

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NANYUKI**  
**MISCELLANEOUS CIVIL CASE NO. E006 OF 2025**

**ABDIRAHMAN                      YUSUF                      HAJI                      HASSAN.....**  
.....**APPLICANT**

**VERSUS**

**BARTON                      MWAI                      KINGORI.....**  
.....**RESPONDENT**

**R U L I N G**

**1.** This ruling resolves the notice of motion herein dated 30/04/2025 for orders that the Applicant be granted leave to file an appeal out of time and stay of execution of the orders arising out of judgment delivered by the trial court on 14/02/2025 pending hearing and determination of the intended appeal. He also sought for costs of this application be in the cause.

**2.** The application is based on the grounds on the face thereof and is supported by an affidavit of Roselyne Kihara, legal officer ICEA Lion General Insurance Company.

She deponed that a judgment was delivered in *Nanyuki CMCC 17 of 2018* on 14/02/2025 in absence of the Plaintiff's advocate and from the record, the judgment was to be delivered upon notices to the parties. The Applicant was dissatisfied with the judgment and instructed the advocate on record to institute an appeal but time of appealing has since lapsed. That the Applicant became aware of the delivery of the judgement after the advocate was served with a mention notice for taxation on 21/03/2025, hence, failure to file an appeal on time was due to the fact that the advocate on record was not aware when the judgement was to be delivered. She deponed that the intended appeal raises pertinent issues and has high chances of success and the Applicant is ready and willing to furnish reasonable security as this court may direct. The application was filed without reasonable delay and unless leave is granted, the Applicant stand to suffer irreparable loss. That unless stay of execution is granted, Applicant's application and appeal will be rendered nugatory.

**3.** In opposing the application, the Respondent filed a replying affidavit sworn by Barton Mwai Kingori. He deposed that a period of 2 months and 16 days have lapsed since the delivery of judgment which amount to inordinate delay. That the date of the judgment was fixed in court during the mention for compliance and the Applicant has access to the case tracking system hence cannot purport not to have known the date of the judgement. Further, the bill of costs was served on 14/03/2025 but the Applicant waited until 20/04/2025 to file this application. The Applicant has also failed to satisfy the requirement for grant of stay as there was delay of 2 months and 16 days which delay has not been explained, no substantial loss has been demonstrated if taxation is to proceed, no undertaking as to security for due performance of the decree as the applicant's income is not known and that the total decretal sum has not been deposited in court. That this application is meant to deny the Respondent the benefit of the judgment.

**4.** In response to the Respondent's replying affidavit, the Applicant filed a further affidavit and averred that counsel

on record informed them that judgment was to be delivered on 22/01/2025 and then on 05/02/2025 but on the said dates, the judgment was not ready and the court had yet to issue a new judgment date and it was delivered on 14/02/2025 and counsel was not informed of the said date. Delay is not deliberate as delivery of judgment was brought to their attention after time has already lapsed. The intended appeal raises triable issues that ought to be determined by this court as the claim before the lower court was of a substantial amount of Kshs.2,399,340/-. The Applicant has also remitted to the Respondent payment for costs as was ordered by the lower court hence the application to file an appeal out of time will not prejudice the Respondent and it is the Applicant who stands to be prejudiced and suffer loss noting the substantial amount that was sought in the lower court.

**5.** The application was canvassed by way of written submissions. The Applicant argued that there was delay in filing the appeal however the delay was occasioned by the fact that the Applicant's counsel was not aware of the delivery of the judgment not having being notified of the

same and only became aware after service of notice of taxation by Respondent's counsel. Afterwards, instruction to appeal was issued and the delay in filing this application is regrettable and it was not deliberate and the litigant ought not to suffer for the mistakes of his counsel. Denying the applicant right to appeal will be contrary to overriding objective and sacrifice substantive justice to the alter of procedural technicalities. He maintained that the Applicant stands to suffer prejudice as the claim before the lower court was of substantial amount.

**6.** As to whether the Applicant is entitled to stay of execution, he submitted that the application was filed due to fear of the Respondent proceeding with taxation. That the Applicant has since entered into a consent with the Respondent in respect of the Respondent's bill of costs, the payment of which awaits remittance to the Respondent. Therefore, there is no need of furnishing security in view of the fact that the Applicant was the Plaintiff in the lower court suit. That the application is merited and ought to be allowed with costs.

7. The Respondent's counsel on the other hand submitted that the Applicant has not demonstrated any or of substantial loss as the supporting affidavit is silent on this issue. Further, the applicant has not provided any security for the due performance of the decree as there is no deposit or an undertaking that has been offered by him. This renders his application fatally defective and unmeritorious. That the delay of 2 months and 16 days has not been explained and in absence of such explanation, the application ought to fail. Further, the appeal lacks merit as the judgment was properly reasoned and the grounds raised in the draft memorandum of appeal do not raise serious or arguable questions of law hence the balance of convenience tilts in favour of the Respondent who is entitled to enjoy the fruits of his judgment. He urged the court to dismiss the application.

8. I have considered the application, the affidavit evidence and submissions on record. It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. The Court of Appeal in ***Thuita Mwangi v Kenya Airways Ltd [2003] eKLR*** while

relying on the case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported)**; stated that;

*“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”.*

9. The **Supreme Court in Nicholas Kiptoo Arap Korir Salat v. The Independence Election & Boundaries Commission & 7 Others, [2014] eKLR** held that a court exercising its discretion to extend time has to consider the following factors;

- a. Extension of time is not a right of a 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 to 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 respondents if the extension is granted;*
- f. Whether the application has been brought without undue delay; and*
- .....”*

**10.** To enable this court to exercise its discretion in favour of the Applicant, the Applicant had the duty to satisfy the above conditions and show this court that he had good and sufficient cause for not filing the appeal in time. The reason advanced by the Applicant is that he was not served with judgment notice and the judgment was delivered on 14/02/2025 in absence of Applicant’s counsel. He averred in the motion that from the record, the judgment was to be delivered upon notices to the parties. The Respondent refuted this claim and stated that the judgment date was fixed in court during mention for compliance and the Applicant had access to the case tracking system hence cannot purport not to have known the date of the judgement.

**11.** It is not in dispute that the current application was filed on 09/05/2025. The judgment sought to be appealed was delivered on 14/02/2025 so he ought to have filed the appeal

on or before 28/02/2025. Therefore, the delay of filing the appeal is 2 months and 12 days. It is to be noted that the Applicant did not attach the record of the trial court to prove that the judgment date was to be given on notice.

**12.** The primary duty of the court is to do justice to the parties. This is a delicate balancing act where equity and fairness must be manifest in the orders arrived at. The Applicant is by law entitled to appeal the impugned decision. There is however delay and the period of appeal has lapsed.

**13.** Going by the decision in ***Nicholas Kiptoo Arap Korir Salat v. The Independence Election & Boundaries Commission & 7 Others, (supra)***

the delay herein is not inordinate and there will be no prejudice suffered by the respondents if the extension is granted. The grant of extension being a discretionary power, am satisfied this is one case where circumstances favour a grant of extension of time.

**14.** Tied to the extension of time is the twin question whether, in the same breadth, there should be a stay of execution pending hearing and determination of the appeal. It

is to be noted that the Applicant was the Plaintiff in the lower court case and his case was dismissed with costs to the Respondent. It is therefore not clear whether the Applicant is seeking stay of orders of costs since there was no other order that was given by the trial court.

**15.** It is trite law that there is nothing to stay in a dismissal order.

**16.** Further, the question of stay in this matter is moot as the applicant has indicated that there is a consent on the issue of costs.

**17.** With the result that I allow extension of time in which the Applicant is to file its appeal. The appeal be filed within 21 days hereof.

**18.** I make no orders as to costs.

**Dated signed and delivered virtually this 5<sup>th</sup> day of  
November 2025**

**A.K. NDUNG’U**

**JUDGE**