

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
MISC. APPLICATION NO. E005 OF 2025

SILVERHAWK CARGO LTD.....APPLICANT

VERSUS

MICHAEL ROTICH.....RESPONDENT

(Being an application for leave to appeal out of time and for stay of Execution against the Judgement and Decree of Hon. Edward Oboge delivered on 3rd February, 2025 in Nakuru SCCCOM No. E2017 of 2024)

RULING

1. What is coming up for determination by this Court is the Applicant's Notice of Motion dated 13th March, 2025, brought under Order 51 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, seeking the following Orders:--

1) Spent.

2) Spent.

3) That this Honourable Court be pleased to grant the Applicant leave to file their intended Appeal out of time, against the Judgement delivered on 3rd February, 2025 in Nakuru SMCCCOM No. E2017 of 2024.

4) That this Honourable Court be pleased to issue an Order of stay of execution of the judgment delivered on 3rd February, 2025, pending the hearing and determination of the Applicant's intended Appeal to the High Court.

5) The costs of this Application be provided for.

2. The grounds are on the face of the application supported by the Affidavit sworn on even date by Daniel Muthenya Nzeki, the director of the Applicant.

3. He states that judgment in this matter was delivered on the 3rd February, 2025, awarding the claimant Kshs. 702,000 in Special Damages and costs of the claim.
4. Being aggrieved with that decision, the Applicant herein is desirous of appealing the decision of the court. However, the time within which an Appeal can be lodged as of right expired on 2nd March, 2025.
5. It is his case that the delay in lodging the Appeal arose out of the delay by the Court in typing the judgment, which was uploaded on the CTS on 20th February, 2025, more than 2 weeks after the delivery of the judgment. However, he contends that the delay in filing this Application was not inordinate in the circumstances.
6. He depones that the Intended Appeal raises several arguable issues and thus urged this Court to enlarge time for them to file the said Appeal and, in the meantime, stay execution of the decree until the Intended Appeal is heard and determined.
7. The deponent states that the urgency of the matter has been necessitated by the Respondent's move to execute the Judgement and attached the Warrants of attachment dated 4th March, 2025 as evidence.
8. He argues that the Intended Appeal will be rendered an academic exercise if the stay is not granted at this stage. He states that he is willing to furnish the Court with any security this Court will determine in the interest of justice.
9. The Respondent filed a Replying Affidavit sworn on 23rd June, 2025. Opposing the Application, he states that Judgment was delivered in the trial court on 3rd February, 2025, and a decree was extracted.
10. Relying on section 79G of the Civil Procedure Act and the case of ***Gerald M'Limbine Vs Joseph Kangangi [2008] eKLR***, he argues that an intended appeal must be filed either before or alongside an application for leave to extend time, rather than seeking permission for a non-existent appeal.
11. Relying on the principles established by the Supreme Court of Kenya in ***Nicholas Kiptoo Arap Korir Salat Versus Independent Electoral and***

Boundaries Commissions & 7 Others[2014] eKLR, he emphasised that such extension of time is an equitable remedy at the court's discretion rather than a right.

12. He argues that no actual appeal has been filed and instead, that the Applicant has only provided a Draft Memorandum of Appeal. He argues that the court cannot use its jurisdiction to admit an appeal that does not legally exist yet.
13. He therefore urges the court to reject the application as there is no appeal currently before the court to be admitted out of time.
14. Regarding time, he asserts that the Applicant has failed to provide a valid explanation as to why the appeal was not filed within the legally prescribed timeframe, considering that the judgment was delivered on 3rd February, 2025, and therefore, the deadline to file an appeal was 2nd March, 2025.
15. However, the Applicant filed the current application on 13th March, 2025, and gave no reason for failing to attend court on the judgment date despite receiving notice.
16. On the argument that the judgment was not typed, the Respondent disputes the excuse by pointing out that it was uploaded to the Case Tracking System (CTS) on 19th February, 2025, and the Applicant admitted receiving a copy a day after, on 20th February, 2025. However, the Applicant took no action to comply within the stipulated time, and no explanation was given.
17. He reiterates that the burden of proof for extending time lies with the Applicant, who he believes has failed to meet it. He concludes that the Applicant has not made a sufficient case to warrant admission of an appeal out of time.
18. Regarding the request for a stay of execution, he argues that under Order 42 Rule 6 (2), a stay cannot be granted unless an appeal has actually been filed.
19. He maintains that as no proper appeal exists, the court lacks the jurisdiction to grant the stay of execution. Further, it is his position that the Applicant

has not proved substantial loss. He argues that the costs being claimed are not a substantial amount.

20. He states that the Applicant has failed to offer any security for the stay orders they are seeking. However, he states that in the event the court does allow the application, then it is his request that the total sum of Kshs. 780,924 be deposited into a joint interest-bearing account.

Applicant's Submissions

21. The Applicant submitted three issues for determination:-
- 1) Whether the court should use its discretion to allow the appeal to be filed late.
 - 2) Whether the Draft Memorandum of Appeal submitted on 14th March, 2025, is legally valid before the court.
 - 3) Whether the Applicant has satisfied the legal requirements to be granted a stay of execution while the appeal is pending.
22. In respect to extension of time, he argues that while appeals must be filed within 30 days, the court can admit them out of time if a good and sufficient cause is shown.
23. Referencing the Supreme Court case of *Nicholas Kiptoo Arap Korir Salat* (supra), the Applicant acknowledges that an extension is an equitable remedy at the court's discretion, not an automatic right.
24. He argues that the delay was reasonable as they could not formulate precise grounds for appeal without first analysing the written judgment, which was only provided on 20th February, 2025.
25. The Applicant highlights that their application was filed just 12 days after the original deadline and 23 days after they actually received the judgment, which they contend is not an inordinate delay.
26. Addressing the Respondent's objections, the Applicant argues that attaching a Draft Memorandum of Appeal to the application for leave is a procedurally sound and established practice. He dismisses the Respondent's focus on procedural technicalities as a red herring designed to derail justice.

27. Citing the Court of Appeal case of *Abubaker Mohamed Al-Amin v Firdaus Siwa Somo [2018] KECA 202 (KLR)*, he asserts that an appeal can be admitted out of time regardless of whether it was filed before or after seeking the court's leave.
28. In respect to the prayer for stay of Execution, the Applicant maintains that a stay of execution is necessary to preserve the trailer, their principal asset and the subject of the original suit, pending the appeal.
29. He argues that if the trailer is sold to satisfy the judgment now, the Applicant will lose their livelihood and be unable to pursue the appeal, making any future legal victory nugatory or meaningless.
30. Lastly, he argues that the Respondent will not suffer prejudice from a temporary delay, as it merely maintains the status quo without extinguishing the Respondent's ultimate rights. He therefore urges this Court to allow the application with costs.
31. The Respondent opted to rely on the Replying Affidavit.

Analysis and determination

32. Upon perusal of the Application, response and the submissions, the issues that call for determination are;-
 - 1) **Whether time should be extended/enlarged to allow the Applicant to file an appeal out of time.**
 - 2) **Whether a stay of execution should issue pending the hearing and determination of the intended appeal.**
 - 3) **Who should meet the costs of this application.**
33. 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.”

34. 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.

35. Indeed, the Court of Appeal in ***Thuita Mwangi v Kenya Airways Ltd [2003] eKLR*** held that : -

“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”.

36. 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 under-lying 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.”*

37. In this case, the lower Court judgement subject of this Application was delivered by Hon. Edward Oboge (RM) on 3rd February, 2025. 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, and therefore, the Appellants’ time lapsed on 2nd March, 2025.

38. The Applicant attributes the delay in filing the Appeal to the fact that judgment, the subject of this Appeal, was not uploaded to the Court Tracking System (CTS) until 19th February, 2025, more than two weeks post-delivery. It is contended that this administrative delay hampered the Applicant’s ability to timeously analyse the findings and settle the grounds of appeal.

39. Given that both parties concede the late upload, this Court is satisfied that the delay is sufficiently explained and, in the circumstances, that delay is not inordinate.
40. On the Respondent's contention that an appeal must be filed before seeking an enlargement of time, the Court in the case of **Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR)**, had this to say when faced with a similar application:-

“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 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, the 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 leave of the court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence.”

41. It follows, therefore, that the Respondent's argument is not tenable. The Applicant is procedurally correct in seeking the court's leave to file their appeal out of time, as the power of this Court to enlarge time is specifically designed to breathe life into an intended appeal that has been caught by the effluxion of time. Filing a Draft Memorandum of Appeal, as done by the Applicant, was therefore in order.

42. 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.***

43. The current Application was filed on 13th March, 2025, about 11 days after the judgment subject of the intended Appeal was delivered. That cannot be termed as inordinate delay, considering further that the Applicant has given sufficient explanation for the delay as stated above.

44. Regarding substantial loss, the Applicant argued that they are apprehensive that the Appeal will be rendered nugatory if the stay is not granted and the subject trailer is sold. The Applicant contends that the subject trailer, which is their primary asset sought for attachment and sale, constitutes their sole source of livelihood and a vital tool of trade.

45. In the circumstances, this Court is satisfied that the Applicant has demonstrated that it will suffer substantial loss should the trailer be sold through a forced sale, as he would be deprived of his means of income.

46. On security for due performance, this Court has noted the arguments and proposal by both parties. The Applicant is willing to abide by any security the Court may order, while the Respondent proposes that the entire amount be deposited in a joint interest-earning account.

47. This Court is persuaded by 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.”

48. 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 this Court grants the following orders; -

1. That leave be and is hereby granted to the applicant to file the intended appeal out of time.
2. The applicant is 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 3rd February, 2025, by Honourable Edward Oboke (RM) in Nakuru SCCOMM No. E2017 of 2024 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 18^h March, 2026.

PATRICIA GICHOHI

JUDGE

N/A for Appellant/Applicant

Ms Mukindi h/b for Mr. Langat for Respondent

ORIGINAL