



**Torenson Company Limited v TM (Minor Suing Thro Mother & Next Friend DNM)
(Miscellaneous Application E215 of 2023) [2025] KEHC 7623 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7623 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E215 OF 2023**

EN MAINA, J

MAY 29, 2025

BETWEEN

TORENSON COMPANY LIMITED APPELLANT

AND

**TM (MINOR SUING THRO MOTHER & NEXT FRIEND
DNM) RESPONDENT**

RULING

1. This is a ruling on the Appellant/Applicant's Notice of Motion dated 30th October, 2023. The application seeks extension of time and leave to appeal out of time. The appellant/Applicant also seeks a stay of execution of the decree arising from the judgment delivered on 11th September, 2023 in SCCC No.E193 of 2023 pending hearing and determination of the intended appeal.
2. Through a replying affidavit sworn on 23rd November 2023 the Respondent deposed that the application is a delaying tactic intended to prolong the matter and deny her from enjoying the fruits of her judgment; that the Applicant has been aware of the judgment as it was served with the decree on 25th September 2023; that the bank guarantee offered as security has a duration of twelve months with no guarantee that the same will be renewed; that the relationship between the Bank, Directline Assurance and the parties to this case has not been explained and further that the Appellant/Applicant is unlikely to suffer substantial loss. The Respondent deposes that the Appellant/Applicant is guilty of laches for filing this application sixty days from the time judgment was delivered.
3. Learned Counsel for the parties agreed to canvass the application by way of written submissions but by the time of writing this ruling the applicant's submission had not been uploaded in the e-filing system.
4. learned Counsel for the Respondent filed his submissions on 27th February, 2024. Relying on the case of *Nicholas Kiptoo Korir Arap Salat -vs- IEBC and 7 others* – Application No. 16 of 2023 and *Evans Kiptoo vs Reinhard Omwonyo Omwonyo* [2021] eKLR Counsel submitted that granting the order for



extension of time to file the appeal would continue to prolong the resolution of the case hence causing continued disruptions and inconvenience of the Respondent's life. Counsel urged this court to balance the interest of both parties.

5. On the limb for grant of a stay of execution, Counsel submitted that the Applicant had not met the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules; that the Applicant has not demonstrated that he stands to suffer substantial loss. Relying on the case of Nicholas Stephen Okaka & another vs Alfred Waga Wesonga [2022] 2KLR, Vinsbham Ravji Halai -vs- Thornton & Turpin [1990] KLR 365.
6. The Respondent also relied on the case of Nyang'au vs Choi & 2 others [2022] KEHC 3015 (KLR), the case of New Nairobi United Services limited & Another vs Simon Mburu Kiiru [2021] eKLR and the case of Re estate of Richard Churko Stephen 'alias' Richard Churko Guyo (deceased) [2021] eKLR and contended that a value security arrangement such as was offered by the Applicant, would undermine the objective of a security under Order 42 Rule 6 of the Civil Procedure Rules thus potentially leading to disputes and hindering effective execution of the orders of this court.

Determination

7. This court has carefully considered the application, the grounds for the application, the affidavits for and in opposition to the application, the submissions filed and the law. The issues that call for a determination are: -
 - a. Whether the Applicant should be granted leave to file an appeal out of time.
 - b. Whether an order for stay of execution of the judgment/Decree of the Small Claims Court should issue pending hearing and determination of the intended appeal.
9. This court's power to grant leave to file an appeal out of time is provided for under Section 79G of the Civil Procedure Act which states 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 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.”(underlining mine).
10. The principles to be considered in such applications were laid down by the Supreme Court in the case of Salat v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling) where the court stated –

“85] 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; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; Whether there will be any prejudice suffered by the respondents if the extension is granted; Whether the application has been brought without undue delay.....”



11. In this case, the impugned judgment was delivered on 11th September 2023 and the current application was filed on 31st October 2023, about fifty days later. That delay is in my view inordinate. The reason given for the delay is that the client gave instructions to prefer appeal late. That explanation is not satisfactory in light of Sections 1A and 1B of the *Civil Procedure Act*. The discretion of the court ought not to be exercised in favour of an indolent party and my finding therefore is that the Applicant is not deserving of the exercise of the discretion of this court in its favour. Be that as it may so as not to impede his right to access to justice, I shall grant him leave to file his appeal out of time. The appeal shall be filed and served within thirty (30) days from today and in default the leave granted shall lapse.
12. The conditions upon which an order for stay of execution can be granted are set out in Order 42 Rule 6(1) & (2) of the Civil Procedure Rules. The main considerations are whether the applicant is likely to suffer substantial loss should the application be rejected and the appeal succeeds; whether the application has been made timeously and whether the applicant is willing to deposit such security as would be ordered by the court.
13. The Court of Appeal has laid down the principles which should guide a court in determining whether to grant or refuse an application for stay of execution pending appeal. In the case of *Butt vs Rent Restriction Tribunal* [1982] KLR 417 the court held: -
 - “(1) 1) The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - (2) 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 the appeal court reverse the judge’s discretion.
 - (3) 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.
 - (4) The Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements.
 - (5) 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 of costs as ordered will cause the order for stay of execution to lapse.
14. The Applicant seeks to stay execution of the decree of the Small Claims Court in E193 of 2023 pending appeal. The decree arises from a personal injury claim where an award for damages in sum of Kshs.203,860/- was made to the Respondent. As already stated, there was inordinate delay in bringing this application. Further, the Applicant has not demonstrated that the Respondent is a person of straw incapable of refunding the decretal sum were the appeal to succeed. In other words, the Applicant has not demonstrated that he is likely to suffer substantial loss because were the appeal to be successful the Respondent can refund the sum. The Respondent would on the other hand suffer prejudice because he shall be denied of the fruits of his judgment yet the award for damages was intended to alienate his suffering as a result of the injuries sustained.
15. On the issue of security, The Applicant has expressed willingness to provide a bank guarantee. This court has perused the security which is dated 6th July 2023 and is valid for ‘12 months with an option



to renew'. The period for that security therefore lapsed on 6th July 2024 and no evidence has been adduced to prove it was renewed. Additionally, the parties named in the guarantee are not parties to this suit hence they cannot be bound by the orders of this court. Accordingly, the application for an order for stay of execution is not merited.

16. The application therefore succeeds only to that extent that the applicant is granted leave to file the appeal out of time. The order for stay of execution is dismissed. The appeal be filed and served within thirty (30) days of this ruling.
17. The costs of the application shall be borne by the Applicant.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 29TH DAY OF MAY, 2025.

E. N. MAINA

JUDGE

In the presence of :

Ms Nzili for Respondent (online)

No appearance for Mwaniki Gachoka for the Applicant

Geoffrey – Court Assistant

