



**AMN v JWM (Miscellaneous Civil Application E007 of 2025)
[2025] KEHC 1228 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1228 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CIVIL APPLICATION E007 OF 2025
EM MURIITHI, J
FEBRUARY 27, 2025**

BETWEEN

AMN APPLICANT

AND

JWM RESPONDENT

RULING

1. The applicant filed a notice of motion dated 31th January, 2025 seeking the following orders:
 1. Spent.
 2. Spent.
 3. That pending hearing and determination of the intended appeal there be a stay of execution of the judgment of 25.9.2024 and of further proceedings in Kerugoya Children Case E018 of 2024.
 4. That the honourable court be pleased to grant leave to the applicant to appeal out of time against the judgment dated 25.9.2024 made by Hon. Grace Waithira Resident Magistrate in Kerugoya Children Case No. E018 of 2024.
2. The application is based on the grounds on the face of the application and the supporting affidavit of the applicant setting out facts relied on. The applicant's case is that he was dissatisfied with the judgement delivered in Kerugoya Children Case No. E018 of 2024 dated 25th September, 2024. It had given him several responsibilities to the exclusion of the respondent and particularly that he pay a monthly upkeep of Ksh. 5000/= to the respondent on behalf of the child. That he is a casual labourer who works in people's tea farms for a daily wage of Kshs 250/= and has no other source of income and despite this evidence; the court did not consider his evidence. That he was informed by his current advocate that he could not file an appeal as the time to appeal had already lapsed but this court has



jurisdiction to extend and on 19.12.2024 he applied for certified court proceedings and filed this application. His previous advocate had not informed him about the delivery of the judgement and he came to learn about it in December, 2024. That he has an arguable appeal with a probability of success. Lastly, he seeks stay of execution and undertake to abide with conditional orders of stay if any granted by the court.

3. The respondent filed a Replying Affidavit sworn on 10th February, 2025. The respondent avers that the applicant has not given any good reason as to why he did not file his appeal on time. That judgment was delivered in the presence of the applicant's advocate and therefore the applicant was very much aware of the judgment as he had given him instructions to appear on his behalf and if he was indolent he cannot now blame his advocate for his lack of follow ups. That when the lower court matter proceeded for hearing and parties sought to file submissions so as to fix the matter for judgment the applicant was present in person and cannot now claim he wasn't aware of the judgment. Lastly, that judgment was delivered on the 25/9/2024 and this application is being made on the 31/1/2025 meaning there is an inordinate delay on the side of the applicant as the application is being made 5 months later after judgment therefore this application is an afterthought.

Issue

4. The issues for determination are :
 - i. Whether leave to appeal out of time should be granted.
 - ii. Whether stay of execution should be granted.

Analysis

5. The applicant filed the notice of motion application seeking orders for: enlargement of time for purposes of filing an appeal out of time and stay of execution pending the hearing and determination of the matter.

Whether leave to appeal out of time should be granted

6. The applicants urge the court to enlarge the time within which he may file an appeal against the Judgment delivered on 25.9.2024 in Kerugoya Children Case E018 of 2024.
7. The applicants depose that the intended appeal is arguable, has high chances of success and this court has unfettered discretion in granting leave to file an appeal out of time.
8. The applicable law for enlargement of time is Section 95 of the *Civil Procedure Act* and order 50 rule 6 of the Civil Procedure Rules. In *Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2015] eKLR, the Supreme Court held that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.
9. The applicants depose that the delay in filing the said appeal was on account of inadvertence owing to his advocate failure to follow up and inform him about the judgement in a timeous manner.
10. The respondent avers that the judgment was delivered in the presence of the applicant's advocate and therefore the applicant was very much aware of the judgment but chose to be indolent in filing the appeal in time.



11. 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.

12. The respondent avers that the applicant has not provided sufficient reason, the delay was inordinate and inexcusable as it has not been sufficiently explained. The judgment was delivered on the 25/9/2024 and this application is being made on the 31/1/2025 meaning there is an inordinate delay on the side of the applicant as the application is being made 5 months later after judgment therefore this application is an afterthought.
13. The applicants deposed that they delayed to lodge a Memorandum of Appeal was occasioned by the need for communication between the applicant and their advocates in ascertaining the options available with regard to the judgement. Further, the applicants have an arguable appeal with a high probability of success. The attached draft memorandum of appeal dated 31st January, 2025 has raised triable issues.
14. The delay of three months outside the 30-day period allowed for filing the appeal cannot be said to be inordinate or unreasonable given the plausible explanation ascribed for it by the applicant. The Court does not find the delay of aggregate 4 months from the date of judgment to the filing of the application for extension of time in this case to be inordinate and inexcusable. In discretion will allow the applicant to file appeal out of time so that the issues raised may be canvassed before a higher court. The applicant shall file his Memorandum of Appeal within 14 days and the Record of Appeal within 30 days.

Whether stay of execution should be granted

15. The principles guiding the grant of a 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:

- “(2) No order for stay of execution shall be made under sub rule (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.

16. The Applicants deposes that he will be prejudiced if this court was to deny him orders for stay of execution as the judgement is prejudicial and he does not have the means to satisfy it.
17. The respondent avers that they applicant has never complied with the courts judgement despite several letters being written to him to comply. He has an income and should comply with the judgment.
18. Nevertheless, the applicant undertakes to abide with conditional orders of stay of execution if any granted by the court.



19. The court considers that an order for the maintenance of child cannot wholly be stayed in view of the continuing nature of the need for upkeep and having considered the alleged means of the applicant, an order for the continuing payment of Ksh.3000/- commends itself as security for purposes of Order 42 Rule 6 (2) of the Civil Procedure Rules.

Orders

20. Accordingly, for the reasons set out above, the court makes the following orders:
21. The applicant is granted leave to file an appeal from the judgment of the trial court delivered on 25/9/2024.
22. The Memorandum of Appeal shall be filed within 14 days and the Record of Appeal within 30 days.
23. There shall be stay of execution of the judgment of the trial court subject to the condition that the applicant shall pay to the Respondent Ksh.3,000/- per month towards upkeep of the children beginning 1/3/2025.
24. The applicant shall in terms of Order 50 Rule 6 of the Civil Procedure Rules pay the costs of the application.

Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Muriithi for the Applicant.

Ms. Kimotho for the Respondent.

