



**Ndirangu & another v Clinton & another (Civil Miscellaneous Application  
E360 of 2024) [2026] KEHC 3685 (KLR) (16 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 3685 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL MISCELLANEOUS APPLICATION E360 OF 2024**

**PN GICHOHI, J  
MARCH 16, 2026**

**BETWEEN**

**JULIUS NDIRANGU ..... 1<sup>ST</sup> APPLICANT**

**ISAIAH GITHINJI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**OCHUODHO BILL CLINTON ..... 1<sup>ST</sup> RESPONDENT**

**DANIEL WAMUGUNDA KIMONDO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicants herein, through the firm of Kimondo Gachoka Advocates, moved this court vide the Notice of Motion dated 4<sup>th</sup> December, 2024 and expressed under Article 159 and 159(2)(d) of *the Constitution* of Kenya 2010; Sections 1A, 1B, 3A, 79G, and 95 of the *Civil Procedure Act*, Order 42 Rule 6 (1), (2) & (7), Order 50 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules, 2010, seeking for the following Orders;-
  1. Spent
  2. The Court grants leave to the Applicants to appeal out of time against the judgment delivered in Nakuru CMCC No. E199 of 2020 by Hon. Bildad Ochieng.
  3. A temporary order of stay of execution be granted pending the inter-partes hearing of the application.
  4. An order of stay of execution of the judgment delivered on 26<sup>th</sup> September, 2024, pending the hearing and determination of the intended appeal.
  5. An order for the provision of a Bank Guarantee for the entire decretal sum of Kshs. 360,500/ = as security pending the appeal.



6. Any other order deemed just and expedient in the interest of justice.
7. Costs of the application be provided for.
2. The Application is based on the grounds on the face of the Notice of Motion and supported by the Affidavit of Linda Chemutai, Advocate seized of the matter, sworn on even date.
3. The deponent states that judgment in the trial Court was delivered on 26<sup>th</sup> September, 2024, where the Court awarded 100% liability against them with damages totalling Kshs. 360,500/=. That they are desirous of lodging an Appeal, however the time within which an Appeal can be lodged as of right has lapsed.
4. She argues that the delay in filing the appeal was inadvertent due to a delay in receiving instructions from their clients, Direct Line Assurance Limited, which was occasioned by the Claim's officer leaving employment before issuing instructions to their advocates.
5. It is the Applicant's case that the intended appeal has high chances of success and that they will suffer substantial and irreparable loss if execution proceeds, as the Respondent's ability to refund the money is unknown.
6. The Affiant expresses the Applicants' willingness to furnish a bank guarantee as security.
7. The 1<sup>st</sup> Respondent has opposed the application vide the Replying Affidavit sworn on 30<sup>th</sup> January, 2025. He terms the application herein as incompetent and an abuse of the court process.
8. He asserts that there has been an unreasonable delay in filing the application without sufficient reason proffered. Further, that there is no evidence that the Applicants' instructing client delayed in providing instructions to their counsel.
9. He contends that the Applicants have failed to demonstrate any substantial loss they would suffer if execution of the judgment is carried out.
10. He points out that the Applicants have not provided evidence to prove he is a person of straw or that he would be unable to refund the decretal amount if necessary.
11. He objects to the provision of a bank guarantee, arguing it would be prejudicial to him if the chosen bank failed or if further litigation was required to enforce payment. He added that an agreement with Family Bank is no guarantee of payment or the bank's future stability.
12. The deponent terms the application a tactical ploy intended to delay him from enjoying the fruits of the judgment. He reiterates that the application is incompetent, bad in law, and an afterthought made in bad faith.
13. He submits that it is in the interest of justice for the court to dismiss the application and that the costs be awarded to him. Alternatively, he requests that if the Court chooses to grant the orders, the Applicants should be ordered to deposit the full decretal sum and costs into a joint interest-earning account held by the advocates of both parties.

**The Applicants' written submissions.**

14. Regarding enlargement of time to file their Appeal out of time, Applicant submits Section 79G of the [Civil Procedure Act](#) allows appeals out of time for various reasons, including when good and sufficient cause is shown.



15. In support of this, they cite the Supreme Court case of Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] eKLR, which outlines the principles for judicial discretion that extension of time is an equitable remedy, not a right, available to deserving parties, the burden of proof lies with the party seeking the extension, whether discretion is exercised is determined on a case-by-case basis, the delay must be reasonably explained to the satisfaction of the court and that the court considers potential prejudice to the respondent and whether the application was brought without undue delay.
16. As to the issue of delay, the Applicants argue that instructions to appeal were only received after the 30-day statutory period had lapsed. They attribute this to internal transitions where a claim's officer at their insurance company left employment without issuing directions.
17. On stay of Execution, the Applicants rely on Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, which require showing that substantial loss may result and that security has been provided.
18. The Applicants maintain they have a meritorious appeal. They argue that if execution proceeds, the appeal will be rendered nugatory and they will suffer substantial loss. They assert that the Respondent has not proven his financial standing to refund the decretal sum if the appeal succeeds. In support of this, reliance is placed on the case of Amal Hauliers Limited versus Abdulnasir Abukar Hassan [2017] eKLR, where the court held that a lack of disclosed income sources could establish a risk of substantial loss.
19. In regard to Security for due performance of the Decree, the Applicants offer a bank guarantee for the full decretal sum, which offer they term reasonable security.
20. They cite the case of Shanzu Beach Resort Limited vs Crown Marble & Quartz Ltd [2020] eKLR to support the use of a bank guarantee as security.
21. In conclusion, the Applicants argue that their appeal raises substantive issues of law. Further, emphasized the importance of balancing a successful litigant's right to the fruits of judgment against an appellant's right to ensure they can recover the amounts paid if they succeed on appeal. They urge the Court to exercise its discretion to allow the appeal out of time and grant a stay of execution.

### **1<sup>st</sup> Respondent's Submissions**

22. The Respondent argues that the Applicants have failed to specify the exact substantial loss they would suffer if the stay is denied. They cite the case of Sun Palm Limited & another v David Pius Mugambi [2019] eKLR, which quoted Joseph Gachie versus Simon Ndeti Muema 2012 eKLR that held that;-
 

“It is not sufficient merely to state that the decretal amount is a lot of money and the applicant would suffer if the money is paid... the applicant should show the damages it would suffer if the order for stay is not granted...”.
23. The Respondent further asserts that this is a money decree, which can be reimbursed if the appeal succeeds. They rely on Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR, where it was held that;-
 

“It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made”
24. On security, the Respondent objects to the proposed bank guarantee, arguing it is prejudicial because it offers no protection if the bank fails. He argues that if this Court grants a stay of execution, then he requests that at least half of the decretal sum and costs be paid directly to them, with the remaining half deposited in a joint interest-earning account.



25. On delay, the Respondent points out that while judgment was delivered on 1<sup>st</sup> August, 2024, the application was not filed until 6<sup>th</sup> December, 2024, a delay of over two months. They characterize the excuse regarding the claims officer leaving employment as a flimsy one, cooked up to justify his delay.
26. Reference is made to the case of Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR Gachugu v Karaine & 3 others [2022] KECA 1411 (KLR), cited in Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR that held:-
- “A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable”.
27. In conclusion, the Respondent submits that the Applicants are indolent and dishonest. He urges the Court to dismiss the application with costs.

### **Analysis and Determination**

28. Based on the Application herein, the supporting and the opposing Affidavit together with the submissions filed; the issues for determination are:-
1. Whether time should be extended/enlarged to allow the Applicant to file appeal out of time.
  2. Whether stay of execution should issue pending the hearing and determination of the intended appeal.
  3. Who should meet the costs of this Application.
29. On enlargement of time to file an appeal out of time, Section 79G of the [Civil Procedure Act](#) provides that: -
- “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.”
30. It is settled law that the Court has discretion to grant an application for extension of time under Section 79G of the [Civil Procedure Act](#) if the Applicant satisfies the court that he had good and sufficient cause for not filing the appeal on time.
31. The Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR had this to say: -
- “Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus: “It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. 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”.

32. Further the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2014] eKLR held: -

“...It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant. 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:

1. 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.
2. A party seeking for extension of time has the burden of laying a basis to the satisfaction of the court.
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.
5. Whether there will be any prejudice suffered by the respondents if the extension is granted.
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

33. In this case, the lower Court judgement subject of this Application was delivered by Hon. Bildad Ochieng (CM) on 24<sup>th</sup> September, 2024 with stay of execution granted for 28 days. The law provides for 30 days period to a party that seeks to appeal against any decision from the subordinate Court to the High Court, therefore, the Appellants’ time lapsed on 24<sup>th</sup> October, 2024.

34. The reason given for delay is that the instructing Client Directline Assurance Limited, the claim’s officer, left its employment without giving out any instructions to the current advocates on record and thus they were unable to file the Appeal on time. The reasons given for the delay in filling the Appeal and the current Application, in my view, is accepted as sufficient cause for delay.

35. On the stay of Execution, the conditions to be satisfied before such Orders are granted by the Court are provided for under Order 42 rule 6 of the Civil Procedure Rules, 2010 and they are: -

1. The application must be brought without unreasonable delay.
2. The Applicant must demonstrate that they will suffer substantial loss unless the order sought is granted.
3. The Applicant must furnish 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.



36. The current Application herein was filed on 5<sup>th</sup> December, 2024, way after the time within which the Appeal could be filed lapsed. Nonetheless, the Applicants have given sufficient explanation for the delay as stated above.
37. As regards substantial loss, the Applicants' apprehension that the Appeal will be rendered nugatory if execution commences, is not farfetched. The Respondent has not sufficiently countered the argument that he is a person of straws hence unable to refund the decretal sum if paid to him and the Appeal succeeds. In the circumstances, The Applicant has demonstrated that he will suffer substantial loss.
38. On security for due performance, F Gikonyo J in the case of Arun C. Sharma v. Ashana Raikundalia T/A Rairundalia & Co. Advocates (2014) eKLR held that:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

39. The bank guarantee issued by Family Bank in favour of Direct Line Assurance Limited dated 6<sup>th</sup> July 2023 specifies a duration of twelve months hence it would have expired by July 2024 and therefore cannot serve that purpose herein
40. In light of the foregoing and in the bid to balance the rights of both parties in the circumstances herein, it is in the interest of justice that the following orders issue:-
1. That leave be and is hereby granted to the applicant to file intended appeal out of time.
  2. The applicant to file and serve the Memorandum and Record of Appeal within 30 days from the date of this Ruling.
  3. Stay of execution of the Judgment delivered on 24<sup>th</sup> September, 2024 by Honourable B. Ochieng (CM) in Nakuru CMCC No. E199 of 2020 be and is hereby granted pending the hearing and determination of the Intended Appeal.
  4. The Applicant shall deposit the entire decretal sum in Court within 45 days from the date hereof.
  5. In default of (2) and (4) above, the stay of execution shall automatically lapse.
  6. Costs of the application to abide the outcome of the Appeal.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 16<sup>TH</sup> DAY OF MARCH, 2026.**

**PATRICIA GICHOHI**

**JUDGE**

N/A for Appellant/Applicant

Ms Kirui for Respondent

Erickson, Court Assistant

