



**Frodak Kenya Limited v Simon (Miscellaneous Application
E009 of 2024) [2025] KEELRC 1456 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1456 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
MISCELLANEOUS APPLICATION E009 OF 2024**

DN NDERITU, J

MAY 15, 2025

BETWEEN

FRODAK KENYA LIMITED APPLICANT

AND

PETER LUPANGA SIMON RESPONDENT

RULING

I. Introduction

1. In a decree dated 27th November, 2024 the respondent was awarded Kshs129,638/= in compensation and Kshs137,210/= in costs as against the applicant in Butali CMC ELR No.1 of 2018.
2. In a notice of motion dated 16th December, 2024 [the application], the applicant is seeking orders that –
 - i. Spent.
 - ii. This Honourable Court be pleased to grant leave to the applicant/judgment-debtor to appeal out of time against the judgment of the Hon. Reuben S. Kipngeno[PM] delivered on the 28th of October,2024 in Butali CMELRC 1 of 2018.
 - iii. The said leave do operate as a stay of all proceedings therein.
 - iv. The costs of this application be provided for.
3. The application is expressed to be founded on Sections 3A,75,78 & 79G of the *Civil Procedure Act* [Cap 21] and Order 50, Rule 6 of the Civil Procedure Rules, 2010. It is based on the grounds on the face of it.
4. The application is supported with the affidavit sworn by Fredrick Otieno Onyango, a director of the applicant, on 16th December, 2024 with several annexures thereto.



5. In opposition to the application, the respondent filed the grounds of opposition dated 31st January, 2024.
6. By consent, the court directed that the application be canvassed by way of written submissions.
7. The applicant's counsel, Ms. Achieng, filed her written submissions on 13th February, 2025 while the respondent's counsel, Mr. Kagunza, filed on 4th March, 2025.

II. Evidence

8. In the supporting affidavit, it is deponed that the trial court in Butali CM ELRC No. 1 of 2018 delivered a judgment [FO1] on 28th October, 2024 with which the applicant was dissatisfied.
9. It is deponed that the applicant instructed the law firm of Okong'o Wandago & Company Advocates on 9th December, 2024 [FO2], in place of Achieng Twena & Associates, to file an appeal but time had run out.
10. It is deponed that the intended appeal as expressed in the draft memorandum of appeal [F02] is arguable, not frivolous, and has high chances of success. It is further deponed that the application has been made without undue delay and the applicant pleads to be allowed to exercise its right of appeal.
11. In the grounds of opposition, the respondent argues that the application is not urgent, it is incompetent and an afterthought, and that the applicant has not demonstrated a good and sufficient cause for having not filed the appeal within the time allowed.
12. It is advanced that the intended appeal raises no arguable issues and that the application was filed after an inordinate and inexcusable delay. It is further argued that the applicant is guilty of material non-disclosure and only intends to delay the conclusion of the litigation.
13. The respondent argues that the application is defective for having not attached the decree/order appealed and hence the same should be dismissed.

III. Submissions

20. Counsel for the applicant submitted globally that under Section 79G of the *Civil Procedure Act* and the holding in *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR; *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecutions & 3 others*[2015]eKLR, and *Stecol Corporation Limited v Susan Awuor Mudemba* [2021] eKLR, the court in granting leave to file an appeal out of time ought to consider the following - the length of the delay; the reason for the delay; the chances of the appeal succeeding if the leave is granted; and, the degree of prejudice that the respondent may suffer if the application is allowed.
21. It is submitted that the application has been brought without inordinate delay as the applicant upon instructing its new advocates filed the present application for leave to file the appeal out of time following the failure by its former advocates to file the appeal on time. Relying on Article 48 & 50[1] of *the Constitution*, the applicant submits that its right to access justice and its right to an impartial and fair hearing should not be hindered.
22. It is submitted that the respondent has not proved the alleged material non-disclosure by the applicant. It is submitted that the respondent shall suffer no prejudice if the application is allowed.
23. On the other hand, the respondent's counsel submitted on two issues – Whether the court should exercise its discretion and grant the applicant leave to file an appeal out of time; and, Whether an order of stay of execution pending appeal should issue.



24. On the first issue, it is submitted that although the court has the discretion under Section 79G of the *Civil Procedure Act* to grant leave for a party to appeal out of time, the applicant must satisfy the court of a good reason for failing to file within time.
25. Citing *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR, counsel reiterated the factors that the court needs to consider in granting leave to file an appeal out of time. They include – the length of the delay; the reason for the delay; the chances of the appeal succeeding if the leave is granted; and, the degree of prejudice that the respondent may suffer if the application is allowed.
26. Further, citing *Telkom Kenya Limited v John Ochanda & 996 others* [2015] eKLR, it is submitted that the court’s discretion should be exercised based on the material evidence placed before it.
27. It is submitted that the delay in filing the appeal is 46 months which delay has not been sufficiently explained to justify the prayer for extension of time to appeal.
28. On the second issue for stay of execution pending appeal, it is submitted that although the applicant argues that the intended appeal was arguable by dint of Order 42 Rule 6 [1] of the Civil Procedure Rules, in the absence of any such appeal in existence, the stay orders cannot issue. Citing *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR, the court is invited to weigh the rights of the applicant to enjoy the fruits of the judgment delivered in his favour and the prospect of not rendering the intended appeal nugatory, and find the application non-meritorious.

IV. Analysis & Determination

20. The court has carefully read and considered the application, the affidavit in support, the replying affidavit, and the written submissions by counsel for both parties, alongside all the cited authorities. The following issues commend themselves to the court for determination – Whether the applicant is deserving of an extension of time to lodge an appeal out of time as prayed; and, Whether an order for stay should issue?

V. Leave to file Appeal Out Of Time

20. This limb of the application is based on Section 79G of the *Civil Procedure Act* which 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 [Emphasis added]

20. Rules 12 & 18 of *Employment and Labour Relations Court [Procedure] Rules, 2024* [The Rules] mirror Section 79G of the *Civil Procedure Rules* providing that –

12 [1] Where a written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified under that written law. [2] Where an appeal is from a magistrate’s court or where no period of appeal is specified in the written law referred to in sub-rule [1], the appeal shall be filed within thirty days from the date the decision is delivered.



18. The Court may, if circumstances justify, extend the time prescribed for the filing of an appeal or any document relating to an appeal. [Emphasis added]
20. The Supreme Court in *Nicholas Kiptoo Korir Salat v IEBC & 7 others* [2014] eKLR laid down the principles that a court should consider in the exercising the discretion to extend the time for filing an appeal –
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.
 5. The delay should be explained to the satisfaction of the Court; 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; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
20. The applicant argues that the delay in filing the appeal on time was occasioned by its previous counsel who failed to file an appeal within the statutory timeline, which prompted the applicant to instruct a new counsel who has now filed the present application seeking leave to extend time for the applicant to file an appeal. It is argued that the delay was occasioned by the change of advocates. It is advanced that the present application has been brought without undue delay.
21. The respondent opposes the application and argues that the delay is inexcusable and that the application is filed with the intention of delaying the conclusion of the proceedings. It is asserted that the intended appeal has no probability of success.
22. The judgment in the lower trial court was delivered on 28th October 2024, and the present application was filed in court on 18th December, 2024. The applicant had up to 28th November, 2024 to file an appeal without leave after the judgment in the lower trial court was delivered. The present application was lodged approximately one month and 21 days after the judgment. The applicant has explained that the delay was occasioned by the change in representation. The court finds and holds that the delay is excusable as the same has been reasonably explained.
23. The court has further perused the draft memorandum of appeal and finds and holds that, prima face, the same raises arguable issues and, as such, the applicant has demonstrated that the intended appeal has a chance of success.
24. As to the prejudice that the respondent may suffer if leave is granted to the applicant to file an appeal out of time, the respondent will certainly have an opportunity to respond to the appeal once filed and stay orders do not extinguish a party's entitlements to a judgment, but rather only delays the enjoyment to a future time. Delay is not denial.



VI. Stay Of Execution

20. The applicant wishes that the leave granted to file the appeal out of time, operate as a stay of execution proceedings. The respondent, on the other hand, posits that the applicant has not met the threshold for grant of a stay as no appeal has been filed to warrant the stay of execution.
21. The principles guiding the grant of stay of execution pending appeal are well settled. These principles are provided for under Order 42 Rule 6[2] of the *Civil Procedure Rules* which provides –
- “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.”
20. Further, a stay may only be granted for sufficient cause. Based on the overriding objective stipulated in Sections 1A and 1B of the *Civil Procedure Act* the Court is no longer limited to the above provisions. Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. The court should aim at rendering substantive justice as opposed to being tied by strict rules of procedure and restrictive interpretation of the law.
21. Section 1A [2] of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.” Under section 1B some of the aims of the said objectives are to ensure – “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
22. As to what substantial loss means, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR that –
- “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. 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.”
20. On his part, the respondent has argued that the applicant has not demonstrated the availability of an arguable appeal from the draft memorandum of appeal attached to the application, since the appeal is yet to be filed in the first place. The respondent further asserts that the applicant has inordinately delayed in coming before this court and objects to the grant of stay.



21. In *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal gave guidance on how a court should exercise its discretion in an application for stay of execution and held that –
- “ 1. the power of the court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle is granting or reusing a stay is: If there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge ‘s discretion[sic] [trial court judgement].
 3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.
 4. The court in exercising its powers under order XLI rule 4 [2] [b] of the *civil procedure Rules* can order security upon application by either party or on its own motion. Failure to put security of costs as ordered with cause the order for stay of execution to lapse”.
20. A copy of the judgment against which the appeal is intended is attached to the application. The respondent has not given any evidence on his ability to repay the decretal sum in case the appeal ultimately succeeds. While the applicant has not pleaded or submitted on whether it shall suffer any substantial loss, the respondent’s means or resources of income remain completely unknown and the court cannot ascertain whether the respondent shall be able to repay the decretal sum in case the intended appeal ultimately succeeded. In that event the success of the appeal shall be rendered nugatory if the respondent shall have no a capacity to refund the decretal sum.
21. The court is satisfied that there has been no inordinate delay in the filing of the application as the judgment appealed was delivered on the 28th October, 2024 and the application was filed a month and 21 days later.
22. Taking all factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objectives, the court shall grant the stay of execution prayed for pending the filing and determination of the intended appeal. The stay of execution shall be subject to the applicant depositing in court, within 30 days, the entire decretal sum plus costs in the judgement as security for the due performance of the decree or order as may ultimately be binding upon it, failing which the stay shall automatically lapse.

VII. Order

20. The court orders that –
- i. The application dated 18th December, 2024 is merited and is hereby allowed.
 - ii. The applicant shall file the intended appeal within 60 days of this ruling and thereafter take a mention date for directions on the hearing and disposal of the appeal.
 - iii. The court grants a stay of execution on the following conditions –
 - a. The applicant shall within 30 days of this ruling deposit the entire decretal sum plus costs in court.



iv. Costs shall abide with the appeal.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 15TH DAY OF MAY, 2025.

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DAVID NDERITU

JUDGE

