

(f) Costs of this application be costs in the Appeal.

2. The application is grounded by a Supporting Affidavit of even date sworn by the Respondent/ Applicant. The Applicant deponed that this court delivered judgment on 2nd October, 2025 but his erstwhile advocate did not inform him and he only found out on 9th December, 2025. That he requested a copy thereof and instructed the firm of JK Kaptich & Associates Advocates, however, the time for lodging the Notice of Appeal had lapsed by 74 days. The Applicant averred that he has obtained typed proceedings but there is no valid appeal and he stands at risk of being evicted from the suit property while he pursues the intended appeal.
3. The Applicant deponed that his Appeal raises serious triable issues with high chances of success. The Applicant averred that if they are evicted and possession/ownership is altered, the appeal will be rendered nugatory and he will suffer substantial loss and irreparable damage. He urged that the reason for the delay was the wrong communication by his former counsel on record. The Applicant deponed that the Respondents will not suffer any prejudice if this application is allowed. He further deponed that the present application had been brought without undue delay.
4. The Respondents opposed the Application through a Replying Affidavit sworn by the 1st Respondent on 27th January, 2026. She stated that the Applicant's Advocate on record was present in court on 2nd October, 2025 when judgment was delivered. That the Applicant cannot therefore claim he was unaware of it yet he filed a Notice of Appeal on 16th December, 2025. She pointed

out that if the Applicant was truly unaware, he had not stated how he came to know about the judgment.

5. The 1st Respondent deponed that the Appellant had been bragging that he cannot be evicted from the land. She added that there was no proof that the Applicant had obtained typed proceedings. She averred that there is no Appeal filed to suggest that there are serious issues with high chances of success. According to the Respondents, the present application is an afterthought, lacks merit, is made in bad faith and only intended to deny them the fruits of their judgment, thus ought to be dismissed with costs.
6. The Respondents also filed a second Replying Affidavit sworn by David Momanyi Gichana, their advocate on record, dated 28th January, 2026. Mr. Gichana deponed that the Applicant in this application personally attended his office on 2nd October, 2025 where he was formally informed of the outcome of the judgment in the presence of his adult son. He deponed that the Applicant was specifically informed that he was required to vacate the suit property within 90 days from the date of the judgment.
7. Mr. Gichana deponed that the Applicant was issued with a written Client Advice dated 2nd October, 2025 detailing the outcome of the judgment and the consequences thereto. That he has had several follow-up conversations with the Applicant regarding the judgment and the steps required for compliance. He termed the Applicant's allegations that he was not informed of the judgment misleading and factually incorrect, made in bad faith and contradicted by his own written acknowledgment. He

asserted that it was improper therefore for the Applicant to claim non-notification when he was personally served.

Submissions:

8. The court directed that the Application would be canvassed by way of written submissions. The Respondents filed their submissions dated 11th February, 2026 opposing the Motion. On 16th March, 2026 the Applicant's advocate informed the court that he had filed submissions in support of the Application. However, the same are not on the record and could not be traced on CTS. On 27th April, 2026 the Court requested a hard copy of the same from the Applicant's Advocate. The Applicant's Advocate however delivered submissions dated 2nd May, 2026 despite the fact that the said date had not even arrived yet, and which from the CTS, it is clear they were filed on 27th April, 2026.

Analysis and Determination:

9. From the present application, the replying affidavits filed by the Respondents and the submissions made by Counsel for the parties herein, the following issues emerge for determination by this court:-
 - (i) *Whether the firm of J.K Kaptich should be granted leave to come on record for the Respondent/Applicant;*
 - (ii) *Whether the court should extend time for the Applicant to file his Appeal out of time; and*
 - (iii) *Whether the court should grant a stay of execution of the judgment*
 - (iv) *Who shall bear the costs of the present application?*

(a) **Whether the firm of JK Kaptich should be granted leave to come on record for the Respondent/Applicant**

10. The first prayer in the present application is for leave to be granted to the firm of JK Kaptich & Associates Advocates to come on record for the Applicant. In this regard, the said prayer is brought under the provisions of Order 9 Rule 9 of the Civil Procedure Rules. It provides that:-

9. Change to be effected by order of court or consent of parties [Order 9, rule 9]

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

11. The provisions of Order 9 Rule 9 allow the Court to grant leave upon an application with notice to all the parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person. The purpose of the said provision is well explained in **S. K. Tarwadi vs Veronica Muehlemann (2019) eKLR**, where the court held as follows:-

“... the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away...”

12. Further, in **Connection Joint vs Apollo Insurance (2006) eKLR**, Fred Ochieng J (as he then was) held that:-

“... Furthermore, it may be recalled that the mischief which was targeted by the introduction of that rule, was the replacement of advocates who had worked hard to enable a case get to the stage of judgement. In my understanding, some unscrupulous persons used to either appoint new advocates or take over the personal conduct of cases, as soon as judgement had been granted in their favour. Thereafter, the advocates who had been replaced were left chasing after their legal fees, which was not fair to them, especially when the said advocates only learnt about their own replacements, after the same had taken effect.

By making it mandatory for the party who seeks to replace his advocate, after judgement was passed, to apply to the court, with notice to his said advocate, the rules committee addressed two concerns. First, it was no longer possible for the advocate to be taken by surprise, by his ouster, as he had to be served with the application seeking to remove him from record:

secondly, the fact that the court had the opportunity of giving due consideration to the reasons for and against the application, implied that the court was able, if necessary, to impose terms and conditions. For instance, if it transpired that the advocate's fees had not yet been paid, the court could impose appropriate conditions to the order enabling the party to either act in person or alternatively, to engage another advocate...”

13. In view of the above, it is clear that the need for leave to change an advocate after judgment is only meant to cater for the interests of the advocate whom the applicant wants to change. In the instant case, all the way to the point of delivery of judgment in this Appeal, the Applicant herein was represented by the firm of Momanyi Gichana Advocates. The Applicant claims that he has now instructed the firm of J.K Kaptich & Associates Advocates to come on record for him, and it is this firm that has filed the present application on his behalf.
14. Although there is no consent filed by the firm of the outgoing advocate, I note that the said firm is aware of the proposed change. Mr. Gichana from the said firm filed a Replying Affidavit dated 28th January, 2026 denying the allegation that he failed to notify the Applicant of the judgment. Notably, if fees have not been paid, the said advocate is at liberty to employ legal means for recovery of the same. Thus, if the intention of Order 9 Rule 9 is to ensure that the outgoing advocate is not caught unawares by the change in representation, then the Applicant’s erstwhile advocate is well informed of this intended change.

15. Further, the Respondents herein have not adduced any evidence to show that it would suffer any prejudice if the firm of JK Kaptich & Associates Advocates is allowed to come on record for the Applicant. Consequently, leave is hereby granted to the said firm to come on record for the Applicant herein.

(b) Whether the court should extend time for the Applicant to file his Appeal out of time

16. The next issue is whether the court should extend the time for the Applicant to file his Appeal out of time. The timeline for filing an appeal from this Court to the Court of Appeal is prescribed under Rule 77(2) of the Court of Appeals Rules which provides that:-

77. Notice of appeal

(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 subrule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.

17. Under Rule 77(2) above, a person intending to appeal to the Court of Appeal ought to file a Notice of Appeal within fourteen days from the date of judgment or ruling which is subject of the appeal. However, by dint of Section 7 of the Appellate Jurisdiction Act, this Court is clothed with the power to extend time to file an Appeal in the Court of Appeal and provides as follows:-

7. Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.

18. The principles guiding the court while considering an application for extension of time are well settled and there are several authorities on it. The Court of Appeal in **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others (2014) eKLR**, set out the following considerations on extension of time:-

“The court ought to consider the following principles in exercising the discretion to extend time for filing an appeal:

- 1. Extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;***
- 2. A party who sought extension of time had the burden of laying a basis for it to the satisfaction of the court;***
- 3. Whether the court ought to exercise the discretion to extend time, was a consideration to be made on a case to case basis;***
- 4. Whether there was a reasonable reason for the delay, which ought to be explained to the satisfaction of the court;***

- 5. Whether there would be any prejudice suffered by the respondents if the extension was granted;**
- 6. Whether the application had been brought without undue delay; and;**
- 7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.”**

19. As a starting point, extension of time is an equitable remedy that is only available to a deserving party. It must also be understood that the powers of the court in deciding such an application are discretionary and unfettered. In addition, it is upon an applicant to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.
20. Since the court must exercise its discretion in favour of a deserving party, a basis must be laid to the satisfaction of the court that the Applicant is deserving of an order for extension of time. Going by the **Nicholas Kiptoo Arap Korir Salat Case (Supra)**, the court must consider specific circumstances of each case in determining the application.
21. That being the case, the Applicant is required to establish a justifiable reason for the delay in filing the appeal on time by explaining it to the satisfaction of the court. In **Stanley Kahoro Mwangi & 2 others vs Kanyamwi Trading Company Limited (2015) eKLR - Civil Application Nai 287 of 2014 (UR 213/2014)**, the Court of Appeal explained that:-
“It is upon the applicant to place sufficient material before the court which would explain why there was delay in filing the Memorandum and Record of Appeal.

The Court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case M/S Portreiz Maternity vs James Karanga Kabia, Civil Appeal No. 63 of 1997 where the Court stated:

‘That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.’

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 exercised. There have been numerous judicial pronouncements on this precise point. Aganyanya, JA in Monica Malel & Anor vs R, Eldoret Civil Appln No. Nai 246 of 2008, stated:

‘When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show ... the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay’...”

22. The Applicant herein claims that although he was represented by counsel in the Appeal, his advocate did not inform him of the outcome thereof. He claims that he did not find out about the

judgment until 9th December, 2025, but by the time, the Applicant had already run out of time to file the Appeal.

23. The reason given has been refuted by the Respondents and claim that the Applicant's advocate on record was in court on the date of delivery of judgment. That as a result, he cannot claim to have been unaware of the judgment. They have also procured a Supporting Affidavit sworn by David Momanyi Gichana, who had represented the Applicant in the Appeal. Mr. Gichana deponed that he had informed the Applicant of the judgment on the same date it was delivered. He deponed that he even issued the Applicant with a Client Advice detailing the outcome of the Appeal and the impact of the judgment, and he attached a copy of the said letter dated 2nd October, 2025 bearing the Applicant's signature. The Applicant did not file any response refuting these claims.
24. Generally, the mistakes of counsel should not be visited upon an innocent litigant. However, courts may hold a litigant responsible when the litigant fails to demonstrate due diligence in pursuing their case. There is no explanation given why the Applicant did not follow up on the progress of the Appeal for over two months, thereby missing the delivery of the judgment as alleged. Indeed, in the case of **Gaciani & 11 others vs Kimanga & another (Application E004 of 2023) [2023] KESC 23 (KLR) (Civ) (21 April 2023) (Ruling)**, the Supreme Court of Kenya stated thus:

“Whereas mistakes of an advocate ought not to be visited upon a litigant, there must be cogent and credible evidence, the applicants have not demonstrated any efforts or due diligence, through

evidence or correspondence of the follow up with the advocates or to pursue their rights as we found in George Kang’ethe Waruhiu v Esther Nyamweru Munene & another Civil Application No 18 of 2020 [2021] eKLR. It is not enough for a party to simply blame the advocates on record for all manner of transgressions. Courts have always emphasized that parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel, and it does not matter whether the party is literate or not.”

25. Be that as it may, the explanation for the delay, being that the applicant was not informed by his counsel of the delivery of the judgment, has been debunked. The Applicant cannot therefore claim that the failure to abide by the timelines in filing the appeal were attributable to his erstwhile advocates. And since no other explanation was given for this delay, then the court must find that there is no justifiable reason given for the failure in filing the Appeal on time.

26. That aside, the court must also be satisfied that the application for extension of time has been made without inordinate delay. In considering what amounts to inordinate delay, the court in ***Utalii Transport Company Limited & 3 Others vs NIC Bank Limited & another (2014) eKLR*** held that:-

“Whereas there is no precise measure of what amounts to inordinate delay, and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the

subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying Court's mind on the delay, caution is advised for Courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."

27. In this case, it is common ground that the Court's judgment in this matter was delivered on 2nd October, 2025 and the Notice of Appeal was to be filed 14 days thereafter. The Notice of Appeal ought to have been filed on 16th October, 2025. The present Application was filed on 19th December, 2025 over two months later. This court thus finds that the delay in this matter to be inordinate and lacks any plausible explanation.
28. The Applicant's claim that he was not aware of the judgment and only found out about it on 9th December, 2025 has been found to be untrue. But even if the court were to believe the Applicant, the period between 9th December, 2025 and 19th December, 2025 has not been explained to the court. While discussing the period of delay, the Court of Appeal in **Motorways Kenya Limited vs Kenya Engineering Workers Union (2018) KECA 327 (KLR)**, held that:-

"I have carefully weighed the affidavits on record and the submissions of counsel. The period between 1st

March when the notice of appeal was due and 6th March when one was purportedly filed would ordinarily be a viewed as a short one. Any delay, however, even for one day, ought to be explained otherwise it is rendered inordinate. And there lies the 'achilles heel' of this application."

29. No tangible explanation has been offered why the Applicant waited for over two months before bringing this application if indeed he was anxious that he will be evicted from the suit land. This court is of the view that the Applicant was indolent in pursuing the intended appeal.
30. The other criterion is the issue of the chances of the appeal succeeding. The Applicant claims in his supporting affidavit that his appeal raises triable issues with very high chances of success. However, I have scoured the file and note that although the Applicant claims to have filed and served a Notice of Appeal, there is no Notice of Appeal in the court file. The Notice of Appeal annexed to the Application is only signed by the Applicant's Advocate and is yet to be endorsed by the Deputy Registrar of this court. I have also confirmed from CTS that there is no official receipt issued with respect to filing fees for the said Notice of Appeal.
31. Moreover, no draft memorandum of the intended appeal was annexed to the affidavit nor are the grounds even alluded to in the supporting affidavit. As a result, this court is not able determine the possible chances of success thereof. This limb therefore has also not been satisfied.

32. Finally, before extending time for filing an Appeal, the court must also be convinced that the Respondents will not suffer any prejudice if the extension of time is allowed. The Applicant claims that the Respondents herein will suffer no prejudice if the present application is allowed.
33. However, the Respondents have a judgment in their favour that they will not be able to execute if the orders sought herein are granted. The Respondents have been in court in this Appeal since 2024, and before that, the case in the lower court was filed in 2022. The Applicant cannot claim that they will not be prejudiced when they will be forced to remain in the corridors of justice longer and incur further legal expenses, while also being denied the fruits of their judgment.
34. Owing to the above, the Applicant herein has not laid any basis to satisfy this court to warrant the exercise of the court's discretion to extend time for filing the Appeal. Consequently, I find the prayer for leave to appeal out of time is not merited and is hereby disallowed.

(c) Whether the court should grant a stay of execution of the judgment

35. The last issue before the Court is whether there should be a stay of execution of the judgment delivered on 2nd October, 2025. The jurisdiction of this court to issue a grant of stay of execution is found at Order 42 Rule 6 of the Civil procedure Rules, which provides that:-

6. Stay in case of appeal [Order 42, rule 6]

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order

appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such 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 appellant needs to satisfy the Court on the following conditions before he can be granted the stay orders:-
- a. Substantial loss may result to the applicant unless the order is made.
 - b. The application has been made without unreasonable delay, and

c. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

37. The first requirement is that the Applicant must demonstrate that he stands to suffer substantial loss if the judgment is not stayed. In **James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) KEHC 1094 (KLR)**, the court gave the following explanation as regards substantial loss:-

“11. No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma vs Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule

5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

'...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.'

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the CPR only on the chances of the success of the appeal."

38. The Applicant claims that there is a risk that he will be evicted from the suit property if the orders are not issued, and his appeal will be rendered nugatory. Aside from this, the Applicant's has argued that the appeal is arguable with a good chance of success. It is understood that an order of stay of execution is issued to preserve the subject matter of the appeal. However, the order can only issue where there is a valid Appeal before the court, which the Applicant can then claim will be rendered nugatory, and thus he will suffer substantial loss.
39. But this court has established that the Notice of Appeal herein was not filed in court. The Applicant himself has deposed in at paragraph 8 of the Supporting Affidavit that there is no valid Appeal pending in court at this point. Aside from that, the application to extend time to file the Appeal has been found to be without merit. In the absence of a valid Appeal, the Applicant herein cannot be heard to say that he will suffer substantial loss, or that his appeal will be rendered nugatory.

40. Besides, the court has already considered the requirement of undue delay, and found that there was delay in bringing this application, which delay has not been explained. For these reasons, the Applicant has not satisfied this court that he is entitled to the order of stay sought herein. As a result, this court finds that the Applicant has not satisfied any of the conditions necessary for grant of an order of stay of execution.

(d) Who shall bear the costs of the present application?

41. Turning to the issue of costs, Section 27 of the Civil Procedure Act provides that while costs are awarded at the discretion of the court, they shall follow the event. The Applicant brought this application, but has been unable to demonstrate that he is entitled to the orders sought. Having failed to successfully prosecute his application, the Applicant will be condemned to pay the costs hereof.

Orders:-

42. In the end, the court hereby makes the following orders in determination of the present application:-

(a) That save for prayer (b), the Respondent/Applicant's Notice of Motion dated 17th December, 2025 is without merit and is hereby dismissed.

(b) The Respondent/Applicant shall bear the costs of this application.

43. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at **ELDORET** on this **30TH** day of **APRIL, 2026** vide Microsoft Teams.

**HON. C. K. YANO
ELC, JUDGE**

In the presence of;

Mr. B. I. Otieno for the Respondent/Appellants.

Mr. Collins Kigen for the Respondent/ Applicant.

Court Assistant - Laban.

ORIGINAL