

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CIVIL MISC. APPLICATION NO E134 OF 2025**

SARA AMAKOBE NGOTE (suing as an administrator of the estate of COLLINS YONAM ESHIWANI)-----  
APPLICANT

VERSUS

JABEL MUHSEN ALAI-----1<sup>ST</sup>  
RESPONDENT

BEN KIPROTICH SERONEY-----2<sup>ND</sup>  
RESPONDENT

**RULING**

1. Vide a notice of motion application dated 8<sup>th</sup> August 202A, the Applicant herein moved this court seeking the following orders;
  - a) *That there be a stay of judgment in KAKAMEGA CMCC NO. 28 OF 2019*
  - b) *THAT the Honourable Court be pleased to grant leave to the appellants to file an appeal out of time against the judgment in KAKAMEGA CMCC NO. 28 OF 2019*
  - c) *That cost be provided for.*
2. The application was supported by the affidavit of the applicant, who averred that she had instituted a suit at the lower court seeking general damages, which was dismissed on 11/06/2025 by Hon. Vienna Amboko
3. She asserts that she intended to institute an appeal at the high court but was advised by her advocate to wait for the lower court typed proceedings as well as fees to file the appeal; however, at the time, she had to search for the funds to institute the appeal.

4. According to the applicant, by the time she found the cash to file the appeal, the time for filing the appeal had lapsed, locking her out of the appeal process.
5. She invoked the jurisdiction of this court to grant leave to file an appeal out of time. She contends that she has an arguable appeal with a high chance of success and prays that the leave be granted in the interest of justice.
6. The application was canvassed by way of written submissions.
7. At the time of writing this judgment, the respondent had not filed their submissions.

#### **Appellants submissions**

8. In their submission dated 9<sup>th</sup> December 2025, the applicant raised three issues for determination on the leave to extend the appeal period; they quoted section 79 G of the Civil Procedure Act. They aver that they had to satisfy that they had a good and sufficient cause and relied on the principle in **Diplack Kenya Limited vs. William Muthama Kitonyi (2018)** on seeking enlargement of time.
9. She avers that she delayed in filing the appeal as there was intermittent system failure and further that she lacked the resources to file the appeal on time, stating that the delay is less than 20 days, hence it's excusable.
10. On the prayer for stay of execution, they relied on order 42 rule 6 of the Civil Procedure Rules and aver that if the appeal is not granted, the appeal would be rendered nugatory and if allowed the

respondent would execute the costs and considering she had meagre earnings, it would disadvantage her.

11. They pray that the application be allowed in the interest of justice.

**Determination**

12. I have considered the application, the supporting affidavit, and the submission filed as well as the authorities relied upon.

13. 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.***

14. The applicant seeks an enlargement of time to file the appeal which she attributes the delay to intermittent service failure as well as her inability to raise the funds to file the appeal on time.

15. In **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others**, the Supreme Court restated the principles governing extension of time in Kenya. The court held that extension of time is not a right of a

party, but an equitable remedy available at the discretion of the court. The Applicant must therefore demonstrate a satisfactory reason for the delay, show that the application has been brought without undue delay, and persuade the court that no prejudice will be occasioned to the other side. The court also underscored that each case must be considered on its own peculiar facts, and that the overarching consideration is whether the interests of justice would be served.

16. In the present case, the applicant states that the judgment was delivered on 11<sup>th</sup> June 2025 while the application was filed on 8<sup>th</sup> August 2025 . the delay of less than 20 days cannot be termed as inordinate.

17. On the reasons for the delay, it was her assertion that she was financial restarined and was looking to find funds to file the appeal, While lack of funds alone may not ordinarily suffice, courts have taken a pragmatic approach where the delay is short and sufficiently explained. In **Diplack Kenya Limited v William Muthama Kitonyi [2018] eKLR,** the court emphasized that the overarching consideration is whether justice would be served by extending time.

18. This Court is persuaded that the explanation tendered, coupled with the relatively short delay, constitutes sufficient cause within the meaning of Section 79G

19. The second issue for determination is whether this court should grant stay of execution pending appeal. For the stay to be allowed, the applicant must demonstrate;
- a) The application was made without unreasonable delay
  - b) They will suffer substantial loss unless the stay is granted.
  - c) Security for the due performance of the decree
20. It is undisputed that the judgment was rendered by Hon. Vienna Amboko on 11<sup>th</sup> June 2025 while the application for stay filed on 08<sup>th</sup> August 2025. The delay was less than a month hence the delay cannot be termed as inordinate.
21. On the substantial loss. The applicant avers that the Respondent would claim for costs and given her financial constraints she would be unable to pay. While execution for costs alone does not automatically constitute substantial loss, the Applicant has deposed that she has meagre means and would suffer prejudice.
22. The Courts must balance the rights of both parties. In **Kenya Shell Limited v Benjamin Karuga Kibiru & Another [1986] eKLR**, the Court emphasized that substantial loss is the cornerstone of the jurisdiction for granting stay.
23. Given that the appeal has not yet been filed and considering that the decree relates primarily to costs, this Court finds that an order for stay can issue on condition that appropriate security is furnished.

24. In the result, and in the interest of justice, the Notice of Motion application dated 8<sup>th</sup> August 2025 is allowed on the following terms:

a) Leave is hereby granted to the Applicant to file an appeal out of time against the judgment in Kakamega CMCC No. 28 of 2019.

b) The intended appeal shall be filed and served within fourteen (14) days from the date hereof.

c) There shall be a stay of execution of the judgment and decree in Kakamega CMCC No. 28 of 2019 pending the hearing and determination of the intended appeal, on condition that the Applicant deposits security for costs in the sum of Kshs. 50,000/= within thirty (30) days.

d) In default of compliance with (c) above, the order of stay shall lapse automatically.

e) Costs of the application shall abide the outcome of the appeal.

f) Mention 19.6.2026 on the Appeal for directions.

25. Right of Appeal 30 days.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30<sup>TH</sup> DAY OF APRIL, 2026.**

**S.N MBUNGI**

**JUDGE**

**In the presence of:-**

**CA: Velma/Angong'a**

The Applicant present.

Respondent, absent.