



Board of Management Friends School Kimugui v Kisika (Miscellaneous Application E003 of 2025) [2025] KEELRC 2998 (KLR) (30 October 2025) (Ruling)

Neutral citation: [2025] KEELRC 2998 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
MISCELLANEOUS APPLICATION E003 OF 2025**

**DN NDERITU, J
OCTOBER 30, 2025**

**BETWEEN
BOARD OF MANAGEMENT FRIENDS SCHOOL KIMUGUI APPLICANT
AND
BRENDA MABUKA KISIKA RESPONDENT**

RULING

I. Introduction

1. In a notice of motion (the application) dated 17th February 2025 filed through J. O. Makali & Company Advocates the applicant is seeking for the following orders –
 - a. That this application be certified urgent and service of therefore be dispensed with in the first instance.
 - b. That there be a temporary stay of execution against the applicant pending hearing and determination of this application inter-parties in Bungoma Chief Magistrate’s Court ELRC NO. E016 of 2021.
 - c. That the proclamation notice dated 6th February, 2025 issued by Lufree Auctioneers to the applicant be permanently stayed and/or vacated.
 - d. That this Honourable court be pleased to grant the applicant leave to appeal out of time against the judgment delivered by Hon. Maloba CM on the 19th December, 2024.
 - e. That this Honorable court be pleased issue an order for stay of execution of the judgment entered and delivered herein against the applicant on 19th December, 2024 pending the hearing and determination of the intended appeal.
 - f. Cost of this application be provided for



2. The application is expressed to be brought under Sections 1A, 1B, 3, & 3A of the *Civil Procedure Act* and Order 42 Rules 1, 2, & 3 of the Civil Procedure Rules, and all other enabling provisions of the law.
3. The application is based on the grounds stated on the face of it and supported with the affidavit of Chrisantus Wanyonyi, the principal of the school and the secretary of the respondent, sworn on 17th February 2025 with several annexures thereto.
4. The application was certified urgent on 20th February 2025 and interim orders for stay of execution issued. The said orders were extended on 25th February 2025 pending the hearing and determination of the application.
5. In response to the application the respondent through Omundi Bw'Onchiri Advocates filed a replying affidavit sworn by the respondent on 22nd February 2025 with several annexures thereto.
6. The applicant filed a supplementary affidavit sworn by Chrisantus Wanyonyi on 21st March 2025.
7. By consent, the application was canvassed by way of written submissions. Miss Masengeli for the applicant filed written submissions dated 25th March 2025 while Miss Wanyama for the respondent filed submissions dated 22nd February 2025.

II. The evidence

8. In the supporting affidavit, it is deposed that the judgment in Bungoma CMC ERLC No. E016 of 2021 was to be delivered on notice but no such notice was either served upon the applicant or its counsel on record. However, with utter surprise, the applicant was served with a notice of proclamation from Lufree Auctioneers on 7th February 2025. It is only then that the applicant suspected and later established that a judgment had been delivered against it on 19th December 2024. It is deposed that the applicant's counsel was also not aware of the delivery and the contents of the said judgment.
9. It is deposed that in the foregoing circumstances, the applicant could not file the intended appeal within the lawful period allowed of 30 days.
10. It is further deposed that the applicant has arguable grounds of appeal and that the intended appeal shall be rendered nugatory if the execution is not stayed and the same allowed to proceed.
11. In the replying affidavit, it is deposed that the application is based on falsehoods and that the same is frivolous, vexatious, scandalous, and an abuse of the process of court.
12. It is deposed that on 20th December 2024 a bill of costs was served upon applicant's advocates on record and an affidavit of service filed. It is deposed that the bill of costs in item 24 clearly indicated that judgment had been delivered on 19th February 2024 and hence it cannot be true that the applicant became aware of the judgment when the notice of proclamation was served upon it.
13. It is deposed that the application as filed does not meet the conditions for an order for stay of execution as set out in Order 42 Rule 6(2) of the Civil Procedure Rules.
14. It is further deposed that having been aware of the judgment as above, no reason has been advanced by the applicant as to why an appeal was not lodged within the legal time allowed.
15. It is further deposed that the applicant moved the High Court in Bungoma Civil Application No. E009 of 2025 that is still pending in court. A copy of the said application is annexed.
16. In the supplementary affidavit for the applicant it is deposed that indeed no evidence has been availed by the respondent demonstrating that a notice of delivery of judgment was served upon the applicant.



It is deposed that as of 19th December 2025 when the impugned judgment was purportedly delivered the applicant's Advocates had closed their office for Christmas holidays.

17. It is further deposed that even the bill of costs was not served upon the applicant's Advocates and in any event the same cannot take the place of a notice of delivery of judgment.
18. It is deposed that the application that had been erroneously filed in the High Court was withdrawn before the respondent filed a response thereto.
19. It is deposed that had the applicant been made aware of the delivery of the judgment, it would have taken the necessary steps in filing an appeal within the time allowed.

III. Submissions By Counsel

20. Counsel for the applicant submitted that the applicant is aggrieved by the judgment that was delivered by the lower trial court on 19th December 2024 and should have appealed within the allowed time had it been served with a notice of delivery of the said judgment. It is submitted that the applicant only became aware of the judgment upon service of a notice of proclamation on 7th February 2025. It is submitted that with this background the application by the applicant to appeal out of time is justified and meritorious.
21. Counsel for the applicant identified two issues for consideration and determination by the court – Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 for stay of execution pending appeal; and, Whether the applicant should be granted leave to appeal out of time.
22. In support of the first issue, it is submitted that if the stay is not granted the applicant shall suffer substantial loss. It is further submitted that the respondent is unlikely to repay the decretal sum plus costs in case the appeal ultimately succeeds. Counsel cited *Kenya Hotel Properties Limited V Willisden Investments Limited (2007) eKLR* in support of the foregoing.
23. It is further submitted that the applicant has an arguable appeal especially on the ground that no notice of delivery of judgment was served upon it.
24. Further, it is submitted that the applicant lodged the application without undue delay after it was served with the notice of proclamation on 7th February 2025. It is noted that the application was lodged on 17th February 2025.
25. It is further submitted that the applicant is ready and willing to provide security and comply with any and all the conditions that the court may impose for the stay of execution; including providing security in satisfaction of the decree.
26. On the second ground, it is submitted that Section 79G of the *Civil Procedure Act* gives the court the discretion to enlarge the time within which an appeal may be filed. It is submitted that the reason for the failure by the applicant to file an appeal within the time allowed is evidently clear – it was not served with a notice of delivery of the judgment and it was not aware of the judgment until 7th February 2025 when it was served with a notice of proclamation in execution.
27. It is submitted that the application was filed without delay upon the applicant becoming aware of the judgment. Further, it is emphasized that the respondent shall suffer no prejudice if the application is allowed.
28. Counsel for the respondent submitted that the application fails to meet the threshold set out in Order 42 Rule 6(2) of the Civil Procedure Rules for stay of execution. It is argued that the conditions set



therein are cumulative as was held in *James Wangalwa & Another V Agnes Naliaka Cheseto* (2012) eKLR and *Machira t/a Machira & Company Advocates V East African Standard* (2002) KLR 63.

29. It is submitted that the failure by the applicant to file an appeal within the time allowed and the prolonged delay is inexcusable. It is submitted that the applicant only moved the court upon realizing that execution was imminent and the application is only intended to scuttle the execution process for a lawful judgment.
30. The court is urged to dismiss the application with costs.

IV. Issues For Determination

31. In the considered view of the court, there is only one main issue for determination in this application – Should the court allow the application as prayed and hence allow the applicant to – Firstly, file an appeal out of time; and, secondly, order a stay of execution pending the hearing and determination of the intended appeal?
32. The respondent argued that the applicant had filed a similar application before the High Court at Bungoma being Misc. Application No. E009 of 2025. However, the applicant countered that it withdrew that application before the respondent filed a reply and that last position has not been disputed. It is the court’s holding that there is no other application pending in the High Court or in any other court over the same subject matter.
33. The first issue is rather easy to determine. The uncontroverted evidence on record, based on the affidavits filed and annexures from both sides, is that the applicant was not notified of the date of the judgment and only came to learn of the same when it was served with a notice of proclamation in execution. The necessary implication is that the period of 30 days within which the applicant could have filed an appeal had by then already expired.
34. In the circumstances, the delay in filing of the appeal within the time allowed in law cannot in any way be attributed to the applicant. It is noted that, based on the evidence summarized above, upon being served with the notice of proclamation on 7th February 2025 the applicant filed this application on 17th February 2025, which the court deems and holds to have been done within reasonable time and without inordinate or undue delay.
35. However, the court is taken aback by the fact that a copy of the impugned judgment was not annexed to the application and no draft memorandum of appeal was attached. Although the omission may not be fatal to the application, the two documents would have served to demonstrate that indeed the applicant is serious about filing of the appeal against an existing and not an imagined or abstract judgment. The grounds of appeal should have demonstrated what arguable points the applicant shall be raising in the intended appeal. For now, the court has been denied the benefit of the foregoing.
36. Further, the mere fact that the judgment was delivered without notice to the applicant does not of itself render the same defective, ineffectual, unlawful, or illegal. It does not mean that the lower trial court would have delivered a different judgment had the applicant been notified of the delivery date. The intended appeal must challenge the judgment on merits not on the mere argument that it was not notified of the delivery of the same.
37. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR emphasized that in deciding whether to allow an application to extend time for lodging an appeal out of time, a court should be driven and motivated by the interest of justice upon considering all the circumstances in the matter. Each case shall be considered on its own unique merits and circumstances.



38. For the reasoning in the foregoing paragraphs, and particularly that the applicant was not notified of the delivery of the judgment, the applicant shall be allowed to lodge an appeal out of time on the conditions set out below.
39. On the second issue, Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows –
- “(2) No order for stay of execution shall be made under subrule (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 be ultimately be binding on him has been given by the applicant.”
40. The principles and conditions upon which stay of execution may be granted has been stated and restated in various decisions by courts at all levels in this Republic. However, the conditions in the above law stand out unambiguously.
41. The court has found and held that the application was filed without undue or unreasonable delay upon the applicant becoming aware of the judgment. In my considered view, substantial loss does not necessarily mean or imply that the amounts of money involved are huge. For example, if a decree-holder is not capable of refunding the decretal sum if the appeal ultimately succeeds, that points towards substantial loss to the judgment-debtor.
42. Although not put in the replying affidavit, counsel for the applicant submitted that the respondent may not be in a position to refund the decretal sum in case the appeal ultimately succeeds. It was submitted that this shall render the appeal nugatory and of no consequence. Again, although not so stated on oath, it was submitted that the applicant is ready and willing to offer security in satisfaction of the decree and comply with such conditions as the court may impose for stay of execution.
43. It is not lost on the court that the applicant is a public school financed by parents and taxpayers. It is important, not for this sole reason, to allow the applicant a chance to file the intended appeal out of time in the interest of justice. The court shall impose the conditions thereof as hereunder.

V. Orders

44. The court finds and holds that the application dated 17th February 2025 has merits and makes the following orders –
- a. The applicant is hereby granted leave to appeal against the judgment of the lower trial court out of time.
- b. The applicant shall file and serve a notice of appeal, memorandum of appeal, and a record of appeal within 60 days of this ruling.
- c. That an order for stay of execution of the judgment and decree from the lower trial court be and is hereby issued upon the applicant depositing the entire decretal sum plus costs in the sum of Kshs418,303/= in court within 60 days of this ruling.
- d. Failure to comply with (b) & (c) above the leave and the stay of execution shall automatically lapse.



- e. Costs of the application shall abide with the outcome of the intended appeal.
- f. In the event that no appeal is filed the costs of the application shall be to the respondent and the monies deposited in court as per (c) above shall be released to the respondent, decree holder, forthwith.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 30TH DAY OF OCTOBER, 2025.

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DAVID NDERITU

JUDGE

