



REPUBLIC OF KENYA



**Riitho & another v Raphael (Civil Miscellaneous Application
E018 of 2025) [2025] KEHC 1376 (KLR) (Civ) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1376 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL MISCELLANEOUS APPLICATION E018 OF 2025

TW CHERERE, J

FEBRUARY 27, 2025

BETWEEN

MOSES WAMBUGU RIITHO 1ST APPLICANT

JAMES IRIMU 2ND APPLICANT

AND

OCHAKO OBIRI RAPHAEL RESPONDENT

RULING

1. On 16th August 2024, a judgment was entered in Milimani CMCC E4600 OF 2022 in favour of the Respondent against the Applicants for the sum of KES. 1,101,050/- plus costs and interest which remains unsettled to date.
2. By a notice of motion dated 14th January 2025, Applicants seek two main substantive prayers namely:
 - (1) Leave to file appeal out of time
 - (2) Stay of execution of the judgment pending filing of an intended appeal
3. The application is based on grounds among others that the Applicants are aggrieved by the impugned judgment and wish to appeal, the time to file the appeal has lapsed and the Applicants are apprehensive that Respondent might execute the judgment rendering the appeal nugatory.
4. The application is additionally supported by an affidavit sworn on 14th January 2025 by Moses Wambugu Riitho, the 1st Applicant in which he avers that they did not give instructions to their advocate in good time, that the application has been filed without undue delay, that they have an arguable appeal and that they will suffer loss if execution of the judgment is not stayed. The deponent also avers that the Applicants are ready to give security in the form of a bank guarantee.



5. The Respondent opposes the application vide his replying affidavit sworn on 28th January 2025. He urges the court to reject the application on the grounds that this application was filed 6 months after the delivery of the impugned judgment, it aims at denying him the fruits of his judgment, and also that the Applicants have not demonstrated substantial loss.
6. I have considered the application in light of affidavits on record and annexures thereto and have identified the following issues for determination.
 1. Whether the Applicant has demonstrated sufficient cause for the enlargement of time to appeal the judgment of the trial court.
 2. Whether the Applicant has met the legal threshold for the grant of a stay of execution pending appeal under Order 42 Rule 6(2) of the *Civil Procedure Rules*
7. Section 79G of the *Civil Procedure Act* which is the statutory framework for the enlargement of time provides:

“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.”
8. Order 50 Rule 6 of the *Civil Procedure Rules* grants the Court discretion to extend time where sufficient cause is demonstrated and states:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require.”
9. Order 42 Rule 6(2) of the *Civil Procedure Rules* which was reaffirmed in *Butt v Rent Restriction Tribunal* [1979] eKLR provides the legal threshold for stay of execution that in considering an application for a stay of execution, the court must be satisfied that:
 - a) The application has been made without unreasonable delay;
 - b) The appeal is arguable with a probability of success;
 - c) The applicant will suffer substantial loss if the stay is not granted; and
 - d) Security for the due performance of the decree has been provided.
10. In this case, the 1st Applicant owns up to the mistake of the Applicants not having given instructions to their advocate within adequate time to enable them to file an appeal.
11. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2015] eKLR held that:

An applicant must explain the reasons for the delay and demonstrate any extenuating circumstances to enable the court to exercise its discretion in their favor.
12. The impugned judgment was delivered on 16th August 2024 and this application was filed on 14th January 2025 which is five months from the date of the impugned judgment and four months from the last day that the appeal ought to have been filed.



13. In *Century Oil Trading Company Ltd v Kenya Shell Ltd* Nairobi [2008] eKLR, *Shabbir Ali Jusab v Annar Osman Gamrai & Anor* [2014] eKLR and *Gitbau v Kagiri & another* (Civil Appeal 314 of 2023) [2024] KEHC 6320 (KLR) (6 June 2024) (Ruling), Applicants who moved the court to file appeal out of time after 12 days, 8 months and 13 days respectively were excused on the ground that the circumstances revealed that the delay was not inordinate.
14. The Applicants have shown good faith in admitting that the delay was occasioned by their failure to instruct counsel to file the intended appeal. Consequently, I find that the 5 months' delay is not inordinate.
15. An arguable appeal need not necessarily succeed but must raise a bona fide issue deserving judicial consideration. The draft memorandum of appeal filed by the Applicants reveals that they challenge both liability and quantum. and it demonstrates prima facie that they have an arguable appeal.
16. On whether the appeal would be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. (See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR (Civil Application No. Nai. 31 of 2012)).
17. The Applicants' contention that the Respondent may not be in a position to refund the decretal sum if the appeal succeeds has not been contested. Therefore, I find that the Applicants' apprehension of substantial loss is not farfetched.
18. The security needed under Order 42 guarantees the due performance of such decree or order as may ultimately be binding on the Applicant. (See *Arun C. Sharma v Asbana Raikundalia T/A Rairundalia & Co. Advocates* (2014) eKLR).
19. The Applicants have stated that they are ready to offer a bank guarantee as security for the due performance of the decree. I note that since 14th January 2025, the Applicants have not complied with the court order that granted them 30 days to deposit the decretal sum with the court.
20. The foregoing notwithstanding, I find that Applicant have demonstrated an arguable appeal and the interest of justice favours the grant of the orders sought.
21. In the end, the notice of motion dated 14th January 2025 is allowed on the following terms:
 1. There shall be a stay of execution of the judgment in CMCC No. E4600 of 2022, on condition that the Applicants deposit the entire decretal sum with the court within 14 days from the date of this ruling.
 2. The Applicants have leave to file the intended appeal within 14 days from today's date
 3. Costs shall abide the costs in the appeal

DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Applicants - Mr. Morara for Kimondo, Gachoka & Co. Advocates

For Respondent - Mr. Momanyi for Musili Mbiti Advocates LLP

