



**Adhiambo v Opany & another (Miscellaneous Civil Application
E390 of 2024) [2025] KEHC 11639 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 11639 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E390 OF 2024**

JM OMIDO, J

JUNE 26, 2025

BETWEEN

JANE ATIENO ADHIAMBO APPLICANT

AND

NASHON OUMA OPANY 1ST RESPONDENT

GRACE EUNIA KWAMA 2ND RESPONDENT

RULING

1. The Applicant's Notice of Motion dated 13th December, 2024 is expressed to be brought under Sections 1A and 3A of the [Civil Procedure Act](#), Cap 21 Laws of Kenya, Section 5(b) of the [Insurance \(Motor Vehicle Third Party Risks\) Act](#), Order 42 rule 6, Order 51 rule 1 and Order 22 rule 22 of the [Civil Procedure Rules](#) and all other enabling provisions of the law and seeks the following orders:
 - a. [Spent].
 - b. [Spent].
 - c. That the Honourable Court be pleased to grant stay of execution of the judgement and/or decree delivered on 16th September, 2023 for Ksh.180,000/- together with costs and interest and taxation proceedings in Kisumu SCCC No. E376 of 2024 pending hearing and determination of the intended appeal.
 - d. That the Honourable Court be pleased to grant leave to the Applicant to file an appeal out of time from the judgement and decree of the Honourable trial Court delivered on 16th September, 2024 for Ksh.180,000/- together with costs and interests in Kisumu SCCC No. E376 of 2024.
 - e. That the costs of this application be provided for.



2. The grounds upon which the application is premised are that the time within which to prefer an appeal from the matter before the lower court has since lapsed and the reason for the delay is explainable and reasonable and that the Applicant stands to suffer immense prejudice if the order sought is not granted as its intended appeal is arguable and meritorious.
3. The application is supported by the affidavit sworn on 13th December, 2024 by Christine Musando, Advocate, who is on record for the Appellant.
4. The deponent to the supporting affidavit expounds on the above grounds and states that the reason for the delay in filing the Memorandum of Appeal was due to the fact that the instructing client (Directline Assurance Company Limited) experienced management challenges that resulted in the delay in the transmission of instructions from the client to the Advocate.
5. The said deponent further states on oath that it has a good appeal and that an order for stay of execution pending appeal should also be issued as it may not be able to recover the decretal amount from the Respondent in the event the intended appeal is successful, should the order for stay not issue. The deponent states that the Applicant is ready to furnish security for the performance of the decree, in the nature of a bank guarantee, as may be ordered by the court.
6. The application is opposed by both Respondents. The two Respondents filed their respective replying affidavits, both sworn on 3rd February, 2025.
7. The two Respondents state in their respective replying affidavit states that the delay in filing the appeal is inordinate and has not been explained satisfactorily by the Applicant, and as such, the court should not grant leave to the Applicant to appeal out of time. They further state that the Applicant has not met the conditions requisite for the grant of an order for stay of execution pending appeal.
8. This court directed that the application proceeds by way of written submissions and the parties herein filed their respective submissions.
9. I have perused and considered the application, the Applicant's affidavit in support thereof, the Respondents' respective replying affidavits and the submissions of the parties. The application as filed is two pronged, as it seeks orders that:
 - a. The Applicant be granted leave to appeal out of time.
 - b. That there be a stay of execution pending the hearing and determination of the Applicant's intended appeal.
10. What is clear from the record is that the judgement and decree from which the Applicant intends to appeal was delivered on 16th September, 2024. The application seeking for leave to appeal out of time, subject of which this ruling is made, was filed on 18th December, 2024. The period within which to appeal lapsed on or about the 16th October, 2024. There is therefore a delay of a period of about two months in bringing the application.
11. What this court should then proceed to determine is:
 - a. Whether the Applicant has met the prerequisites for the grant of leave to appeal out of time.
 - b. Subject to (a) above, whether the court should exercise its discretion to grant the Applicant leave to file its appeal out of time.
Subject to (a) and (b) above



- c. Whether the Applicant has met the prerequisites for the grant of an order of stay of execution pending the determination of the intended appeal.
12. Section 79G of the *Civil Procedure Act* provides as follows:
- 79G. 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.
13. It is clear from the text of the above provision of statute that before the court considers granting an order to allow the appeal to be filed out of time, the Applicant must demonstrate to the court that he has good and sufficient cause for filing the appeal out of time (see the cases of *Diplack Kenya Limited v William Muthama Kitonyi* [2018] eKLR and *Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others* [2014] eKLR).
14. The Supreme Court in the case of *Salat* (supra) held inter alia that:
- “The underlying principles a court should consider in exercise of such discretion should include:
- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted; and
- f. Whether the application has been brought without undue delay.”
15. Whether there is a reasonable ground for the delay, the Applicant states that the instructions to its Counsel to file a Memorandum of Appeal were issued and/or communicated late due to management challenges that the Appellant was experiencing. The Appellant however failed to file an affidavit sworn by its officer to explain the nature of the challenges that it was experiencing and how the same impeded the issuance of timely instructions to its Counsel.
16. In my view, Counsel for the Applicant was not competent to make depositions on oath on the matters concerning the alleged management challenges that the instructing client was experiencing. An affidavit from the client was therefore necessary.
17. Be that as it may, I cannot help noticing that the annexure CM-1, which is a letter from the Applicant’s Advocates to their client is dated 16th July, 2024, which is a date that is two months prior to the delivery of the judgement by the trial court. The response (annexture CM-3) dated 9th December, 2024 also refers to the letter of 16th July, 2024. As the discrepancy on the date when CM-1 was authored is not



explained, it is possible that the same was tailored for purposes of the application before me. I will however leave that here.

18. Thus then, the delay by a lengthy period of about two months, is not only inordinate, in the circumstances, but also remains unexplained therefore inexcusable.
19. In the obtaining situation, I will agree with the Respondents that the Applicant did not file the application that seeks the permission of the court to appeal out of time without unreasonable delay.
20. From the foregoing, I am not persuaded that the Applicant has met the prerequisites for leave to appeal out of time. Thus then, the court cannot judiciously exercise discretion to allow the Applicant appeal out of time.
21. Having determined that the prayer for leave to appeal out of time is not merited, I find it preposterous to determine the prayer that seeks an order for stay of execution pending the hearing and determination of the appeal that the Applicant intended to file.
22. The result I then reach, based on the reasons above, is that the Notice of Motion application dated 13th December, 2024 is without merit. I proceed to dismiss it with costs to the Respondents, which I assess at Ksh.6,000/-.
23. This file is closed.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 26TH DAY OF JUNE, 2025.

JOE M. OMIDO.

JUDGE

For Applicant: No appearance.

For Respondents: Ms. Nyakongo.

Court Assistants: Mr. Ngoge & Mr. Juma.

