



REPUBLIC OF KENYA



KENYA LAW
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**Njuguna v Kimotho (Civil Appeal E060 of 2023)
[2026] KEHC 2780 (KLR) (27 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 2780 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E060 OF 2023
FN MUCHEMI, J
FEBRUARY 27, 2026**

BETWEEN

BERNARD GACHUKI NJUGUNA APPELLANT

AND

DAVID KIMOTHO RESPONDENT

RULING

Brief facts

1. The application for determination dated 17th November 2025 seeks for orders of stay of execution in respect of the judgment in the instant case delivered on 9th October 2025 pending the hearing and determination of the appeal in the Court of Appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 18th November 2025.

Applicant's Case

3. The applicant states that judgment in the instant court was delivered on 9th October 2025 in favour of the respondent. Being dissatisfied with the said judgment, the applicant states that he filed his Notice of Appeal on 28th October 2025 and applied for certified copies of proceedings and judgment. The applicant further states that he served the Notice of Appeal and letter requesting for proceedings upon the respondent vide email on 30th October 2025.
4. The applicant states that he is apprehensive that the respondent may execute orders of the judgment after the taxation of bill of costs scheduled for taxation on 15th December 2025. The applicant avers that he has an arguable appeal with overwhelming chances of success as it raises important points of law and facts. Further, the appeal would be rendered nugatory if the execution was to proceed without the appeal being heard first.



The Respondent's Case

5. The respondent states that a Notice of Appeal merely signals an intended appeal as no appeal has been filed. Further, the applicant's argument that his appeal has high chances of success is speculative and unsupported as no grounds of appeal have been filed. The respondent states that the applicant has not demonstrated any exceptional circumstances or irreparable harm that would arise if taxation proceeds. In the event the court is inclined to grant stay, the respondent states that the applicant ought to be compelled to deposit security in court for an amount that this court may deem fit so as to strike a balance.
6. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

7. The applicant relies on Order 42 Rule 6 of the Civil Procedure Rules and the case of *Butt vs Rent Restriction Tribunal* [1979] and submits that he filed the Notice of Appeal and the instant application without unreasonable delay. The applicant further submits that if stay is not granted, the appeal may be rendered nugatory. Further, the applicant argues that he has an arguable appeal with overwhelming chances of success as it raises important facts and law. Relying on the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR, the applicant submits that the danger of the appeal being rendered nugatory is sufficient substantial loss.

The Respondent's Submissions

8. The respondent submits that as per the Court of Appeal rules made pursuant to the *Appellate Jurisdiction Act* and read together with the Supreme Court Rules an aggrieved party has 14 days from the date of the judgment or ruling to file a Notice of Appeal in the Court of Appeal. Thus, the last day for filing a competent Notice of Appeal was 23rd October 2025 yet the applicant filed his Notice of Appeal on 28th October 2025 which is five days out of time without the leave of the court. Further, the said Notice of Appeal cannot form a proper foundation for an application for stay pending appeal as there is no valid and competent Notice of Appeal before the court. To support his contentions, the applicant relies on the cases of *Civil Appeal E172 of 2023* [2023] KEHC (unreported); *Bookpoint Limited vs Guardian Bank Limited & Another* [2021] eKLR and *Diplack Kenya Limited vs William Muthama Kitonyi* [2018] eKLR and submits that a notice of appeal filed out of time absent an application for and grant of extension of time under Rule 4 of the Court of Appeal Rules 2022 renders the appeal a nullity and of no legal consequence.
9. The applicant further relies on the cases of *Ishmael Kagunyi Thande vs Housing Finance Kenya Ltd* (Civil Application No. Nai 157 of 2006) (unreported) and *Hasfwa Omar Abdalla Taib & 2 Others vs Swaleh Abdalla Taib* [2015] eKLR and submits that for an applicant to succeed in obtaining stay of execution, they must demonstrate that the appeal is arguable and a valid appeal has been lodged.

The Law

Whether the application has merit

10. Rule 77 of the Court of Appeal Rules 2022 provides:-
 1. A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.



2. Each notice under sub rule (1) shall, subject to rules 84 and 97 be lodged within fourteen days after the date of the decision against the decision for which the appeal is lodged.
11. Judgment in the instant case was delivered on 9th October 2025 and the applicant filed the Notice of Appeal on 28th October 2025. Thus the applicant filed the Notice of Appeal five days out of the statutory time and without leave of the court. It is trite law that an appeal cannot be filed out of time without the leave of the court.
12. The Supreme Court in SC Application No. 38 of 2014 TSC vs Simon Kamau & 19 Others adopted its earlier decision in Nicholas Kiptoo arap Korir Salat vs IEBC & 7 Others SC Application No. 16 of 2014 and stated:-

No appeal can be filed out of time without leave of the court. Such filing renders the document so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court.

13. Similarly in County Executive of Kisumu vs County Government of Kisumu & 8 Others (Civil Application 3 of 2016) [2017] KESC 16 (KLR) (Civ) (12 April 2017) (Ruling) the Supreme Court held:-

We are in total agreement with the respondent that an appeal filed in this Court out of time without the leave of this Court is irregular and this Court will not invoke such novel principles as urged by the applicant so as to validate that petition and deem it as properly filed. We buttress this Court's position in Nicholas Salat when this Court stated thus...In his submissions, counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed. What we hear the applicant telling the Court is that he is acknowledging having filed a document he calls an appeal out of time without the leave of the Court. Pursuant to rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court's Rules this Court can indeed extend time.

However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such an appeal is tantamount to moving the Court to remedy an illegality. This Court cannot do. To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without the leave of the court. Such a filing renders the document so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without the leave of the Court.

14. Thus the Notice of Appeal dated 27th October 2025 having been filed out of time and without leave of this court is hereby struck out. There being no notice of appeal, the instant application has no proper or legal foundation.
15. Accordingly, the application dated 17th November 2025 lacks merit and is hereby dismissed with costs.
16. It is hereby so ordered.



**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27TH DAY OF
FEBRUARY 2026.**

F. MUCHEMI

JUDGE

