



Sote v Kibirir & another (Suing as Administrators of the Estate of Geoffrey Kemboi Moto (Deceased)) (Civil Miscellaneous Application E043 of 2024) [2025] KEHC 13761 (KLR) (29 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13761 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL MISCELLANEOUS APPLICATION E043 OF 2024
JN KAMAU, J
SEPTEMBER 29, 2025**

BETWEEN

HUMPHREY ALOSE SOTE APPLICANT

AND

ZACHEL KIVUVU KIBIRIR 1ST RESPONDENT

MARGARET MUSIMBI MWOTO 2ND RESPONDENT

**SUING AS ADMINISTRATORS OF THE ESTATE OF GEOFFREY KEMBOI
MOTO (DECEASED)**

RULING

Introduction

1. In his Notice of Motion dated 13th December 2024 and filed on 16th December 2024, the Applicant herein sought that he be granted leave to file an appeal out of time against the Judgment of the lower court dated 29th October 2024 in Vihiga SPMCC No 66 of 2022.
2. He swore an Affidavit in support of his said application on 12th December 2024. He averred that on 29th October 2024, the lower court entered Judgment against him and in favour of the Respondents herein. He stated that his advocates sought his insurer's instructions whereupon, the said insurers expressed dissatisfaction with the Judgment and on 5th December 2024, instructed his said advocates to appeal the whole Judgment. He pointed out that by the time his said advocates received the aforesaid instructions, the time within which to file an appeal had lapsed, necessitating the filing of this application.
3. He further averred that his intended appeal raised triable issues, was merited and had high chances of success. He added that the order for stay of execution granted by the lower court had lapsed and he was apprehensive that the Respondents might start execution process against him. He averred that the



- Respondents were men of straw and any monies paid to them would not be refundable in the event that the appeal succeeded.
4. He contended that in the event execution was levied against him, he would suffer irreparable loss and the intended appeal would be rendered nugatory.
 5. He further stated that his insurers were willing to give a bank guarantee for the decretal amount pending the hearing and determination of the appeal. He was emphatic that his application had been made timeously and in good faith.
 6. In opposition to the said application, Okwaro Winnie Anono, advocate swore a Replying Affidavit on 13th January 2023 (sic) and on behalf of the Respondents herein. The same was filed on 14th January 2025.
 7. The Respondents averred that the Applicant's application was destitute of any merit, misplaced and brought in bad faith with the aim of delaying the cause of justice. They further contended that his delay in presenting this appeal was inordinate and that the intended appeal was frivolous and a gimmick. They argued that he did not annex a draft memorandum of appeal to demonstrate the need for orders sought or show sufficient cause why he should be allowed to file an appeal out of time.
 8. They asserted that whilst he alluded to instructions from his insurer to institute an appeal, there was no evidence in form of a letter or email detailing the same. They added that his Supporting Affidavit was full of hearsay.
 9. They further averred that although he had referred to them as men of straw, he had equally not demonstrated his ability to obtain a bank guarantee in terms of the Judgment which he intended to appeal against. They averred that although he had the right to appeal, they were not agreeable with his proposed form of security and instead proposed that he deposits the entire decretal sum plus costs in a joint interest earning account in the names of both counsel on record pending the hearing and determination of the appeal. They were emphatic that the court should not be seen to assist the indolent.
 10. The Applicant's Written Submissions were dated and filed on 1st April 2025 while those of the Respondents were dated 28th February 2025 and filed on 7th March 2025. The Ruling herein is based on the said Written Submissions which both parties relied on in their entirety.

Legal Analysis

11. The Applicant invoked Order 42 Rule 6 of the Civil Procedure Rules and asserted that the said provisions were echoed in the case of Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others, Civil Appeal No 291 of 1997 (eKLR citation not given). He also placed reliance on the cases of Jaribu Holdings Ltd vs KCB Ltd 2017 (eKLR citation not given), Civil Application No 314 of 2017 (sic) (eKLR citation not given) and Socfnaf Ltd (Ruera Estate) vs Abisagi Igoki [2018] eKLR where the common thread was that for an order of stay of execution pending appeal to be granted, the applicant was obliged to demonstrate that the intended appeal was arguable and that if the orders were not granted and the appeal succeeded, the appeal would be rendered nugatory.
12. He further relied on the case of Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 Others [2016] eKLR where an arguable appeal was defined as one that raised legitimate points deserving judicial determination.



13. He argued that the Trial Court arrived at a wrong finding on liability and that its award on quantum was inordinately high in the circumstances. He explained that the Draft Memorandum of Appeal showed arguable grounds and hence had overwhelming chances of success.
14. He further asserted that if the decretal amount was released to the Respondents and the appeal succeeded, it was unlikely that the same would be refunded. He argued that the burden of proof in this circumstance had shifted to the Respondents herein. In this regard, he cited the case of National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another, Nairobi Civil Application No 238 of 2005 (eKLR citation not given) where it was held that once an applicant expressed a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden shifted to the respondent to show the resources he or she had.
15. He was emphatic that the Respondents' financial status was unknown since they had not filed any affidavit of means to demonstrate that they were in a good financial position to repay him the decretal sum in the event that the appeal was successful.
16. He pointed out that the Trial Court's Judgment was delivered on 29th October 2024 and the application herein was filed on 16th December 2024. In this regard, he relied on the case of Feisal Amin Janmohammed t/a Dunya Forwarders vs Shami Trading Co Ltd[2014]eKLR where an application for stay was filed about ten (10) days after the ruling date, the court held that the matter had been filed promptly and there was no unreasonable delay by the applicant in filing the same.
17. He reiterated that although the application herein was filed after the statutory time required for filing an appeal had lapsed, the delay was not intentional and was occasioned by the client who gave instructions late. He added that he was willing to offer security in the form of a bank guarantee and was willing to abide by any other conditions that may be given by court. He pointed out that that was a gesture of good will and honesty and that he did not wish to deny the Respondents the fruits of their Judgment, arguments that were upheld in the case of Focin Motorcycle Co Limited vs Ann Wambui Wangui & Another [2018] eKLR.
18. He was emphatic that he had satisfied the conditions for granting an order of stay. He invoked Section 27(1) of the Civil Procedure Act and urged the court to allow his application and order that costs abide the outcome of the appeal.
19. On their part, the Respondents cited Section 79G of the Civil Procedure Act and placed reliance on the case of Dilpack Kenya Limited vs William Muthama Kitonyi[2018]eKLR where it was held that an applicant seeking enlargement of time to file an appeal was required to show that he had a good cause for doing so.
20. They further relied on the case of First American Bank of Kenya Ltd vs Gulab P. Shah & 2 Others Nairobi (Milimani)[2002] 1 EA 65 where in granting an application for leave, it had to consider the explanation, if any for the delay, the merits of the contemplated action, that is, whether the appeal was arguable deserving a day in court and whether or not the respondent could be adequately compensated in costs for any prejudice that such respondent may have suffered as a result of a favourable exercise of discretion in favour of the applicant therein.
21. They reiterated that the delay was admitted, inordinate and there was no sufficient reason to explain the cause for the said delay. They pointed out that they were not privy to the communication between the Applicant and his counsel and that at the very least, his counsel ought to have written to them seeking their indulgence as they waited for the communication from his insurer. They added that he did not indicate whether he had followed up with his insurer before the appeal period lapsed hence they could not be punished for his misfortune.



22. They asserted that he failed to disclose to the court that after the stay period issued by the Trial Court lapsed, execution was done but the decree which he intended to appeal against remained unsettled. They argued that the Applicant was on a fishing expedition and a mission to frustrate them.
23. They were categorical that while the Applicant had the right to appeal, the court was required to weigh that right against the success of a litigant who should not be deprived of the fruits of his or her Judgment. They called upon the court to ensure that neither party suffered prejudice.
24. To support their case, they relied on the case of *Supa Hauliers Ltd vs David Masinde Musungu*[2015]eKLR wherein the court made reference to the case of *M/s Portreizt Maternity vs James Karanga Kabia Civil Appeal No 63 of 1997* (eKLR citation not given) where it was held that the right of appeal had to be balanced against an equally weighty right of the respondent to enjoy the fruits of the judgment that were delivered in his or her favour.
25. They further invoked Order 42 Rule 6 of the Civil Procedure Rules and argued that the Applicant's proposal of a bank guarantee as security was made without considering the prejudice suffered on their part in the event the bank failed to honour the said guarantee. They cited the *Law of Guarantee* by Richard Millet 2nd Edition at page 156 which defined a contract of guarantee as an accessory contract by which the surety undertook to ensure the principal performed the principal obligation.
26. They submitted that a guarantee was dependent on default of the principal and therefore a question arose as to when the guarantee fell due and became payable and in this case, whether it was upon the default of the principal or upon hearing and determination of the intended appeal. They were emphatic that the purpose of security as a legal instrument under Order 42 Rule 6(2)(c) was to guarantee due performance of such decree or order as may be binding on the applicant and not to punish the judgment debtor.
27. They pointed out that liability was an issue before the Trial Court which found the Applicant a hundred percent (100%) liable for the said accident. They reiterated that if this court was inclined to allow the application then the same should be on condition that the Applicant deposited the entire decretal amount plus costs in a joint interest earning account in the names of the counsel on record pending the hearing and determination of the appeal.
28. In exercising its discretion to allow an application seeking extension to file an appeal out of time, a court had to be satisfied that the omission to file the same within time was excusable. In other words, there had to be a plausible explanation for the delay in filing the appeal.
29. It was apparent from the court record that the decision the Applicant intended to appeal against was delivered on 29th October 2024. The present application was filed on 16th December 2024. Although about seventeen (17) days had lapsed from the date when the Applicant was required to lodge an appeal as was stipulated in Section 79G of the *Civil Procedure Act*, it was the considered view of this court that this was not an inordinately long period.
30. However, this court noted that the Applicant did not annex any documentary evidence to show the communication between his Advocates and the insurer and that the late instructions, if any, prevented him from lodging the appeal in good time. This court could, therefore, not decipher whether he was being truthful or not.
31. Having said so, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the *Constitution* of Kenya, 2010. Even where a party delays in doing an act, there was always a provision that would give it reprieve to seek justice.



32. Notably, Order 50 Rule 6 of Civil Procedure Rules, 2010 empowers the court to enlarge the time to do a particular act. The said Order 50 Rule 6 of Civil Procedure Rules stipulates as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.

33. Against this backdrop, this court, therefore, perused the draft Memorandum of Appeal that was annexed to the present application. It did not, however, consider the merits or otherwise of the grounds of appeal that were set out therein as that was strictly under the purview of the appellate court. All that it was expected to do was to consider if the Applicant herein had demonstrated that he had arguable grounds of appeal.

34. The grounds in the Applicant’s draft Memorandum of Appeal showed that he was aggrieved by the Trial Court’s decision on liability and quantum. He sought that the appellate court determine if the Trial Court erred in law and in fact. These were arguable points of law.

35. While considering whether or not to grant an order for extension to do any act, the court was also required to consider if the opposing side would suffer any prejudice if extension of time was granted. This court did not see any prejudice that the Respondents would suffer or were likely to suffer if the Applicant herein exercised his constitutional right of appeal. If there was any prejudice, then they did not demonstrate the same.

36. Taking all the factors hereinabove into account, it was the considered view of this court that it was in the interests of justice (emphasis court) that the Applicant be given an opportunity to have his intended Appeal heard on merit as he would suffer prejudice if he was denied an opportunity to fully present his Appeal to be heard on merit.

37. Indeed, the power to grant orders in the interest of justice and/or for the ends of justice (emphasis court) was well captured in Section 3A of the [Civil Procedure Act](#) that states that: -

“Nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice (emphasis court) or to prevent abuse of the process of the court.”

38. Turning to the issue of order for stay of execution pending appeal, this court noted both parties’ submissions on their arguments on the conditions to be met for an order of stay of execution to be granted. It noted that the Respondents were not technically opposed to the Applicant’s application for stay of execution pending appeal. What concerned them was the deposit of the decretal sum in a joint interest earning account in the names of their advocates and those of the Applicant herein.

39. Nonetheless, this court felt it was prudent to briefly consider if the Applicant had complied with the three (3) conditions for the granting of an order for stay of execution.

40. In respect of the first condition for the grant of an order for stay of execution, this court had already found that there was no inordinate delay in filing the present application.



41. The Respondents had not filed an affidavit of means. This very court had determined in the case of G.N. Muema P/A(Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another [2018] eKLR that the rigmaroles of recovery of decretal sum by a successful Applicant could amount to substantial loss.
42. In the absence of proof that the Respondents would be able to refund the Applicant the entire decretal sum without any hardship, this court was not persuaded that it should order the Applicant to release the decretal sum to her pending the hearing and determination of the Appeal herein. The second condition of being granted an order for stay of execution pending appeal was thus satisfied.
43. The Applicant was ready and willing to furnish security. Even so, this court took the view that a bank guarantee was not a suitable form of security considering that there was a possibility of the bank not honouring the bank guarantee and not being a party to the suit would make it difficult for a successful Applicant to enforce any orders he or she would get regarding the said bank guarantee, if at all. This court therefore determined that the security to be furnished herein would be in form of money.

Disposition

44. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Application dated 13th December 2024 and filed on 16th December 2024 was merited and the Prayer No (d) be and is hereby allowed in the following terms: -
 1. That there shall be a stay of execution of the Decree issued in in Vihiga SPMCC No E66 of 2022 pending the hearing and determination of the appeal on condition the Applicant shall deposit the decretal amount in a joint interest earning account in the names of both counsel herein within forty five (45) days from the date of this Ruling.
 2. For the avoidance of doubt, in the event, the Applicant shall default on Paragraph 44(1) hereinabove, the conditional stay of execution shall automatically lapse.
 3. The Applicant be and is hereby directed to file and serve his Memorandum of Appeal within fourteen (14) days from the date of this Ruling.
 4. The Applicant be and is hereby directed to file a Record of Appeal within one hundred and twenty (120) days from the date of this Ruling.
 5. It is hereby directed that this matter will be mentioned on 11th November 2025 to confirm compliance and/or for further orders and/or directions.
 6. Either party is at liberty to apply.
45. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF SEPTEMBER 2025

J. KAMAU

JUDGE

