



**Safeworld Telecom Ltd v Koech (Civil Appeal E029 of 2023)
[2025] KEHC 14059 (KLR) (8 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14059 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E029 OF 2023
JK NG'ARNG'AR, J
OCTOBER 8, 2025**

BETWEEN

SAFEWORLD TELECOM LTD APPLICANT

AND

PETER CHERUIYOT KOECH RESPONDENT

RULING

1. The Applicant filed a Notice of Motion Application dated 13th May 2025 seeking the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That the Applicant be granted leave to file and serve the Notice of Appeal and Memorandum of Appeal out of time and/or that time for filing the said documents be extended.
 - iv. That the funds deposited as security in a joint interest earning account at African Banking Corporation Ltd, Kisumu Branch Account No. 0043XXXXX0821 be preserved pending the hearing and determination of the intended Appeal to the Court of Appeal.
 - v. That the execution of the Judgment and Decree dated 02/04/2025 in favour of the Respondent against the Applicant in Bomet HCCA No. E029 of 2013 be stayed pending the hearing and determination of the intended Appeal to the Court of Appeal.
2. The Application was brought under section 7 of the *Appellate Jurisdiction Act*, sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 51 Rules (1) and (3) and Order 42 Rule 1 of the Civil Procedure Rules. The Application was based on the grounds on the face of the Application and further by the annexed Supporting Affidavit of Dancan Otieno Njoga Advocate sworn 13th May 2025.



The Applicant's case.

3. The Applicant stated that Judgment in this matter was delivered on 2nd April 2025 in favour of the Respondent for the amount of Kshs 356,436/= in special damages and Kshs 1,522,000/= for loss of user. That he was issued with instructions to appeal on 8th May 2025 by which the time for filing the Notice of Appeal had lapsed and it was necessary for this court to grant him leave to file the Notice of Appeal and Memorandum of Appeal out of time. The Applicant further stated that he was apprehensive that the Respondent would commence execution to the Applicant's detriment.
4. It was the Applicant's case that unless this court stayed the execution of its Judgment, he would suffer great financial loss without getting an opportunity to be heard. That he was ready and desirous to appeal this court's Judgment to the Court of Appeal.
5. The Applicant stated that the amount of Kshs 1,522,000/= was deposited in a joint interest earning account at ABC Bank, Kisumu Branch and it was in the interest of justice that the funds be preserved pending the hearing and determination of the Appeal.
6. It was the Applicant's case that the delay in filing the Notice of Appeal was due to the fact that the Applicant's insurer was reviewing the Judgment and by the time they issued instructions to appeal it, the time had lapsed. That this Application had been made in good faith and was made without undue delay. It was his further case that the delay was not attributable to him.
7. Through its written submissions dated 18th July 2025, the Applicant submitted that this court had discretion on whether or not to grant leave to file an Appeal out of time. It relied on *Omar Shurie v Marian Rashe Yafar* [2020] KECA 492 (KLR) and *Thuita Mwangi v Kenya Airways Ltd* [2003] KECA 201 (KLR). That it had given a sufficient reason why it should be allowed to file the Notice and Memorandum of Appeal out of time.
8. It was the Applicant's submission that there was no delay in filing the present Application and the grounds and reasons contained in its supporting affidavit dated 13th May 2025 were plausible. It was their further case that its Appeal was arguable. That the Respondent would not suffer any prejudice if the leave was granted.
9. The Applicant submitted that this court had discretion to grant stay of execution pending appeal. They relied on Order 42 Rule 6 and *Butt vs Rent Restriction Tribunal* (1982) KLR 417 et.al.

Response

10. The Respondent filed a Replying Affidavit sworn by Erick Ochieng Daniel Advocate. The Respondent stated that the Application was incompetent, misconceived, an afterthought and did not meet the probative threshold for granting the leave sought. That Judgment in the lower court was delivered on 25th April 2023 and the Applicant filed his Memorandum of Appeal to this court on 24th May 2023 and this court canvassed all the grounds of appeal including loss of user. The Respondent further stated that this court exercised its discretion judiciously when it upheld the trial court award.
11. It was the Respondent's case that the issue of whether loss of user was a general damage or not had been settled by this court and other courts including in *Jackson Mwabili vs Peterson Mateli* (2020) eKLR. That it was baffling why the Applicant would seek leave to move to the Court of Appeal over the same issue. It was the Respondent's further case that the grounds contained in the Applicant's Memorandum of Appeal were incompetent and had no merit.



12. The Respondent stated that the Applicant was keen on denying him the fruits of his Judgment. That even if the Applicant had a right to appeal, there must be an end to litigation. That the Applicant was only interested in delaying the matter and he asked this court to dismiss the Application.
13. Through his written submissions dated 30th July 2025, the Respondent submitted that the Applicant's delay in filing the present Application was inexcusable. That after the Judgment had been delivered on 2nd April 2025, the Applicant had 30 days to lodge an Appeal but he took 42 days. It was his further submission that the delay had no compelling explanation and was clearly unreasonable. He relied on *Jaber Mohsen Ali & another vs Priscillah Boit and another* (2014) eKLR and *Aviation Cargo Support Group Ltd v St. Mark Freight Services Limited* [2015] KECA 688 (KLR).
14. It was the Respondent's submission that the Applicant had not satisfied the threshold for stay of execution. That the Applicant had not demonstrated any substantial loss that it would suffer if the orders it sought were not granted. It was the Respondent's further submission that the Applicant was a man of straw and could not afford to furnish security.
15. I have gone through and considered the Notice of Motion Application dated 13th May 2025, the Respondent's Replying Affidavit, the Applicants' written submissions dated 18th July 2025 and the Respondent's written submissions dated 30th July 2025. The two issues that I sieve for my determination are: -
 - i. Whether the Applicant should be granted leave to file its Notice of Appeal and Memorandum of Appeal out of time
 - ii. Whether the Applicant should be granted a stay of execution pending the hearing and determination of its intended Appeal.

i. Whether the Applicant should be granted leave to file its Notice of Appeal and Memorandum of Appeal out of time

16. The Applicant anchored its Application under section 7 of the *Appellate Jurisdiction Act* which provided: -

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired

17. The Court of Appeal in *Kenya Airport Authority & another v Timothy Nduvi Mutungi* [2014] KECA 241 (KLR) held: -

“The application of 10th December, 2012 was properly made in the High Court as High Court has power to extend time for giving notice of intention to appeal pursuant to Rule 7 of Court of Appeal Rules (sic!) (clearly meant section 7 of the *Appellate Jurisdiction Act*) which provides:

“The High Court may extend time for giving notice of intention to appeal from a Judgment of the High Court or making an application for leave to appeal or for a certificate that the case is fit for appeal notwithstanding that time for giving such notice or making such appeal may have already expired.”



Since the application for extension of time for lodging a notice of appeal made in the High Court was competent and which the High Court should have determined.....”

18. It was clear from the above that this court had the jurisdiction to deal with the present Application. This therefore meant that this court is clothed with the discretion to decide whether or not to grant leave to file an appeal out of time. Such discretion ought to be exercised judiciously and within the principles of the law. The principles were set out in the Court of Appeal case of Omar Shurie v Marian Rashe Yafar [2020] KECA 492 (KLR) where it was held: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

19. Similarly, the Court of Appeal in Edith Gichugu Koine v Stephen Njagi Thoithi [2014] KECA 485 (KLR) held: -

“.....Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others – See Fakir Mohamed V Joseph Mugambi & 2 Others, Civil Application Nai. 332 of 2004 (unreported). There is also a duty now imposed on the Court under sections 3A and 3B of the *Appellate Jurisdiction Act* to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.”

20. The importance of giving a sufficient reason for the extension of time to appeal was discussed in the Court of Appeal case of Susan Ogutu Oloo & 2 others v Doris Odindo Omolo [2019] KECA 966 (KLR) where it was held: -

“In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in Nicholas Kiptoo Arap Korir Salat V. IEBC (2014) EKLR Sup. CT. Application No. 16 of 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted”.

21. The Applicant’s Advocate stated that the reason he could not file his Appeal on time was because time lapsed as his client was reviewing the Judgment. That when his client issued instructions to Appeal, the statutory time within which one was allowed to file the Notice and Memorandum of Appeal had lapsed. The Applicant’s Advocate attached an e- mail (instructions) between himself and



the client dated 8th May 2025 and marked as “DON-1”. I have looked at the e-mail and it buttressed the Applicant’s Advocate’s assertion that he received instructions from his client on 8th May 2025, after the lapse of 30 days.

22. I have also considered the Respondent’s assertion that the Applicant’s reason for delay was baseless and without merit. With due respect to the Respondent, I disagree. That said, I am satisfied that the circumstances that led to the delay to file the Notice and Memorandum of Appeal by the Applicant’s Advocate was beyond his reach and control. It is my finding therefore that the delay was properly and sufficiently explained and was thus excusable.

23. On the issue of the Appeal being arguable, I have perused the draft Memorandum of Appeal and I find that it was arguable as it raised an issue that required the court’s determination. In the case of Kenya Industrial Estate Limited & another v Matilda Tenge Mwachia [2021] KECA 1012 (KLR) the Court of Appeal held: -

“As stated earlier, an arguable appeal is one that is not frivolous but raises a bona fide issue deserving determination by a Court and a single bona fide issue would suffice”.

24. The final ground that the court considers in such an Application is the prejudice that the Respondent would suffer if leave to file the Appeal out of time was granted. In the case of Ngwambu Ivita Vs. Akton Mutua Kyumbu (1984) KLR 441, the Court of Appeal held: -

“The Defendant must however satisfy the court that he will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution.”

25. The Respondent stated that he would be prejudiced if the Applicant was allowed to file his appeal out of time. His prejudice was that the Applicant was denying him the fruits of his Judgment. This in my view is not a sufficient reason to deny the Applicant an opportunity to ventilate his case on Appeal. It is my finding that the Respondent has not shown the prejudice he would suffer if the leave to file the Appeal out of time was granted.

26. This court’s position is that a party has a right to appeal and it would take extra ordinary circumstances to deny a party such a right. In the final analysis, the Applicant has satisfied the conditions precedent to the court enlarging his time to file his appeal.

ii. Whether the Applicant should be granted a stay of execution pending the hearing and determination of its intended Appeal.

27. The principles that relate to stay of execution orders are well settled. 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 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.

28. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, the Applicants should satisfy the court that: -
 - i. Substantial loss may result to them unless the Order/Ruling of stay is granted.
 - ii. That the Application has been made without unreasonable delay.
 - iii. The Applicant gives such security as the court orders for the due performance of such Decree or order as may ultimately be binding to them.

29. Regarding the issue of substantial loss, the court in Jason Ngumba Kagu & 2 others v Intra Africa Assurance Co. Limited [2014] KEHC 2183 (KLR) held that: -

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”

30. I have looked at the pleadings and I have found that the Applicant has not demonstrated any substantial loss it would suffer if the stay order was not granted.

31. On the issue of inordinate delay, I have found earlier in this Ruling that the delay was sufficiently explained and excusable.

32. Regarding security for the performance of the Decree, Gikonyo J. in the persuasive case of Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others [2014] KEHC 2430 (KLR) 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 acts 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.”



33. On this issue, I have noted that the decretal sum has been deposited in a joint interest earning account in African banking Corporation Ltd, Kisumu Branch. Therefore, the issue of security does not arise in this particular case as the same had been provided and deposited.
34. The sum total of the above is that the Applicant has not satisfied the conditions precedent for the grant of stay of execution.
35. In the end and in the best interests of justice, I make the following orders: -
- i. The Applicant be and is hereby granted leave to file and serve the Notice of Appeal and Memorandum of Appeal out of time.
 - ii. The Applicant shall have a total of 30 days to file its Notice and Memorandum of Appeal to the Court of Appeal. Failure to abide by this timeline means the leave shall be vacated.
 - iii. The funds deposited as security in a joint interest earning account at African Banking Corporation Ltd, Kisumu Branch Account No. 0043XXXXXX0821 be preserved pending the hearing and determination of the intended Appeal to the Court of Appeal.
 - iv. Each party to bear their own costs.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 8TH DAY OF OCTOBER, 2025.

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J.K.NG'ARNG'AR

JUDGE

Ruling delivered in the presence of;

Siele and Susan (Court Assistants).

Otieno for the Appellant

Mr. Ochieng for the Respondent

