

discovered the mistake, they immediately withdrew the appeal in the High Court and filed the present application, as the time within which to file the appeal had lapsed. The applicant has averred that the application has been brought in good faith and that the respondent would not be prejudiced if the application is allowed. The applicant has urged the court to allow the application in the interest of justice. The applicant's advocate, Ida Anyango, annexed to her affidavit in support of the application a copy of the judgment of the lower court and evidence of filing the initial appeal in the High Court.

The respondent has opposed the application through a replying affidavit sworn on 31st July 2025. The respondent has averred that the applicant has not given a sufficient explanation for his failure to file the appeal within time. The respondent has averred that the fact that the applicant's advocates filed the appeal in the wrong court cannot justify the failure by the applicant to file the appeal within the prescribed time. The respondent has contended that the applicant's conduct amounts to negligence and lack of diligence, which the court cannot reward by making discretionary orders in his favour. The respondent has averred that the limb of

the application seeking a stay of execution has not satisfied the requirements of Order 42 Rule 6 of the Civil Procedure Rules. The respondent has averred that the applicant has not demonstrated that he stands to suffer substantial loss if the stay sought is not granted. The respondent has averred that the applicant has also not offered to furnish security for the performance of the decree. The respondent urged the court to dismiss the application with costs.

The application was argued through written submissions. The applicant filed his submissions dated 8th July 2025, while the respondent filed submissions dated 1st August 2025. I have considered the application together with the supporting affidavit. I have also considered the respondent's affidavit filed in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and authorities cited in support thereof. The applicant's application has two limbs. The first limb is seeking an extension of time within which to file an appeal against the judgment of the lower court, while the second limb is seeking a stay of execution of the said judgment pending the hearing of the intended appeal.

Section 16A (1) of the Environment and Land Court Act 2011 provides that all appeals to this court from subordinate courts and local tribunals shall be filed within 30 days from the date of the decree or order appealed against. Section 16A (2) of the said Act provides that:

“An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

Sufficient cause was defined in Attorney General v. Law Society of Kenya & another [2017]eKLR as follows:

“Sufficient cause or good cause in law means:

...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See BLACK’S LAW DICTIONARY, 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

The court's power to extend the time within which to file an appeal against a decision of the lower court is discretionary. In Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others [2014] eKLR, cited by both parties, the Supreme Court stated that:

“Extension of time is not a right of a litigant. It is an equitable remedy that is only available to a deserving party at the discretion of the court. A party who seeks extension must place before the court sufficient material to explain the delay. The court has to consider the length of delay, the reason for the delay, the chances of success of the intended appeal, and the degree of prejudice that would be suffered.”

A party approaching the court for an extension of time must demonstrate that it deserves the exercise of the court's discretion. The judgment sought to be appealed was delivered on 2nd April 2025. The appeal against the same should have been filed by 2nd May 2025. The present application was filed on 19th May 2025, after a lapse of 17 days from the time when the applicant was supposed to file the appeal.

I disagree with the respondent that a delay of 17 days to file an appeal or an application for an extension of time to appeal is

inordinate in the circumstances of this case. I find the explanation for this delay given by the applicant reasonable. The evidence presented to this court by the applicant that as soon as the judgment of the lower court was delivered against him, he instructed his advocates to appeal, and the said advocates prepared a memorandum of appeal which they inadvertently filed in the High Court instead of this court was not controverted. In my view, this was not a case of professional negligence or ignorance of the law as claimed by the respondent, but a mistake which occurs all the time in our courts. In Shabbir Din v. Ram Parkash - Anand [1955]22 EACA 48 Briggs JA stated at page 51 as follows:

“...In particular, mistake or misunderstanding of the appellants’ legal advisers, even though negligent may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of that particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.’

In Philip Chemwolo & Another v. Augustine Kubende (1982 - 88) 1 KAR 1036, Apaloo, J.A stated as follows:

“...Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the right of the parties and not for the purpose of imposing discipline.”

In the circumstances of this case, I am inclined to exercise my discretion in favour of the applicant. The applicant has given a reasonable explanation for the delay in filing the appeal and has also demonstrated that the intended appeal is arguable.

The limb of the application seeking a stay of execution was brought under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, provides that:

“6. (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 preferred 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 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 ultimately be binding on him has been given by the applicant.”

In Halai & another v. Thornton & Turpin (1963) Ltd [1990] KECA 65 (KLR), the court stated as follows on this court’s power to grant an order of stay of execution pending appeal:

“Thus, the Superior Court’s discretion is fettered by three conditions. Firstly the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a

stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.”

In Kenya Shell Limited v Karuga (1982 - 1988) I KAR 1018 the court stated that:

“It is usually a good rule to see if order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

I am not persuaded that the applicant would suffer substantial loss if the stay sought is not granted. In his affidavit, the applicant has not stated what kind of loss he is likely to suffer if the stay sought is not granted. In his submission, the applicant has not dedicated even a single sentence to the issue of stay. Stay of execution does not even feature in the issues framed by the applicant for determination by the court. This is a court of law. It does not issue orders out of benevolence or sympathy, or on assumptions. It is not for the court to read the judgment of the lower court and assume that since the applicant was ordered to remove the structures, he had put up on the suit property, he is

likely to suffer loss if the stay sought is not granted. A case has therefore not been made out for the grant of the stay order.

Conclusion

In conclusion, the applicant's application succeeds partially. The applicant is granted leave to file an appeal out of time. The time within which the applicant was to file an appeal against the judgment of Hon. V.Adhiambo SRM delivered on 2nd April 2025 in Kisumu CMC ELC No. 117 of 2021, Charles Ouru Otiende v. Joel Omondi Ondu, is extended up to and including 20th November 2025. The appeal shall be filed in a separate appeal file and not in this file. Each party shall bear its costs.

Delivered and signed at Kisumu on this 13th day of November 2025

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Anyango for the Applicant

N/A for the Respondent

Ms. Anne-Court Assistant

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