

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CIVIL MISCELLANEOUS APPLICATION NO. E008 OF 2026

GILBERT GICHANA NYANGAU.....
.....APPLICANT

DAVID MISUKO
RESPONDENT

VERSUS
NYACHIRO.....

RULING

[1] The Notice of Motion dated 9th February 2026 was filed by the applicant, **Gilbert Gichana Nyangau**, pursuant to Sections 1A, 1B, **3A and 79G** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya as well as Order 50 Rules 6 and 8** and **Order 51 Rule 1** of the **Civil Procedure Rules**. The applicant thereby prayed for orders that:

[a] Spent

[b] Spent

[c] That the Court be pleased to grant an order of stay execution of the judgment and decree in **Oyugis CMCCC No. E085 of 2023** dated the 8th day of January 2026 and all consequential orders arising therefrom pending the hearing and determination of the intended appeal.

[d] That the Court be pleased to extend time to appeal and admit the applicants appeal or allow the applicant to file a Memorandum of Appeal out of time.

[e] That the costs of the application be provided for.

[2] The application was premised on the grounds that the applicant is dissatisfied with the whole of the judgment of the trial court in **Oyugis CMCC NO E085 OF 2023** intends to appeal against the said judgment and Decree dated the 8th day of January 2026; and that unless the orders sought are granted the respondent shall proceed with execution thereby rendering the application and the intended appeal nugatory. The applicant further averred that failure to lodge appeal within statutory period was as a result of breakdown of communication between the him and his counsel.

[3] Further to the foregoing, the applicant averred that the intended appeal raises salient and/or pertinent issues of law and facts hence the same has overwhelming chances of success.; and that the respondent will not suffer any prejudice granted that he is willing to abide by any just and reasonable condition that this court may set, including depositing the entire decretal sum in court or in a fixed term joint interest-earning account in the names of advocates acting for the parties as security pending hearing and determination of the application herein. He also averred that the application has been brought promptly without inordinate delay; and therefore that it is in the interest of justice that it be allowed.

[4] Although the respondent filed a Replying Affidavit sworn on 16th February 2026 opposing the application in all its aspects, his counsel conceded on the 24th February 2026 to the aspect of stay, on the basis of the security offered by the respondent.

Accordingly, the only issue for determination is whether justification has been shown for leave to appeal out of time. In this regard, the respondent averred that:

[a] The application does not meet the conditions for Out-of-Time Appeals, namely, valid reason for delay, prospect of success or that no prejudice will be suffered by the parties.

[b] The application is brought in bad faith and is intended to unduly delay satisfaction of decree and it is part of the applicant's scheme and pattern of delaying tactics.

[c] It is only fair and just that he be paid the proceeds of judgement and in default I recover through execution.

[d] The application as well as the intended appeal are only intended to frustrate and delay him from realizing the fruits of my litigation.

[e] The applicants shall suffer no injustice, unfairness, loss or prejudice in the event that their motion is declined.

[5] Section 79G of the Civil Procedure Act is explicit that an appeal from the subordinate court to the High Court be filed within 30 days; failing which leave of the Court ought to be obtained to admit the appeal out of time. It states 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.

[6] The above section requires that before one can be allowed to file an appeal out of time, one must demonstrate “**good and sufficient cause**” for not filing the appeal in time. The Court of Appeal had occasion to underscore this principle in the case of **Paul Musili Wambua v Attorney General & 2 others** [2015] eKLR. Here is what it had to say:

“...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.”

[7] And, in the case of **County Executive of Kisumu v County Government of Kisumu & 8 others** [2017] eKLR the Supreme Court restated the applicable principles thus:

“...It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated 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 who seeks 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;”

[8] The judgment that the applicant seeks to challenge was delivered on 8th January 2026 hence the 30 days’ period within which the applicant was to file a memorandum of appeal lapsed on or about 7th February 2026. The present application having been filed on 9th February 2026, was therefore filed after a delay of only two days. The applicant has explained the cause of the delay and stated that there was communication breakdown between him and his Advocate which was exacerbated by his expectation that his insurers had matters under control.

[9] It is therefore my finding that the delay was not inordinate in the circumstances; and that it has been sufficiently explained. As was stated in **Ivita v Kyumbu** [1975] eKLR thus:

“...the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay...”

[10] A perusal of the draft Memorandum of Appeal and a copy of the judgment of the lower court annexed to the Supporting Affidavit shows that the issues raised therein are *prima facie* arguable; and therefore worthy of consideration on appeal. Needless to say that an arguable appeal is not one which must necessarily succeed; and that at this stage, the Court need not go into the merits of the appeal. In the case of **Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited** [2020] eKLR the Court held: -

“...Court can gauge the arguability of an intended appeal from other supportive evidence. Herein the applicant intends to challenge the dismissal of its liquidated claim which according to counsel involves a colossal amount of money. In my view, that in itself is arguable notwithstanding that it may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the

Court. In my view, the issue of whether the applicant's claim was meritorious or otherwise is arguable notwithstanding that it may not succeed..."

[11] It is my finding, therefore, that there appears to be arguable points of law, for instance the question of whether or not the trial court misapprehended the principles application in assessment of damages in personal injury claims. I am therefore convinced that this is a proper and fit case in which the Court ought to exercise its discretion in favour of the applicant by allowing his application for leave to appeal out of time.

[12] In the result, it is hereby ordered, in respect of the application dated 9th October 2024, as hereunder:

[a] That leave be and is hereby granted to the applicant to appeal out of time against the judgment and decree passed in **Oyugis Chief Magistrate's Civil Case No. E085 of 2023** delivered on 8th January 2026.

[b] That the intended appeal be filed within 30 days from the date hereof.

[c] That an order of stay execution of the judgment and decree in **Oyugis CMCCC No. E085 of 2023** delivered on 8th January 2026 be and is hereby granted pending the hearing and determination of the intended appeal on condition that the decretal sum be deposited in court within 30 days from the date hereof.

[d] That the costs of the application to abide the outcome of the intended appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY
THIS 19TH DAY OF MARCH 2026**

.....

OLGA SEWE
JUDGE

ORIGINAL