



**Wasonga & another v Ochieng (Miscellaneous Application
E027 of 2024) [2025] KEHC 1055 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1055 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
MISCELLANEOUS APPLICATION E027 OF 2024
DK KEMEL, J
FEBRUARY 28, 2025**

BETWEEN

KEVIN OTIENO WASONGA 1ST APPLICANT

KENNEDY OCHIENG 2ND APPLICANT

AND

JENIFER AOKO OCHIENG RESPONDENT

*(In the matter of an intended appeal from the judgment and decree of the Hon.
L. Simiyu (SPM) delivered on 07/08/2024 in Siaya CMCC No. E048 of 2022)*

RULING

1. The Applicants have approached this court vide a Notice of Motion application dated 22/10/2024 seeking the following orders:
 - i. Spent.
 - ii. That this Honorable court be pleased to grant leave to the Appellant to file an appeal out of time from the judgment and decree of the honorable court delivered on 07/08/2024.
 - iii. Spent.
 - iv. That this Honourable court be pleased to grant an interim order for stay of execution of the judgment and decree dated 07/08/2024 for kshs 376,420/= together with costs of ksh 101,900/= in Siaya CMCC No. E048 of 2022 pending the hearing and determination of the intended appeal.
2. The application is supported by grounds set out on the face thereof plus the supporting affidavit of Mary Ongong'a, learned counsel for the Applicants sworn on even date. The Applicants' case is inter alia; that the period of stay granted by the trial court has since lapsed; that the delay in lodging an appeal



was due to the fact that the Applicants had to engage with their insurer and that some time passed before instructions were given for the filing of the present application; that the delay was also caused by the late delivery of the typed proceedings and judgement; that the Applicants are aggrieved by the judgement especially on quantum of damages as can be seen by the draft Memorandum of Appeal annexed to the supporting affidavit; that the intended appeal is meritorious and raises triable issues; that the Applicants are ready and willing to provide security for the due performance of the decree.

3. The said application is opposed by the Respondent through her Counsel F. Omondi ESQ, who filed grounds of opposition dated 2nd December 2024 which are inter alia; that the application is frivolous, vexatious and an abuse of the court process; that the application is made in bad faith; that the application has been filed under undue delay;
4. In the affidavit by the Applicants, the Counsel deposed inter alia; that judgment in the said case was delivered on 07/08/2024 wherein the trial court gave 30 days stay of execution; that thereafter they wrote a letter to the Claims Director of Direct Line Assurance Company Limited (the Applicants insurer and the instructing client) advising on the judgment; and he responded with instructions to appeal the decision on quantum; that by the time they received instructions from the client on 10/09/2024 time had lapsed. And just before they could proceed to prepare the application herein, the instructing client, Direct line Assurance' system which gives the Counsel access to the files was abruptly shut down thereby locking the Advocates out of the systems and paralyzing their operations which information was in the public domain; that as a result of the aforementioned challenges, it was difficult to confirm their instructions and access the requisite documents to enable them prepare the application herein without delay; that by the time they were able to resume operations after the Ruling of the Court in Milimani HCA E328 OF 2024 that enabled proper access to the files and instructions the said 30 days had lapsed by 8th September 2024; that the delay in filing the appeal and the application was caused by the late receipt off the judgement from court, internal process of transmission of communication of judgment from Advocates to client and transmission of instructions from client to advocate owing to the challenges faced by the Assurance company as above explained and that the same is excusable; that the intended appeal has high chances of success as shown in their draft memorandum of appeal dated 10th October 2024 that they have annexed to this application and marked.
5. The Appellants Counsel further deposed that that the applicants motor vehicle registration number KCR 575A may be proclaimed and attached and risks being sold as the stay of execution has lapsed.
6. That the Applicants and Ms. Direct line Assurance Company ltd will suffer substantial and irrecoverable loss unless an order of stay of execution is made. That the Applicants through Ms Direct line Assurance company limited is willing to deposit half the decretal sun in a joint interest earning account in the name of both the advocate of the applicant and the Respondent as security.
7. That no prejudice will be suffered by the Respondent and that it is in the interest of justice that the stay of execution of the judgment and decree be granted pending the hearing and determination of the application and intended appeal.
8. The Application was canvassed by way of written submissions. Both parties have complied.
9. On their part, the Applicants relied on the provisions of section 79G of the Civil Procedure Act which provides as follows:

“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.”

They submitted that the delay was not because of their indolence but because of the reasons explained in the grounds and supporting affidavit.

10. They submitted further that a party should not be denied the right to appeal due to procedural technicalities of timelines, While placing reliance on the case of Samuel Mwaura Muthumbi vs. Josephine Wanjiru Ngugi & Another (2018) eKLR which held thus: “...statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not in themselves a core substantive value in the same sense...”
11. They likewise submitted that the delay was not inordinate and excusable and that they were ready and willing to provide security for the due performance of the decree.
12. In conclusion, the Applicants submitted that they have satisfied the conditions for granting an order for stay of execution pending appeal as espoused under section 79G of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules and prayed that the same be granted.
13. On the other hand, the Respondent submitted the grounds upon which this court may exercise its discretion for grant of stay of execution pending appeal are: a) the length of the delay, b) reasons for the delay, c) chances of the appeal succeeding and d) degree of prejudice to the Respondent. They placed reliance on the case of Nakuru Civil Application No. E115 of 2023. Samuel Kiprono Sang & Another vs. African Banking Corporation ltd & Another.
14. The Respondent submitted further that the annexed copy of judgment by the applicants (MO-1) shows that Mary Ongong’a Counsel for the Applicants was personally present in court for the delivery of the judgment on 7th August 2024. They submitted that she did not give an explanation why it took her six (6) days to relay the judgment to her instructing client.
15. Secondly, the Respondent submitted that the allegation of late receipt of judgment was hollow as the Applicants’ counsel did not adduce any evidence to show that she tried to access the court portal before 20th August 2024 and failed to find a judgment. Further, that the letter dated 12th August 2024 already had an opinion from Counsel that an appeal was plausible, therefore the copy of the judgment received on 20th August 2024 had no bearing on Counsel’s opinion. There was no evidence that a further opinion was tendered after receipt of the judgment.
16. Thirdly, they submitted that the Applicants’ address for service on the Notice of Motion and on annexure MO-2 show that the law firm operates from 10th floor Hazina Towers Nairobi. Similarly, annexures MO3 show that Direct Line Assurance Company has its offices on the 17th floor of the same building. Which meant that communication between Counsel and the instructing client whether electronic or by hard copy is receivable almost immediately. No explanation was rendered why it took up to 6th September for the client to respond.
17. Fourthly, that the deponent to the supporting affidavit appreciated that at the date indicated on the letter 6th September 2024, the time given for stay had not lapsed yet erroneously the client instructed the Counsel to seek leave to appeal out of time.
18. As regards the chances of the appeal succeeding, the Respondent submitted that the draft memorandum of appeal is a standard memorandum of appeal that can be filed against judgment in any running down claim; it does not raise any substantive ground. Further, that the memorandum of appeal is intended to appeal against quantum only. The Applicants concede that the Respondent is due for some compensation but makes no attempt to pay what they deem due.



19. Lastly it was the Respondent's submission that an application for stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules must abide an appeal. That the essence of preserving a subject matter pending appeal presupposes that an appeal exists. That since no appeal has been lodged, the prayer for stay is premature. (see Nakuru High court Misc. Application No. E109 of 2024. Abdul Fazal vs Rashida Abdurahim.)
20. The Respondent concluded that the application is bereft of merit and that the same should be dismissed with costs.
21. I have considered the instant application together with the rival submissions. I find the issue for determination is whether the Applicants have met the grounds for the court to exercise its discretion in their favor and grant the orders sought.
22. Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and that the court will impose such security as the court may find appropriate for the due performance of any decree or order as may ultimately be binding on the Applicant. See *Amal Hauliers Limited Vs Abdulnasi Abubakar Hassan* (2017) eKLR & *Butt Vs Rent Tribunal* (1982) KLR 417.
23. To the foregoing, i would add that an order for stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the same, shall also consider the overriding objective stipulated under sections 1A and 1B of the *Civil Procedure Act*. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman vs. Amboseli Resort Limited* [2004] 2 KLR 589.
24. On the likelihood of suffering substantial loss, and security of the appeal, the court has to balance the interest of the Appellants who seek to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory as well as the interest of the Respondent who seeks to enjoy the fruits of her judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of her judgment. See *Attorney General Vs Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd Vs Kibiru & another* (Supreme); *Mukuma Vs Abuoga* (1988) KLR 645.
25. The law is that where the Applicant succeeds, he/she should not be faced with a situation in which he would find himself unable to get back his money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in his intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. See Court of Appeal in the case of *Nduhiu Gitahi Vs Warugongo* (1988) KLR 621; *IKAR 100;(1988-92) 2 KAR 100*.
26. In view of the foregoing observations, iam satisfied that the Applicants have satisfied the conditions set out under section 79G of the *Civil Procedure Act* as well as Order 42 Rule 6 of the Civil Procedure Rules to warrant the grant of the orders sought. I find that the Respondent will not suffer any prejudice since the decretal sums will be deposited into a joint interest earning account in names of the advocates for the parties pending the determination of the intended appeal. Consequently, the Applicants' application dated 22/10/2024 is allowed in the following terms:



- a. The Applicants are hereby granted leave to file an appeal out of time and that the Memorandum of Appeal be filed and served upon the Respondent within ten (10) days from the date hereof.
- b. An order of stay of execution of the judgement and decree in Siaya CMCC No. E048 of 2022 is hereby granted upon the Applicants depositing the entire decretal sums plus assessed costs in a joint interest earning account in the names of both advocates within thirty (30) days from the date hereof failing which the stay shall lapse.
- c. The costs of the application shall abide in the appeal.

It is so ordered.

DATED, AND DELIVERED AT SIAYA THIS 28TH DAY OF FEBRUARY, 2025.

D. KEMEI

JUDGE

In the presence of:

N/A Ongonga.....for Applicants

Omondi.....for Respondent

Ogendo.....Court Assistant

