



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION NO. E030 OF 2026

MR. LEUNIDAH TEMBA

APPLICANT

AND

BENARD IMONJE CELEBWA

RESPONDENT

(Being an application for leave to appeal out of time against the judgment and decree of Hon. J. N. Maragia (Senior Resident Magistrate) in Butali MCCC No. 229 of 2023 dated and delivered on 3rd September 2025)

RULING

1. Before this court for determination is a Notice of Motion application dated 24th March 2026. The Applicant seeks, inter alia:-
 - 1) *Spent.*
 - 2) *THAT the Honourable Court be pleased to extend tin-re for lodging of a Memorandum of Appeal against the Judgment of*

the Hon. Josephine Nyatuga Maragia (SRM) in 2023 BENARD IMONTE CELEBWA -vs- MR. LEUNIDAH TEMBA.

- 3) *THAT the Draft Memorandum of Appeal dated 24th March, 2026 be deemed as properly filed upon payment of the requisite Court fees.*
 - 4) *Spent.*
 - 5) *THAT pending the hearing and determination of the intended appeal herein, there be a stay of execution of the judgment delivered on 3rd September, 2025 in BUTALI CMCC 229 of 2023 BENARD IMONJE CELEBWA -vs- MR. LEUNIDAH TEMBA.*
 - 6) *THAT this Honourable Court allow the Applicants to furnish the Court with security in the form of a Joint Account Deposit for the whole sum of Kshs. 1,213,250/=.*
 - 7) *THAT the costs of and incidentals to this application abide the result of the Appeal.*
2. The application is supported by the Applicants affidavit, sworn on the same date in which he avers that he was unable to obtain a copy of the judgement that immediately it was delivered, and that thereafter it took time for him to hold deliberations with his insurers and the investigators who were commissioned to inquire into the accident thereby leading to the delay.
 3. The Respondent filed an affidavit in opposition in which he averred that the Applicant was well aware of the Judgement but took no action to settle the decree, that he did not demonstrate that the

Respondent is impecunious and unable to refund the decretal amount in the event the appeal is successful and that the appeal would be rendered nugatory unless an order of stay is granted. He further deposed that the Applicant had not given sufficient reasons to warrant extension of time and that as a successful party, he ought to be allowed to enjoy the fruits of his judgement.

4. The application was canvassed through written submissions which I have considered.

Analysis and Determination

5. Having considered the application, the affidavits and submissions in support thereof, I find that there are two main issues for determination, being:-
 - a) *Whether the Applicant has met conditions for the grant of leave to file the Memorandum of Appeal out of time.*
 - b) *Whether the Applicant has satisfied the conditions under Order 42 Rule 6(2) of the Civil Procedure Rules for the grant of a stay of execution pending appeal.*
6. Section 79G of the Civil Procedure Act stipulates that an appeal from the subordinate court to be filed within 30 days of the date of judgment or order and states:-

“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.”

7. In determining whether to grant an Applicant leave to file an appeal out of time based on Section 199 of the Civil Procedure Act, which requires an applicant to show “good and sufficient cause”, the court needs to consider four factors:-

- (a) The length of the delay.
- (b) The reasons for the delay.
- (c) The chances of the appeal succeeding.

(d) The degree of prejudice to the Respondent if the application is allowed. See **Thuita Mwangi v. Kenya Airways Limited [2002] KECA 100 (KLR)**.

8. The principles that govern this court when exercising its discretion are under section 3A of the Civil Procedure Act and the court has unfettered discretion to extend time provided good and sufficient cause is shown by an applicant for the failure to file the appeal within time. In **Leo-Sila Mutiso Vs. Rose Hellen Wangari Mwangi Civil Application No. 251 Of 1997 At Nairobi**, it was stated that the court has a wide discretion which is to be exercised judiciously, taking into account the reason for the delay, the

duration of the delay, the likely prejudice to the Respondent and possibly the chances of appeal.

9. The Supreme Court in ***Nicholas Kiptoo Korir Arap Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR*** further laid down the guiding principles that a court must consider when exercising discretion to extend time. These include: (a) the length of the delay; (b) the explanation for the delay; (c) the degree of prejudice to the other party; and (d) whether the intended appeal raises arguable points. The court emphasized that the discretion must be exercised judiciously and not capriciously.
10. Applying those principles to the present case, the impugned judgment was delivered on 3rd September 2025. The 30 days' period for filing the appeal expired on or about 2nd October 2025. The present application was filed on 24th March 2026, a delay of approximately four months. A period of over four months is, on the face of it, inordinate, considering the strict timelines set by the Act, and it was therefore upon the Applicant to offer good and sufficient reasons why the court should grant leave out of time.
11. According to the Applicant, the delay was caused by the fact that he had to obtain a copy of the judgement and further hold deliberations with his insurers and investigators before reaching a decision to appeal by which time the timelines for filing appeal had long lapsed.

12. Looking at the Applicant's affidavit, it is apparent that the Applicant took a casual approach towards his case. He has not advanced any reason as to why it took them four months to arrive at a decision to file appeal and has not specified on which exact date he received a copy of the judgement which in the ordinary course of court proceedings, is normally available within 24 hours from the date of delivery. The delay has definitely prejudiced the Respondent but the prejudice can be ameliorated through an order for costs.
13. On whether the intended appeal is arguable, the Applicant has demonstrated that the intended appeal is not frivolous. It raises points that, if successful, could materially alter the outcome of the suit. This court is not required at this stage to delve into the merits of the appeal, but is satisfied that the grounds are arguable.
14. In the spirit of substantive justice and to promote the Appellant's right to be heard on appeal, the application for leave to appeal out of time, the application is allowed.

Stay of Execution

15. The legal requirements for stay of execution are provided under Order 42 Rule 6(2) of the Civil Procedure Rules. The Applicant must demonstrate:-
 1. *Substantial loss may result unless the order is made.*
 2. *The application has been made without unreasonable delay;*
 3. *Security for the due performance of the decree has been provided.*

16. Substantial loss was explained in the case of **James Wangalwa & Another v. Agnes Nalika Cheseto [2012] KEHC 1094 (KLR)** where the court held:-

“...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 V 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.”

17. It is common ground that a judgement was delivered more than four months before this application was filed. The Respondent, being the decree holder has a right to execute the decree. The Applicant did not depone that the Respondent is impecunious and unable to refund the decretal amount in the event of a successful appeal. However, he has deponed that the Insurer is willing to deposit the entire decretal amount as security for the stay. This is a critical safeguard that eliminates any real prejudice to the Respondent.
18. The Respondent has a judgement and decree in his favour which has not been satisfied six months down the line. He is entitled to enjoy the fruits of his judgement in a timely manner as justice delayed is justice denied.
19. Weighing all the factors, the balance of convenience tilts in favour of granting the stay. The Applicant has partially satisfied the requirements of Order 42 Rule 6(2).
20. From the foregoing analysis, the Applicant's Notice of Motion dated 7th November 2025 is allowed and the court makes the following orders:-
 - (i) The Applicant is granted leave to file and serve the Memorandum of Appeal together with the Record of Appeal within fourteen (14) days from the date of this ruling.
 - (ii) Execution of the judgment and decree of the Senior Resident Magistrate dated and delivered on 3rd September 2025 in

Butali MCCC No. 229 of 2023 is hereby stayed pending the hearing and determination of the appeal.

- (iii) The Applicant shall pay to the Respondent half of the decretal amount within thirty (30) days from the date of this ruling.
- (iv) The Applicant shall deposit the remaining half of the decretal amount in a joint interest earning account within thirty (30) days from the date of this ruling.
- (v) In default of compliance with either clause (iii) or (iv) of this order, the stay shall automatically lapse.
- (vi) The costs of the application shall be borne by the Applicant.

Dated, signed and delivered at Kakamega this 15th day of May 2026.

**A. C. BETT
JUDGE**

In the presence of:

Ms. Kinyanjui for the Applicant

Ms. Muriithi for the Respondent

Court Assistant: Polycap