



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. E172 OF 2025

KENSLEY M. MUHANJI **1ST**
APPELLANT

ROSEMARY ISAYI **2ND**
APPELLANT/APPLICANT

VERSUS

RUTH INDIMULI MUYIA
RESPONDENT

RULING

1. Before this court for determination is a Notice of Motion application dated 14th January 2026, where the Applicant seeks an order to be granted leave to appeal out of time and an order of stay of execution of the judgment rendered on 22nd October 2022 in Kakamega SCCCOMM No. E528 of 2025 pending the hearing and determination of the appeal.
2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn by the 2nd

Appellant/Applicant, who deponed that she is sickly suffering from hypertension, diabetes and asthma and seeks medical attention from Kakamega Central Nursing Home and that when the judgment was being delivered, she was in hospital receiving treatment.

3. She claimed that after the delivery of the judgment, she approached Abok and Company Advocates who had been representing her to file an appeal, but it was in vain. However, she managed to file the Memorandum of Appeal on 26th November 2025 by which time the Respondents had obtained warrants of attachment and instructed auctioneers to attach her property.
4. According to the Applicant, the appeal has a high chance of success and she will suffer irreparable loss and lose her property if the orders of stay are not granted.
5. In a reply dated 16th January 2026, the Respondent opposed the application, stating that it was made in bad faith and an abuse of the court's process.
6. She deponed that the 2nd Appellant/Applicant had failed to explain the reason for her delay in seeking the stay orders, as the judgment was delivered on 22nd October 2025.
7. She further avers that the applicant has not furnished any security as provided under Order 42 rule 6 of the Civil Procedure Rules and has not expressed her willingness to abide by the conditions set by the court if the application is allowed, and avers

that the appeal is frivolous. The same should be dismissed with costs.

8. This court directed that the appeal be canvassed by way of written submissions.

Appellant's Submissions

9. In her submission dated 5th January 2026, the Applicant prays that this court exercises its discretion to grant her leave to file the appeal out of time. Relying on section 79 G of the Civil Procedure Act, she states that she was seriously ill during the statutory period for filing the appeal and was undergoing medical treatment, and further that she was unrepresented.
10. She cites the case of ***Nichols Kiptoo Korir Salat vs IEBC & 7 others (2014)*** on the principles the court should consider in granting an extension of time.
11. On whether a stay should be granted, she relies on Order 42 Rule 6. She avers that she has demonstrated that unless the orders are granted, she will suffer substantial loss. She cites the case of ***Butt vs Rent Restriction Tribunal (1982) KLR 417*** and the case of ***Halali & another vs Thornton & Turpin (1963) Ltd (1990) eKLR*** on the discretionary nature of security to be issued to balance the interests of both parties.

Respondent's Submissions

12. The Respondent referred to the provisions of Order 42 Rule 6 of the Civil Procedure Rules and contends that although the court has the discretion to order stay of execution, the provisions set under Order 42 ought to be satisfied.

13. She maintains that the court ought to consider the interests of both the parties so as not to deprive them of the fruits of the judgment and cause gross injustice.
14. She argues that the Applicant has failed to demonstrate what caused the unreasonable delay and had failed to furnish any form of security. She states that the excuse that she had been seeking treatment was never brought up in the lower court and is thus an afterthought and a deliberate ploy to deny her the fruits of the judgment. She relies on the case of **James Wangalwa & another vs Agnes Naliaka Cheseto Misc. application No. 42 of 2011(20120 eKLR.**

Analysis and Determination

15. I have carefully considered the application, the affidavits both in support and in opposition, and the rival submissions by counsel. In my view, the issues that arise for determination are as follows;
 - a) *Whether this court should grant leave to appeal out of time;*
 - b) *Whether an order of stay of execution pending appeal should be issued.*
16. On the first issue of whether this court should grant leave to file the appeal out of time, section 79 G of the civil procedure Act provides as follows:-

“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”.

17. It is now settled that courts have the discretion to extend time to admit an appeal out of time; however, such a discretion should be exercised judiciously and within principles of the law. This indeed is what was stated in the case of **Paul Njage Njeru v Kariya K. Mugambi (2021) KEHC 760 (KLR)** as follows:-

“The discretion to extend time must be exercised within the established principles of the law and the factors to be considered when determining an application seeking leave to appeal out of time were discussed by the Court of Appeal in Omar Shurie V Marian Rashe Yafar (Civil Application No. 107 of 2020) being: -

i)the length of the delay

ii)the reason for the delay

iii)the chances of the appeal succeeding if the application is granted

iv)the degree of prejudice to the respondent if the application is granted.”

18. Further, the Court of Appeal in **Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1999] eKLR** held that:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary.

It is also well stated 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.”

19. In the present case, judgment was delivered on 22nd October 2025, and the Memorandum of Appeal was filed on 26th November 2025. The present application was filed on 14th January 2026. The delay, though not inordinate, calls for explanation.
20. The Applicant has attributed the delay to ill health, stating that she suffers from hypertension, diabetes and asthma and was under medical care at the time of delivery of Judgment. This assertion has not been controverted. Sickness, when properly explained, constitutes a plausible and reasonable cause for delay.
21. Additionally, the Applicant has deponed that she attempted to instruct her former Advocates, Abok and Company Advocates, to appeal but was unsuccessful. While the actions of their advocates generally bind litigants, courts have severally held that no party should be punished for the mistakes of their Advocate. This was the holding in the case of ***Philip Kiptoo Chemwolo & Another -vs- Augustine Kubendo [1986] KECA 87 (KLR)***.

22. On the arguability of the appeal, this Court is not required at this stage to determine the merits conclusively. It suffices that on a cursory glance the appeal appears to be arguable and not frivolous. From the annexed draft memorandum of appeal, I am satisfied that the appeal raises triable issues.
23. Regarding the claim that the Respondent stands to suffer prejudice, she contends that she will be denied the fruits of her judgment. That is a legitimate concern. However, the right of appeal is a constitutional and statutory safeguard which should not be lightly denied. The courts are under obligation to balance the interests of both parties.
24. In the premises, and guided by the above authorities, I am persuaded that the Applicant has demonstrated sufficient cause to warrant the exercise of this Court's discretion in her favour.
25. The second issue to be determined is whether the court should grant a stay of execution pending the determination of the appeal. The principles governing stay of execution are set out under Order 42 Rule 6 of the Civil Procedure Rules. An applicant must demonstrate:
- i. That substantial loss may result unless the order is made;*
 - ii. That the application has been made without unreasonable delay; and*
 - iii. That such security as the Court orders has been given.*
26. On the first limb, the Applicant has deponed that execution has already been initiated and that her property is at risk of attachment and sale. In ***Kenya Shell Ltd v Benjamin Karuga***

Kibiru & Another [1986] KLR 410, the Court of Appeal held that substantial loss is the cornerstone of the jurisdiction to grant a stay.

27. In my view, the imminent attachment of the Applicant's property constitutes a sufficient demonstration of substantial loss.
28. On whether the application has been made without unreasonable delay, although the Respondent has argued that there was a delay, I find that the explanation tendered by the Applicant regarding her illness reasonably accounts for the period in question which in any event was not inordinate.
29. Regarding security, while the Applicant did not expressly propose specific security, she has expressed willingness to abide by any conditions imposed by the Court. In ***Halai & Another v Thornton & Turpin (1963) Ltd [1990] eKLR***, the Court emphasised that the purpose of security is to balance the interests of both parties. This Court is therefore enjoined to issue appropriate conditions that secure the decretal sum while preserving the right of appeal.

Determination

30. In the foregoing, I find merit in the Notice of Motion dated 14th January 2026. Accordingly, the application is hereby allowed on the following terms:
 - i. The time within which to file leave is hereby extended, and the Memorandum of Appeal already on record is deemed as duly filed and properly on record.

- ii. An order is issued staying the execution of the judgment and decree in Kakamega SCCCOM E528 of 2025 pending the hearing and determination of the appeal.
- iii. The Applicant shall deposit half the decretal sum in a joint interest-earning account in the names of both advocates for the parties within thirty (30) days from the date hereof.
- iv. That the Applicant shall pay to the Respondent costs of this application assessed at Kshs. 15,000/= within thirty (30) days.
- v. In default of compliance with any of order (iii) and (iv) above, the orders of stay shall automatically lapse.

31. It is so ordered.

Dated, signed, and delivered at Kakamega this 23rd day of April 2026.

**A. C. BETT
JUDGE**

In the presence of:

No appearance for the Appellants

Mr. Mondia for the Respondent

Court Assistant: Polycap