



**King'oo v Kituva & another (Civil Miscellaneous Application
E064 of 2025) [2025] KEHC 14407 (KLR) (1 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14407 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL MISCELLANEOUS APPLICATION E064 OF 2025**

NIO ADAGI, J

OCTOBER 1, 2025

BETWEEN

JANET KATUNGWA KING'OO APPELLANT

AND

CHARLES NGOVU KITUVA 1ST RESPONDENT

HON ATTORNEY GENERAL 2ND RESPONDENT

RULING

The application

1. This ruling is on the Notice of Motion application dated 12th February 2025 brought under Sections 79G, IA, 1B & 3A of the *Civil Procedure Act*, Order 51(1) of the Civil Procedure Rules and any other enabling provisions of the Law for orders that:-
 - a. Spent.
 - b. This Honourable Court be pleased to grant the applicant leave to appeal out of time against the judgment delivered by Hon. Daffine Nyabokeye Sure on the 26th day of November 2024.
 - c. Spent
 - d. Spent
 - e. This Honourable Court be pleased to issue a stay of execution of the judgment dated the 26th day of November 2024 and all consequential and/or further proceedings thereto pending the hearing and determination of the intended appeal.
 - f. There be such further orders as may be fair and just
 - g. The cost of this application be provided for.



2. The application is supported by the supporting affidavit of Janet Katungwa King'oo, the Applicant and is based on the following grounds that:-
 - i. Despite the Applicant's desire to lodge an appeal, the Applicant was faced with financial constraints to sufficiently proffer instructions to counsel and as a consequence, the statutory prescribed time within which to file the memorandum of appeal lapsed.
 - ii. Owing to the nature of the offence preferred against Applicant in the initial criminal matter, it has been extremely difficult for the Applicant to find any gainful form of employment hence why it took time for her to raise the legal fees required to instruct her advocates to lodge an appeal in the matter.
 - iii. The learned trial magistrate erred in her appreciation of the consequence of acquittal under Section 87 (a) of the Criminal Procedure Code.
3. By a further affidavit, the Applicant states that the 1st Respondent is keen on levying execution of the decree and as such, should the stay orders be declined, her appeal will be rendered nugatory. The Applicant is also emphatic that the financial status of a person does not necessarily remain static more so in these harsh economic times. Further, that the 1st Respondent is not her employer and as such cannot speak to whether or not the Applicant is employed.
4. The Applicant avers that the delay in filing the instant application amounts to a mere 23 days which is not so inordinate to be inexcusable. Apprehensive that the 1st Respondent may at any time levy execution of the decree against her, the applicant urges that her application is well merited and prays that the same is allowed as prayed.
5. Premised on the foregoing, the Applicant invited the court to consider whether the Court should exercise its discretion to grant the applicant leave to file her appeal out of time and whether a Stay of Execution of the Judgment and Decree dated 29th November 2024 should issue.

The 1st Respondent's Response

6. The 1st Respondent strongly oppose the application through their Replying Affidavit sworn by the 1st Respondent on 4th March 2025 and their submissions dated 26th May 2025.
7. The 1st Respondent contends that an extension of time is not a right of a Party but an equitable remedy that is only available to a deserving Party at the discretion of the court and a Party who seeks for an extension of time has the burden of laying a basis to satisfaction of the court as was held in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commissions & 7 others* (2014) eKLR.

The 1st Respondent prays that the instant application be dismissed with costs.

No response by the 2nd Respondent

8. The 2nd respondent, though duly served, did not file a response to the application herein and the Applicant invites this court to treat this application as unopposed on the part of the 2nd Respondent.
9. The application was canvassed through written submissions. The Applicants submissions are dated 25th March 2025 while the 1st Respondent's submissions are dated 26th May 2025. The 2nd Respondent did not file submissions.



Analysis and determination

10. I have considered the application, the supporting affidavit, the Replying Affidavit, the trial court's judgement and the rival submissions filed by the parties' counsel as well as the judicial decisions relied upon. In my view, the issues for determination are as follows:
- a. Whether the court should exercise its discretion to grant the Applicant leave to file her appeal out of time;
 - b. Whether the Applicant has met the prerequisite for grant of stay of execution pending appeal;

Whether the court should exercise its discretion to grant the Applicant leave to file his appeal out of time;

11. Section 79G of the *Civil Procedure Act* states: -

“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 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 good and sufficient cause for not filing the appeal in time.

12. It is clear from the wording of Section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018] eKLR which held that an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.
13. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“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.



14. Similarly in the case of Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

15. Applying the above principles to the present application, the judgment herein was delivered on 26th November 2024. The Applicant filed the current application together with the annexed Memorandum of Appeal on 12th February 2025. This is about 24 days outside the time limited for filing an appeal taking into account the High Court December recess when time does not run. The Applicant has attributed the delay in filing her appeal to financial constraints to sufficiently proffer instructions to counsel. The Applicant contends that owing to the nature of the offence preferred against her in the initial criminal matter, it has been extremely difficult for her to find any gainful form of employment hence why it took time for her to raise the legal fees required to instruct her advocates to lodge an appeal in the matter.
16. The 1st Respondent in response to the above contention argues that during the hearing the Applicant testified that she was a nurse and that she was working in a health facility in Nairobi and she never stated that she was jobless and as a matter of fact she testified that she did not use public means of transport to work or to court and that she only used private means which she paid huge sums of money and only attends fancy hotels.
17. Given that the only ground that the Applicant is relying on for extension of time is lack of gainful employment, she has failed to provide proof of when she lost her job.
18. I have considered the delay in filing the appeal and I find that the less than a month delay cannot really be termed as an inordinate delay, however the reasons given by the Applicant for the delay have not been satisfactorily explained to the court as required by the law. I have not had the privilege of perusing the trial court’s proceedings to ascertain what testimony the Applicant gave, but again, in the absence of any proof shown in the application that the Applicant lost her employment, when that happened and the reasons as to why, I am equally persuaded just like the 1st Respondent that the Applicant has not given any plausible reasons for the delay in filing the appeal.
19. I have perused the intended Memorandum of Appeal and the judgment of the trial court and noted that the appeal does not raise any arguable or triable issues. The Applicant challenges the trial court’s judgment on the main basis that it failed to appreciate the consequence of acquittal under Section 87A of the Criminal Procedure Code. This however does not connote malice on the party who instituted the prosecution so long as the same was done honestly, reasonably and without malice. In the case, Republic v James Mureri Karugu & 2 Others [2019] eKLR it was held that the respondent has the burden to prove that the prosecutor acted dishonestly and unreasonably. In the trial before the lower court, this burden was not discharged. The Applicant did not demonstrate how the police (prosecutor) acted maliciously and dishonestly. In the humble view of this court. The arrest, detention and prosecution of the Applicant was not instituted without reasonable and probable cause. There



were reasonable grounds for the arrest, detention and prosecution of the Applicant. As such, the appeal cannot be said to be arguable.

Whether the applicant has met the prerequisite for grant of stay of execution pending appeal;

20. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-

1. “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 orders set aside.
2. 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 1st 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.

21. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

22. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

“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”.

23. The Applicant is silent in her affidavit on how she stands to suffer substantial loss. She only states at paragraph 7, 10 and 11 of the supporting affidavit that she is indeed weary that the 1st Respondent will proceed to execute before the intended appeal is heard on merit. That the prospects of success of the proposed intended appeal are overwhelming and in the interest of justice there be a stay of execution pending appeal.



24. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The Applicant is required to show the manner in which execution will irreparably affect her or will alter the status quo to her detriment therefore rendering the appeal nugatory. The Appellant has failed to demonstrate substantial loss in my considered view.
25. On whether the application has been made without unreasonable delay. As already found, the application was filed without unreasonable delay.
26. On the issue of security for costs, the purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

“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 acts as security for the 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.
27. Evidently, the issue of security is discretionary and it is upon the court to determine it and set its terms. The trial court delivered judgment and dismissed the Applicant’s suit seeking damages for malicious prosecution with costs to the 1st Respondent.
28. It is imperative that the right of appeal must be balanced against an equally weighty rigid right of the successful Party to enjoy the fruits of the judgment delivered in his/her favour. In the case of Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”
29. I notice that the Applicant has not offered any security for costs on the performance of the decree.
30. The Applicant cannot have a blanket stay of execution without providing reasonable security for the performance of the decree particularly on the amount in the decree.
31. Consequently, I find that there is no proper appeal before this court the basis upon which proceedings of stay of execution maybe considered
32. The Applicant’s application dated 12th February 2025 therefore has no merit and the same is dismissed with costs to the 1st Respondent.
33. It is hereby so ordered.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 1ST OCTOBER 2025

NOEL I. ADAGI

JUDGE



DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 1ST OCTOBER 2025

In the presence of :

Mr. Nzei..... for Appellant

Mr. Nzioka..... for Respondent

Milly grace..... Court Assistant

