



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kibera v Khandi (Civil Appeal E016 of 2024)  
[2025] KEHC 725 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 725 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E016 OF 2024  
S MBUNGI, J  
JANUARY 29, 2025**

**BETWEEN**

**FREDRICK KIMTAI KIBERA ..... APPELLANT**

**AND**

**LINDA MAPESA KHANDI ..... RESPONDENT**

**RULING**

1. The applicant filed a motion dated February 12, 2024 seeking the following orders:
  - i. Spent.
  - ii. That pending the hearing and determination of this application there be a temporary stay of execution in Kakamega SCC No. 210 of 2023.
  - iii. That the applicant herein be granted leave to file an appeal out of time in Kakamega SCC No. 210 of 2023.
  - iv. That any other order this court may deem fit and just to make.
2. The application was premised on the grounds that judgment was delivered in Kakamega SCC No. 210 of 2023 but the applicant had filed another related suit Kakamega SCC No. E305 of 2023 whose judgment was delivered on 26.01.2024 hence occasioning the delay to lodge the appeal.
3. The application was supported by an affidavit sworn by the applicant.
4. The application was opposed by the respondent vide a replying affidavit dated 20.09.2024 where she stated that the application was an abuse of the court process and an afterthought meant to forestall the execution of the decree.
5. The respondent stated that judgment was entered in her favor on 29.9.2023. The applicant then sought orders of stay of execution pending the determination of the declaratory suit Kakamega SCC No.



E305 of 2023, which was granted by the court. The respondent further stated that following the judgment of the declaratory suit on 26.01.2024, the applicant moved to this court with two matters: one where he contested the judgment in the declaratory suit and the present application seeking leave to file an appeal out of time.

6. The respondent stated that leave for extension to lodge an appeal is not a right of a party but an equitable remedy available to a deserving party, which the applicant is not. The respondent stated that the applicant was aware of the judgment delivered on 29.09.2023 but lodged no appeal in the 30-day period.
7. The respondent stated that the application is an attempt by the applicant to frustrate her and deny her the fruits of her litigation hence it ought to be dismissed.
8. She stated that in the event the court issues stay of execution, the applicant be compelled to deposit the decretal sum in a joint interest earning account.
9. The court ordered that parties file written submissions to dispose off the application.
10. The respondent filed submissions. At the time of writing this ruling, no submissions have been filed by the applicant.

#### **Respondent's submissions.**

11. The respondent isolated two key issues for determination in her submissions.
12. On whether the applicant deserved extension to file an appeal, the respondent submitted negatively. She stated that extension to file an appeal was not a right of a party, but section 79G of the [Civil Procedure Act](#) provided the court the mandate to admit an appeal filed out of time if satisfied that the appellant had a good or sufficient cause for not filing the appeal in time which had not been provided by the applicant. She referred the court to the case of Paul Musili Wambua vs Attorney General & 2 others (2015) eKLR.
13. On whether the applicant was entitled to stay of execution, the respondent submitted that the applicant had not met the conditions of stay of execution as per Order 42 Rule 6(2) of the Civil Procedure Rules since he had not demonstrated what substantial loss he stood to suffer, neither did he provide a guarantee of security in his application.

#### **Analysis and Determination.**

14. I have looked at the application, the supporting affidavit, the replying affidavit and submissions by the respondent.
15. The two key issues for determination are:
  - i. Whether the whether the court should grant leave to the Applicant to file the appeal out of time;
  - ii. Whether an order for stay of execution should be granted.

#### **Issue 1: Whether the court should grant leave to the applicant to file the appeal out of time**

16. 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 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.”

17. The provision of section 79 G of the *Civil Procedure Act* provides that an appeal may be admitted out of time if the court is satisfied that the appellant adduced good and sufficient cause for not filing the appeal in time.
18. Further, in deciding whether to grant an extension of time, the court should take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. (See Court of Appeal Case of Edith Gichungu Koine vs Stephen Njagi Thoithi(2014) eKLR)
19. The judgment in Kakamega SCCE E210 of 2023 was delivered on 29.09.2023. The current application was filed on 12.02.2024. The appeal was expected to have been filed within 30 days. The applicant lodged the appeal more than 12 months after the lower court judgment. The reason adduced by the applicant as to the delay is that the applicant was awaiting the judgment of a related suit (Kakamega SCCE E305 of 2023) against his insurance provider. The said judgment was delivered on 26.01.2024 and it is then that the applicant lodged the present application seeking leave to appeal out of time.
20. In rebuttal, the Respondent submitted that the applicant was aware of the judgment, and out of his own volition, decided to pursue the other lower court matter without lodging an appeal.
21. This court has considered the explanation for failing to file the intended appeal as submitted by the Applicant. In the circumstances, this court finds that the delay was not inordinate as to deny the Applicant an opportunity to ventilate his grievances by way of an appeal to this Court since this application was launched in a period of two weeks after the judgment in Kakamega SCCE E305 of 2023 which was delivered on 26.01.2024.
22. On whether the intended appeal has high chances of success, I have looked at the draft Memorandum of Appeal annexed by the applicant. This court is satisfied that the intended appeal is arguable. The parties will have an opportunity to argue the appeal in relation to the merits or demerits of the appeal before the appellate court.
23. In the upshot, this court is satisfied that the Applicants’ application for leave to file an appeal out of time is found to have merit.
24. The right to appeal, being a constitutional right, it is prudent to allow the applicant to exercise his right.

**Issue 2: Whether an order for stay of execution should be granted.**

25. Stay of execution is provided under Order 42 rule 6 of the Civil Procedure Rules which states that:
  - (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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

26. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:-

- i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- ii. The general principle in granting or refusing 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.
- iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- iv. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
- v. 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 for costs as ordered will cause the order for stay of execution to lapse.”

27. This court enjoys discretion to grant stay of execution of decree pending appeal. Refer to the case of *JMM v PM* [2018] eKLR where it was stated thus:-

“As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is



the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

28. Order 42 rule 6 of the Civil Procedure Rules grants this court as an appellate court, as well as the trial court wide discretion to stay execution of decrees pending appeal. In the instant case, the court herein has already granted leave to appeal out of time as stated herein above. Subsequently, from a perusal of the draft Memorandum of Appeal, this court can safely conclude that the appeal is arguable as the appellate court is being called upon to find out whether the trial court pronounced sound judgment in favor of the respondent.
29. The applicant has given an explanation which this court deems fit regarding the cause of the delay. The respondent has expressed that the applicant did not state what substantial loss they stood to suffer, should stay not be granted.
30. On security, the applicant in his application never gave any guarantee of security.
31. In the case of Joseph Schmaderer (supra), the court stated as follows with regard to security: -

“... On the other hand, the Applicant’s in their Supporting Affidavit at paragraph 8 have stated that they are ready to furnish such reasonable security as shall be ordered by court. 33. The offer of security by the Applicant is bona fides that the stay application is not a mere exercise to deny the Respondent the fruits of its judgments. The offer for security therefore satisfies a ground for stay. This is as was held in the case of Focin Motorcycle Co. Limited v Ann Wambui Wangui & another (2018] Eklr...”
32. On close look at the application, the applicant only sought stay of execution of the decree pending the hearing and determination of this application interpartes. Which this court granted the stay up to the date of the ruling. The applicant never prayed for a stay of execution pending the hearing and determination of the appeal. The court cannot grant what has not been asked for.
33. In light of the foregoing, this court makes the following orders:
  - i. The application for leave to file an appeal out of time in Kakamega SCC No. 210 of 2023 is hereby allowed. The applicant to file and serve the memorandum of appeal and record of appeal upon the respondent within 14 days from today.
  - ii. Mention on April 9, 2025 to confirm compliance and take further directions on the speedy disposal of the appeal.
  - iii. Costs of the application abide to the outcome of the appeal.
34. Orders Accordingly.
35. Right of appeal 30 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF JANUARY, 2025.**

**S.N MBUNGI**

**JUDGE**

**In the presence of :**

Appellant/applicant – present online

Mr. Okinyo for the respondent present



Respondent – absent

Court assistant – Elizabeth Angong'a

