



**Wamalwa v Mbalanya (Miscellaneous Civil Application
E107 of 2025) [2025] KEHC 13631 (KLR) (2 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 13631 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E107 OF 2025**

**AC BETT, J
OCTOBER 2, 2025**

BETWEEN

LYNDA ASEYO WAMALWA APPLICANT

AND

MARGARET MBALANYA RESPONDENT

RULING

1. By way of notice of motion application dated 17th July 2025, the applicant sought the following orders;
 1. Spent
 2. Spent
 3. That there be stay of execution of the decree in Kakamega Small Claims No. E256 of 2023 between Margaret Mbalanya -vs- Lynda Aseyo Wamalwa and another pending the hearing and determination of the Applicant's intended appeal.
 4. That the Applicant be granted leave to file an appeal out of time against the judgment delivered on 2nd May 2025 by the Honourable C.J. Cheruiyot in Kakamega Small Claims No. E256 of 2023 between Margaret Mbalanya –vs- Lynda Aseyo Wamalwa and another.
 5. That the costs of this application be provided for.
2. The application is based on the grounds stated on its face and the supporting affidavit sworn on the same date by the Applicant who deposes that she became aware of the judgment in which the court awarded the Respondent Kshs. 448,230/= on 11th July 2025 as it was not delivered on the scheduled date of 30th October 2023 but on 11th July 2025 without notice to her.
3. She avers that, after being notified of the judgment, the applicant instructed her advocates to file for leave to appeal late, as the period for filing the appeal had lapsed.



4. She indicated that the application was submitted promptly and that the appeal has a strong chance of success.
5. The Applicant asserts that she will suffer substantial loss if the stay order is not granted and the decree is executed, given that the intended appeal is likely to succeed and the decree holder has no known fixed abode and means of income.
6. In response, the Respondent filed Grounds of Opposition dated 10th August 2025, in which she states that the application is fatally defective, misconceived and a non- starter.
7. She asserts that the Applicant has not met the requirements for a stay of execution, as she has not demonstrated any hardship or substantial loss they would incur if the stay were not granted nor that the appeal would be rendered nugatory if stay orders are not granted.
8. She further asserts that she has spent a lot of money in paying for her recuperation and physiotherapy, and it is only fair that the Applicant should deposit the decretal sum in an interest-earning account in the joint names of the parties' advocates within a reasonable period pending the outcome of the appeal.
9. The Respondent did not proffer any opposition regarding the prayer for leave to appeal out of time.
10. According to the Respondent, she should have a chance to enjoy the fruits of her judgment, and the appeal is only intended to delay the finalization of the case.
11. The parties were given directions to file written submissions but at the time of writing the ruling none of the parties had complied.

Analysis and determination

12. I have carefully considered the application and the corresponding affidavits on record, and the two main issues for determination here are:
 - a. Whether the applicant has fulfilled the prerequisite for granting a stay of execution pending appeal.
 - b. Whether the court should exercise its discretion to allow the applicant to file his appeal late.
13. The law governing the granting of orders for a stay of execution pending appeal is codified in Order 42, Rules 6 (1) and (6) of the Civil Procedure Rules, which stipulate the following:-

“(1)No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 referred may apply to the appellate court to have such order set aside.

2. No order for stay of execution shall be made under sub-rule (1) unless—

- (a) The court is satisfied that a 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.
- (c) The above provision requires an Applicant seeking orders for stay of execution to establish that he/she has a sufficient cause for seeking the orders, that he stands to suffer substantial loss if the orders are not granted and lastly, that he is willing to furnish security for the due performance of the decree. In addition to the above conditions, an application for stay of execution pending appeal must be made without unreasonable delay.”

14. The above provision requires the applicant seeking orders for a stay of execution to demonstrate that he has sufficient cause for seeking the orders, that he risks suffering substantial loss if the orders are not granted, and finally, that he is willing to provide security for the due performance of the decree. Additionally, an application for a stay of execution pending appeal must be made without unreasonable delay.

15. The three conditions to be fulfilled can therefore be summarized as follows:-

- a. That substantial loss may result for the Applicant unless the order is made.
- b. Application has been made without unreasonable delay.
- c. Security is the court order for the due performance.

16. 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.”

17. In Century Oil Trading Company Ltd vs. Kenya Shell Limited, Nairobi (Milimani) HCMCA No. 1561 of 2007, Kimaru J as he then was stated as follows:-

“The word 'substantial' 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 all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent become an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum if the applicant is successful in his appeal. The court has to balance the



interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

18. The Respondent did file a replying affidavit to rebut the averments made by the Applicant in the supporting affidavit, and maintained that the Applicant had not proved that she would not be able to refund them the money decree. She, however, never filed any affidavit of means to show or prove that, indeed, if she is paid the decretal sum and the appeal is successful, she would be in a position to refund the decretal sum paid to them. This was important as the Applicant had deponed that the Respondent has no known fixed abode nor means of income.
19. In the case of *National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another (2006) eKLR*, the Court of Appeal held thus:-

“Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has, since that is a matter which is peculiarly within his knowledge.”
20. In the absence of the required proof from the Respondent she is a person of financial means, I find that the Applicant has demonstrated that she stands to suffer significant loss if the decretal sum is paid to the Respondent before the appeal is heard and determined.
21. Regarding whether the application has been made without unreasonable delay, I note that the Applicant filed the present application within the same month she learnt of the judgment. This was not disputed by the Respondent.
22. On the element of security, in the case of *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 Applicant becomes a judgment debtor against 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 that can serve that purpose.”
23. The Respondent urged the court to make an order regarding security and although the Applicant did not offer any security, it is settled law that security must be furnished to the court as a prerequisite for an order of stay.
24. Regarding whether the court should grant leave to file the appeal out of time, Section 79G of the *Civil Procedure Act* states:-

“Every appeal from a subordinate court to the High Court shall be filed within 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.”



25. The Supreme Court in the case of Nicholas Kiptoo Korir Arap Salat v 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 the 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.”

26. In the court of Appeal case of Paul Musili Wambua v Attorney General & 2 Others [2015] eKLR, in considering an application for extension of time, it stated as follows: -

“... 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.”

27. The Applicant's assertion that judgement was delivered without notice to her was not challenged; nor was her deposition that she learnt of the judgement on 11th July 2025 and upon perusal, established that it was in favour of the Respondent. Considering that she filed the present application on 17th July 2025, she moved the court expeditiously and should not be punished for something that was beyond her control.

28. I am inclined to allow the Applicant to file her intended appeal the draft of which I find to raise arguable issues, noting that the delay is not excessive and the Respondent would not be prejudiced if leave is granted.

29. After considering all relevant factors, I am convinced that the application is justified and it is therefore allowed on the following terms:-

- a. An order for the stay of execution of the judgment/decree issued in Kakamega Small Claims Court Case No E256 of 2023 is hereby granted pending the hearing and determination of the intended appeal, on condition that the Applicant shall deposit half of the decretal sum in an interest-earning account at a reputable commercial bank, to be held by both advocates for the parties involved in this appeal.



- b. The Applicant shall have 30 days within which to comply with order (b) above, and in default, the orders staying execution of the decree issued in Kakamega Small Claims Court Case No E256 of 2023 shall lapse, wherefore the Respondent shall be at liberty to execute.
- c. Leave is granted to the Applicant to file an appeal out of time against the judgment delivered in Kakamega Small Claims Court Case No E256 of 2023 to be filed and served it within 14 days from the date of issuance of this order.
- d. The costs of this Application will be in the cause.
- e. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 2ND DAY OF OCTOBER 2025.

A. C. BETT

JUDGE

In the presence of:

No appearance for the Applicant

No appearance for the Respondent

Court Assistant: Polycap

