



Otieno & another v BNO (Minor Suing Through JAO) (Miscellaneous Civil Application E017 of 2025) [2026] KEHC 350 (KLR) (22 January 2026) (Ruling)

Neutral citation: [2026] KEHC 350 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
MISCELLANEOUS CIVIL APPLICATION E017 OF 2025**

OA SEWE, J

JANUARY 22, 2026

BETWEEN

ANTON PETER WACHIAJI OTIENO 1ST APPLICANT

ISAIYA ONYANGO 2ND APPLICANT

AND

BNO (MINOR SUING THROUGH JAO) RESPONDENT

RULING

1. The Notice of Motion application dated 13th February 2025 was brought by the two applicants under Section 3A, 79G and 95 of the *Civil Procedure Act* (Cap 21), Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 and 3 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. Prayers 1, 2, 3 and 4 of the application are spent. The remaining prayers seek the following orders:
 - (a) That this Honourable Court be pleased to grant leave to the applicant to appeal out of time against the judgment of the delivered in Homabay CMCC No. E051 of 2022: BNO (Minor suing through next friend JAO) v Anton Peter Wachiaji Otieno & Isaiya Onyango;
 - (b) That this Honorable Court be pleased to stay execution of the judgment, costs and interests issued in Homabay CMCC No. E051 of 2022: BNO (Minor suing through next friend JAO) v Anton Peter Wachiaji Otieno & Isaiya Onyango pending the hearing and determination of the intended Appeal.
 - (c) That upon prayers [a] and [b] above being granted the Court be pleased to order that the Decretal sum of Ksh 380,000/- be secured by depositing the same in a joint interest earning account in the names of the applicant and the respondent pending hearing and determination of the intended Appeal.



- (d) That this honorable court to stay assessment of costs Homabay CMCC No. E051 of 2022: BNO (suing through next friend JAO) v Anton Peter Wachiaji Otieno & Isaiya Onyango pending hearing and determination of the intended Appeal.
- (e) That the costs of the application do abide the outcome of the intended Appeal.
2. The application is supported by the Affidavit of Anton Peter Wachiaji Otieno, the 1st applicant herein, sworn on 13th February 2025. He averred that he was informed by his Advocates that judgment had been entered on 20th December 2024; that they (the 1st and 2nd applicants) were held 100% liable and were required to pay Kshs. 380,000/= to the respondent.
 3. The 1st applicant further stated that on 20th December 2024, the offices of his erstwhile Advocates had closed for the December holidays, and they were only able to access the judgment on 31st January 2025, when it was posted in the Judiciary CTS by the trial court. He averred that at that time he was out of the country for medical reasons, and was therefore could not be reached by his Advocates. He further contended that he got to learn from Advocates that the 2nd applicant could not be contacted either as he had lost his phone.
 4. The 1st applicant deposed that it was only upon his return around March 2025 that he became aware of the judgment and managed to contact his Advocates. He added that, being aggrieved by the judgment, he instructed M/s Kairu McCourt & Company Advocates to appeal against liability, his assertion being that his vehicle did not cause the accident the subject of Homa Bay CMCC No. E049 of 2022. The 1st applicant averred that the intended appeal is meritorious, arguable, raises important points of law, and has a strong prospect of success. He acknowledged that the deadline to file his appeal expired on 20th January 2025, 30 days after the judgment was delivered, but explained that the delay was inadvertent due to his ill health.
 5. The applicant urged the court to grant the stay orders sought, positing that he may not be able to recover the decretal sum from the respondent in the event of a successful appeal, as no evidence was produced to show that the respondent is a person of means. The applicants therefore prayed that their application be allowed to enable them file their intended appeal.
 6. In response, the respondent filed a Replying Affidavit sworn on his behalf by JAO on 6th April 2025. She averred that the application is an afterthought intended to deny the respondent the fruits of his judgment. She added that the application lacked merit as no decree had been extracted. In her view, there was no imminent threat of execution; and therefore the application is merely a tactic to frustrate the respondent's enjoyment of the benefits of his judgment.
 7. In the alternative, the respondent proposed that, should the court be inclined to grant stay of execution, the applicants be directed to pay him at least three-quarters (3/4) of the decretal sum together with Party-and-Party costs; and that the remaining quarter be deposited in a joint interest earning account in the names of both Counsels.
 8. Directions were given herein on the 7th may 2025 for the application to be canvassed by way of written submissions; and although the applicants complied, the respondent did not. The applicants reiterated their averments and urged the Court to find that the delay is excusable. The applicants annexed a draft Memorandum of Appeal dated 13th March 2025, setting out five grounds of appeal. They urged the Court to find, on the basis thereof, that the intended appeal is arguable and has high chances of success.
 9. The applicants relied on Order 42 Rule 6 of the Civil Procedure Rules, 2010 on the prerequisites for stay of execution, arguing that they will suffer substantial loss if stay is not granted. They contended that they stand to suffer substantial loss in the event of a successful appeal; there being no assurance the



respondent would be able to refund the decretal sum in the event of a successful appeal. They further submitted that there was no demonstration by the respondent or his next of kin that they are persons of means capable of reimbursing the decretal amount.

10. The applicants also placed reliance on *G.N. Muema P/A(Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another* [2018] KEHC 8780 (KLR) where the court held that lack of affidavit evidence demonstrating ability to refund the decretal sum leaves the court uncertain on that issue and in the absence of such proof, the court is entitled to find that the applicant would suffer substantial loss. The applicants also reiterated their willingness to comply with any conditions that may be set by court on security; and that they are willing deposit the decretal sum in a joint interest earning account pending the hearing and determination of the Appeal. Accordingly, the applicants urged the Court to allow their application and grant the orders sought.
11. I have considered the application and the response filed thereto. I have likewise considered the written submissions filed by counsel for the parties. The broad issues for determination are:
 - (a) Whether sufficient justification has been shown by the applicants to warrant extension of time to file their intended appeal; and,
 - (b) Whether in the circumstances an order for stay of execution ought to be issued.

A. On extension of time to file the intended appeal:

12. The law is explicit that appeals from the subordinate court are to be filed within thirty (30) days from the date of the delivery of the decision one intends to Appeal against. In this regard Section 79 G *Civil Procedure Act* provides:

Every appeal from a subordinate court to the High Court shall be filed within a period of 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 to the appellant 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.

13. It is therefore clear, from the proviso to the above provision, that the Court has discretion to grant leave for the admission of an appeal out of time, should “good and sufficient cause” be shown for the delay. The Supreme Court settled the principles that are to guide the courts in the exercise of its discretion to extend time in the case of *Salat v Independent Electoral and Boundaries Commission & 7 others* (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling) where it was held:
 85. This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a court should consider in exercise of such discretion: 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; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; Whether there will be any prejudice suffered by the respondents if the extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time....”



14. Further, the decision on whether to grant leave for an appeal to be filed out of time is an exercise of discretion which should be based on reason and not whims or caprice. The Court of Appeal in the case of *Paul Musili Wambua v Attorney General & 2 others* [2015] KECA 471 (KLR) held:

...it is now well 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 whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the 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. (See *MUTISO V MWANGI*) [1999] 2 EA 231. In other words Rule 4 of the Court of Appeal Rules donates unfettered discretion and as long as the discretion is exercised judiciously, a single Judge would be entitled to consider any other relevant material...”

15. It is not disputed that the judgment of the lower court was delivered on the 20th December 2024 or that this application was not filed until on 28th March 2025. The appeal ought to have been filed by 20th January 2025. It is evident that there has been a delay of about 2 months in the filing of the instant application. The delay was explained by the 1st applicant, namely, that their former advocates were on holiday in December and could not attend the judgment delivery; the judgment became available for download on the CTS platform on 31st January 2025; and that the 1st applicant was abroad for medical treatment and unavailable to give instructions.
16. The applicants also made an attempt to demonstrate that their intended appeal is arguable. They annexed a draft Memorandum of Appeal to their Supporting Affidavit; and having perused the same, it cannot be said that the intended appeal is frivolous. It is my finding that the delay has been sufficiently explained and that leave ought to be granted for the filing of the intended appeal out of time.

B. Whether, in the circumstances an order of stay of execution ought to issue:

17. Stay of execution is provided for under Order 42 Rule 6(2) of the Civil Procedure Rules. It states:
- (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.
18. The above Rule thus provides that before a court can grant an order of stay of execution pending hearing and determination of the appeal, it must be satisfied that there is proof of substantial loss to be suffered by the applicant; that the application was made without unreasonable delay; and that the applicant is ready to provide such security as the court may impose.
19. The key consideration in the exercise of discretion to grant stay is whether the applicant demonstrated the likelihood of suffering a substantial loss if the stay is denied. In the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] KECA 94 (KLR) the Court of Appeal held:

...It is also true to say that, in consideration an application for a stay, the court doing so must address its collective mind to the question of whether to refuse it would, as Mr Kwach, urges, render the appeal nugatory...



As I said I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause...”

20. Further, it is now trite that execution of the decretal sum cannot, of itself, be counted as a substantial loss since the winning party has a right to enjoy the fruits of his/her judgment. In *Jessikay Enterprises Ltd v George Kahoto Muiruri* [2022] KEHC 26949 (KLR) held:

...Execution is a lawful process and the mere fact that it is carried out is not ipso facto evidence of substantial loss. Equally, the right of execution where it has accrued cannot be stayed, save for a just cause, and with conditions...”

21. In this case, the applicants have demonstrated that their intended appeal is arguable, and that unless an order of stay is granted the applicants may suffer substantial loss in the event of a successful appeal. Moreover, the applicants are ready and willing to provide security by depositing the decretal sum in a joint interest-earning account pending the hearing and determination of the proposed appeal.

22. In the result, I find merit in the application dated 13th February 2025. The same is hereby allowed and orders granted as follows:

- (a) That leave be and is hereby granted to the applicants to file their intended appeal out of time against the judgment of the delivered in Homa Bay CMCC No. E051 of 2022: BNO (Minor suing through next friend JAO) v Anton Peter Wachiaji Otieno & Isaiya Onyango;
- (b) That an order of stay of execution be and is hereby granted to stay the intended execution of the judgment, decree, costs and interests issued in Homa Bay CMCC No. E051 of 2022: BNO (Minor suing through next friend JAO) v Anton Peter Wachiaji Otieno & Isaiya Onyango pending the hearing and determination of the intended appeal on condition that entire decretal sum of Kshs. 380,000/- be secured by depositing the same in a joint interest earning account in the names of counsel on record for the applicant and the respondent within 30 days from the date hereof.
- (c) That further proceedings in Homabay CMCC No. E051 of 2022: BNO (suing through next friend JAO) v Anton Peter Wachiaji Otieno & Isaiya Onyango including assessment of costs be and are hereby stayed pending hearing and determination of the intended Appeal.
- (d) That the costs of the application do abide the outcome of the intended appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 22ND DAY OF JANUARY 2026

OLGA SEWE

JUDGE

