



Kemboi (Suing as the Legal Representative of the Late Jonathan Kipkemboi Chepkong'a) v Kimaiyo (Environment and Land Miscellaneous Application E022 of 2024) [2024] KEELC 6293 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6293 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E022 OF 2024
JM ONYANGO, J
SEPTEMBER 25, 2024

BETWEEN

AMON KIPROTICH KEMBOI (SUING AS THE LEGAL REPRESENTATIVE OF THE LATE JONATHAN KIPKEMBOI CHEPKONG'A) APPLICANT

AND

PHILIP KORIR KIMAIYO RESPONDENT

RULING

1. The court was moved vide a Notice of Motion dated 21st May 2024 supported by the affidavit of Amon Kiprotich Kemboi sworn on even date, under inter alia section 79G of the [Civil Procedure Act](#) seeking the following Orders:
 1. Spent.
 2. There be temporary stay of execution of the Judgment/decree and or orders of the trial court in Eldoret Chief Magistrate Court Civil Case Number 801 of 2011, Philip Korir Kimaiyo Versus Amon Kiprotich Kemboi (Sued as the Legal Representative of the late Jonathan Kipkemboi Chepkong'a) pending inter parties hearing and final determination of this application.
 3. There be temporary stay of execution of the Judgment/decree and or orders in Eldoret Chief Magistrate Court Civil Case Number 801 of 2011, Philip Korir Kimaiyo Versus Amon Kiprotich Kemboi (Sued as the Legal Representative of the late Jonathan Kipkemboi Chepkong'a) pending hearing and final determination of the intended Appeal.
 4. The Applicant be and is hereby granted leave to file Appeal out of time against the Judgment/ order/ decree made in Eldoret Chief Magistrate Court Civil Case Number 801 of 2011, Philip Korir Kimaiyo Versus Amon Kiprotich Kemboi (Sued as the Legal Representative of the late Jonathan Kipkemboi Chepkong'a).



2. The application was opposed by the replying affidavit of Philip Korir Kimaiyo sworn on 18th June 2024.
3. The parties were directed to canvass the application by way of written submissions and they both complied accordingly.

Applicant's Submissions

4. The Applicant's submissions filed on 23rd July 2024 were primarily premised on two main issues:
 - a. Stay of Execution
 - b. Extension of time to file an appeal.
5. On the first issue the applicant argued that they were aggrieved by the trial court's judgment in Eldoret Chief Magistrate Court Civil Case Number 801 of 2011, Philip Korir Kimaiyo Versus Amon Kiprotich Kemboi (Sued as the Legal Representative of the late Jonathan Kipkemboi Chepkong'a) and wished to appeal the same.
6. Counsel for the applicant claims that they experienced difficulties in obtaining certified typed proceedings and copies of the judgment and were consequently unable to file the intended appeal within the requisite time.
7. The learned counsel for the applicant further argued that neither the applicant nor themselves were served with the respondent's Bill of Costs dated 18th May 2024 which was assessed at Ksh.233,666/- (hereinafter the Bill of Costs).
8. The applicant urged the court to rely on the finding in *RWW v EKW* [2019] eKLR where the Court held that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the Appellant with those of the Respondent.”
9. It is the applicant's argument that they meet the criteria for a grant of stay of execution. Firstly, they argued that should the Respondent proceed to execute the aforementioned judgment, he stands to suffer substantial loss and damage since the Respondent failed to serve them with the Bill of Costs.
10. Secondly, the applicant argued that they experienced difficulty obtaining the certified copies of the typed proceedings. Counsel for the applicant argues that they wrote to the court severally requesting the certified copies of the typed proceedings and only managed to obtain the same on 21st May 2024.
11. The Applicant urged the court to rely on the Supreme Court decision in *Babayao v Republic (Petition (Application) 2 of 2020)* [2020] KESC 11 (KLR) (23 September 2020) (Ruling) where the Court held:

“We also find that the Petitioner/Applicant has provided sufficient grounds and reasons for the delay in filing the Supplementary Record of Appeal as the delay in obtaining the order



and certified typed copies of proceedings from the Court of Appeal is an administrative issue that cannot and should not be held against the Petitioner/Applicant;...”

12. The Applicant argues that he made every effort to obtain the certified typed proceedings and is consequently not guilty of undue delay and should not be penalized for the lethargy of judicial staff.
13. On the final condition for a stay of execution, the applicant argues that he is willing to abide by whatever terms the Honourable Court may stipulate as it relates to security in accordance with Order 42 Rule 6(2)(b).
14. The Applicant argued for extension of time to appeal and argued that Section 79G of the Civil Procedure Act should be interpreted by bearing in mind Section 7(1) of the Sixth Schedule of the Constitution and Article 159(2)(d) of the Constitution.
15. Counsel for the Applicant placed reliance in Raila Odinga Vs Independent Electoral and Boundaries Commission & 4 Others [2013] eKLR and urged the court to limit itself in considering whether a justiciable cause has been shown to warrant exercise of its discretion in favour of the applicant.
16. The Applicant urged the court to be guided by Nicholas Kiptoo Arap Korir Salat vs I.E.B.C & Others, S.C Application No. 16 Of 2014, where the Supreme Court laid down the following principles that should guide a Court in exercising its discretion to extend time:
 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. The delay should be explained to the satisfaction of the Court;
 5. 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; ...”
17. It is the Applicant’s argument that he is in compliance with the above mentioned principles and that he has established on a balance of probabilities that there exists sufficient reason to warrant an extension of time for him to file his intended appeal.
18. The Applicant reiterates that the delay in filling the intended appeal was occasioned by the difficulty in obtaining the certified copies of the typed proceedings and judgment. Counsel for the Applicant elucidates the manner in which the principles established in Nicholas Kiptoo Arap Korir Salat (Supra) were met fundamentally basing their argument on the procedure in which the Bill of Costs was obtained and the lack of proper service thereafter.
19. Counsel for the Applicant argues that the application herein was made at the earliest opportunity and that based on the draft Memorandum of Appeal, it is apparent that the Applicant has an arguable appeal that has extremely high chances of success and which appeal will be rendered nugatory should the instant application not be allowed as prayed.



Respondent's Submissions

20. The Respondent filed their submissions opposing the application dated 21st May 2024 arguing that the Applicant did not file an appeal against the judgment within the stipulated period of thirty (30) days as provided under Section 79G of the *Civil Procedure Act* Cap 21 Laws of Kenya.
21. The Respondent contends that the delay of more than six months from the judgment to the filing of the application is unreasonable, excessive, and unjustified. Counsel for the Respondent argues that the Applicant has not provided sufficient reasons to warrant an extension of time to file the intended appeal.
22. Counsel for the Respondent argues that that contrary to the Applicant's depositions in paragraphs 8, 9, 10 and 11 of the Supporting Affidavit sworn on 21st May 2024, he did not require to have the typed proceedings for him to file a Memorandum of Appeal as envisaged under Order 42 Rule 1, 2 and 3 of the Civil Procedure Rules.
23. The Respondent further contends that the application for stay of execution does not meet the requirements set out under Order 42 Rule 6 (2) (a) and (b) of the Civil Procedure Rules.
24. The Respondent pointed out that the 6-month delay between the judgment and the filing of the application is unreasonable. He further contended that the Applicant bears the burden of demonstrating that substantial loss would ensue if the stay of execution is not granted, a burden which the Applicant has not adequately met.
25. The Respondent relied on the case of Joseph Odide Walome v David Mbadi Akello [2022] eKLR and affirms his assertion in paragraph 11 of the replying affidavit that he has the financial means to refund the decretal sums.
26. Essentially, it is the Respondent's argument that the Applicant will not suffer any substantial loss in the unlikely event the intended appeal succeeds as the Respondent is capable of refunding the decretal sums.
27. Finally, the Respondent contended that the application is without merit, is an afterthought, and is simply intended to delay or hinder the Respondent from enjoying the fruits of his judgment. He further argued that the application dated 21st May 2024 should be dismissed with costs awarded to the Respondent.

Issues for Determination

28. Having examined the application, the replying affidavit in response to the application and the parties' respective submissions, the following issues emerge for consideration:
 - i. Whether a stay of execution of judgment/ decree should be granted
 - ii. Whether the application for leave to appeal out of time is merited
 - iii. Who should bear the costs

Analysis

 - i. Whether a stay of execution of judgment/ decree should be granted
29. The court possesses the discretion to grant a stay of execution of a decree pending appeal under Order 42 Rule 6 of the Civil Procedure Rules, but this discretion must be exercised with careful consideration and fairness.



30. The Applicant herein sought the order for stay of execution pursuant to Order 42 Rule 6 of the Civil Procedure Rules, which stipulates that:
1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 Applicants 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 Applicants”.
31. It is imperative to emphasize that the fulfillment of these conditions is not merely procedural but essential to balancing the interests of both parties.
32. The court must diligently assess the evidence of substantial loss and the timeliness of the application, alongside the provision of security, to ensure that the stay is not granted capriciously, but rather on a foundation of demonstrated necessity and equitable assurance.
33. The first consideration is to determine whether the Applicant stands to suffer substantial loss in case the stay is not granted. On this issue, the Applicant urged the court to be guided by the decision in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR where the court pronounced itself in the following terms:
- “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...
- ... 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.”
34. The Applicant’s main argument on the substantial loss he stands to suffer essentially hinges on the procedure in which the Bill of Costs was obtained by the Respondent and further the alleged lack of service of the same.
35. Such an argument is inadequate in demonstrating substantial loss as it fails to establish concrete evidence of actual or imminent loss that would result if the stay of execution is not granted. The court requires a clear and substantive evidence of the specific harm that the applicant would suffer, beyond procedural grievances, to justify a stay.
36. Consequently, the Applicant falters at the very first hurdle, and the stay of execution cannot be granted. Thus, the court need not examine the other conditions established in Order 42 Rule 6. Nonetheless



the delay in filing the application which has not been explained to the satisfaction of the court also works against the Applicant.

ii. Whether the application for leave to appeal out of time is merited

37. The Applicant is seeking leave to appeal out of time primarily anchored in 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.”

38. Thus, in order for an appeal to be admitted out of time, the Applicant must convincingly demonstrate to the court that there were legitimate and substantial reasons for the delay, which were beyond their control and justified the failure to file the appeal within the prescribed period.

39. The Applicant urged this court to be guided by the principles espoused by the Supreme Court in Nicholas Kiptoo Arap Korir Salat (Supra) which underscore that the extension of time is not a guaranteed right but an equitable remedy granted at the court’s discretion, reserved only for parties who can substantiate their request.

40. It is the applicant’s duty to offer a robust justification for the delay, demonstrating a reasonable and justifiable cause, and showing that the application was made promptly without causing undue prejudice to the respondent.

41. The court must carefully scrutinize each application for extension of time on a case-by-case basis, evaluating the credibility of the reasons for delay, the promptness of the application, and the potential impact on all parties involved.

42. I take cognizance of the fact that the application was filed on 27th May 2024, slightly over 6 months after judgment was entered in Eldoret Chief Magistrate Court Civil Case Number 801 of 2011, Philip Korir Kimaiyo Versus Amon Kiprotich Kemboi (Sued as the Legal Representative of the late Jonathan Kipkemboi Chepkong’a).

43. It is acknowledged that delays are a common occurrence, and a party may miss the deadline for an action. At common law, equity emerged within the courts of Chancery to mitigate the strictness of common law rules. If a party demonstrated a legitimate cause of action but was unable to act within the stipulated timeframe due to compelling and uncontrollable reasons, the Chancery courts had the discretion to intervene and grant relief, provided that the party was not at fault.

44. The question that beckons is to determine whether the applicant has provided sufficient reason to justify the 6-month delay.

45. The Respondent argues that the Applicant ought to have filed the appeal before 23rd December 2023. He further argue that attempting to file the appeal 6 months after judgment was delivered is unreasonable, inordinate and disproportionate.

46. The Applicant argues that he made several attempts to obtain the certified typed proceedings and judgment. To buttress this argument, the Applicant has attached two letters to his affidavit.



47. The Applicant's first letter is dated 23rd November 2023 and received in court on 13th December 2023 whereas the second letter is dated 21st May 2024. For all intents and purposes, this does not constitute "several attempts" as alleged by the Applicant.
48. In any case, I am inclined to concur with the Respondent's argument that the Applicant did not require to have the typed proceedings for him to file a Memorandum of Appeal as envisaged under Order 42 Rule 1, 2 and 3 of the Civil Procedure Rules which provides as follows;
- [Order 42, rule 1.]
1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
 2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.
- [Order 42, rule 2.]
2. Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.
- [Order 42, rule 3.]
- 3.(1) The appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 13.
 2. After the time limited by subrule (1) the court may, on application, permit the appellant to amend his memorandum of appeal
49. From the foregoing, it is evident that lack of the certified typed proceedings and the judgment/decree is not a justifiable reason not to file an appeal within the statutorily prescribed timeline.
50. The Applicant's averments in paragraphs 8,9,10,11 and 12 of their supporting affidavit together annexed letters indicates that the applicant had the intention of filing an appeal.
51. The timeline stipulated in section 79G of the [Civil Procedure Act](#) is clear and unequivocal. Unless the Applicant provides a satisfactory explanation, granting leave to file the appeal out of time would be an affront to justice.
52. As established by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat (Supra)*, the Court's discretion to extend time is unfettered. However, the onus is on the Applicant to provide a persuasive argument to persuade the court to exercise this discretion in their favour.
53. In the instant case, the Applicant has failed to table compelling reasons to convince the court that the 6-months delay in filing the appeal is justified. His argument crumbles under scrutiny, and the application for leave to extend time to file an appeal is consequently denied.
- iii. Who should bear the costs
54. While the general rule is that cost follow the event, courts have the latitude to depart from the norm on a case-by-case basis.



55. In *Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others* [2014] eKLR, the Supreme Court of Kenya addressed the issue of discretion in awarding costs as follows:

“...Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.”

56. In this case, no compelling reasons have been shown to deviate from the general rule on costs. The upshot is that the Applicant shall bear the cost of the application.

Conclusion

57. In view of the foregoing, the application dated May 21, 2024 is dismissed in its entirety and the Applicant shall bear the costs of the application.

DATED, SIGNED AND DELIVERED, AT ELDORET THIS 25TH DAY OF SEPTEMBER, 2024

.....

J. M. ONYANGO

JUDGE

In the presence of;

Mr. Njuguna for the Respondent

No appearance for the Applicant

Court Assistant: Brian

