medical attention, the Court will grant him the benefit of doubt and exercise its discretion to allow the Application for leave to file the appeal out of time.
- ii. Stay of Execution Pending Appeal.
13. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates that: -
6. No order for 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.
14. In the oft-cited case of *Butt vs. Rent Restriction Tribunal* (1982) KLR 417, it was held that: -
- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.



2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
  3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
  5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
15. I have already noted that there was a delay of about 4 months in filing the Application. I find that the said period, when considered alongside the reasons furnished for the delay, is not inordinate.
  16. On substantial loss, the Applicants submitted that, the Respondent will not be in a position to refund the decretal sum should the same be paid out to him and the intended appeal eventually succeeds. Reference was made to the decision in G.N. Muema T/A Mt. View Maternity & Nursing Home vs. Miriam Maalim Bisbar & Another (2018) eKLR where the court allowed an application for stay of execution pending appeal because the Respondent had not filed an affidavit of means to prove their ability to refund the decretal sum should the appeal succeed.
  17. The Respondent, on the other hand, submitted that the Applicant did not explain the manner in which he would suffer loss apart from the claim that he faced the imminent risk of execution. It was submitted that execution was a lawful process which cannot be the basis for the claim on substantial loss. Reliance was placed on the decision in Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Another (1986) eKLR where the court held that it was not sufficient to state that the Applicant will suffer hardship due to the substantial sum of money as such an Applicant had to prove that substantial loss would ensue.
  18. In James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR the court explained what constitutes substantial loss as follows:-
 

“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. In the present case, I have already noted that the judgment debt is Kshs. 307,350/=. While the Court appreciates that the Respondent should not be unduly denied her right to enjoy the fruits of her judgment, the Applicant's right to pursue his right of appeal cannot also be overlooked. To this end and in balancing the competing interests of the two parties, I find that it would be in the interests of justice to find that the second parameter has been established particularly because, the grounds of appeal enumerated in the draft Memorandum of Appeal raise substantive triable issues that must be addressed on appeal.
20. On the issue of security for the due performance of the decree, the Applicant averred that he is willing to deposit the entire decretal sum in a joint-interest earning account.
21. In *Gianfranco Manenthi & Another vs. Africa merchant Assurance Co. Ltd* [2019] eKLR it was held that:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls. Further, Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine....”

22. In *Ndubiu Gitabi vs. Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 it was held thus: -

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that



the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it”.

23. Guided by the above cited cases, I find the Applicant’s proposal to deposit the entire decretal sum in a joint interest earning account fulfils the requirement for provision of security for the due performance of the decree. For the reasons that I have stated in this ruling, I find that the Applicant has made up a case for the granting of orders for stay of execution pending appeal. Consequently, I allow the said Application in the following terms: -

- a. The Applicant is hereby granted an order for stay of Execution pending appeal on the following conditions: -
  - i. The Applicants shall deposit the entire decretal sum plus costs and interests, in a joint-interest earning account to be held in the names of counsel for both parties, within thirty (30) days from the date of this Ruling.
  - ii. The Applicant is hereby granted leave to appeal out of time and the draft Memorandum of Appeal annexed to this Application shall be deemed as duly filed upon payment of the requisite filing fees.
  - iii. The Applicant is further directed to file and serve his Record of Appeal within 30 days from the date of this Ruling.
- b. In the event of failure to comply with Orders in i), (ii) and (iii) above the Respondent shall be at liberty to proceed with the execution of the decree issued by the trial court.

24. The costs of this Application shall abide the outcome of the Appeal.

25. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**W. A. OKWANY**

**JUDGE**

