



REPUBLIC OF KENYA



**KENYA LAW**  
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**Almasi Bottlers Limited & another v Sang (Miscellaneous Civil Application  
206 of 2023) [2025] KEHC 8939 (KLR) (25 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8939 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS CIVIL APPLICATION 206 OF 2023  
PN GICHOHI, J  
JUNE 25, 2025**

**BETWEEN**

**ALMASI BOTTLERS LIMITED ..... 1<sup>ST</sup> APPLICANT**

**SAMSON KIPTOO CHEMJOR ..... 2<sup>ND</sup> APPLICANT**

**AND**

**BARNABAS KIPTOO SANG ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the Applicants' Notice of Motion dated 8<sup>th</sup> June, 2023 and filed pursuant to Order 42 rule 6 and Order 51 rule 1 of the Civil Procedure Rules, Section 3A, 63(e), 79G and 95 of the *Civil Procedure Act*, seeking for Orders that:-
  - a. Spent.
  - b. Spent.
  - c. The Honourable court be pleased to stay execution pending hearing and determination of the intended appeal.
  - d. The Honourable court be pleased to enlarge the time for lodging an appeal arising out of judgment delivered on 31/3/2023 in Nakuru Cmcc No. E1091 Of 2021 Barnabas Kiprono Sang -v- Almasi Bottlers Ltd & Samson Kiptoo Chemjor.
  - e. Costs of this application be in the cause.
2. The grounds are on the face of the application and the Supporting Affidavit sworn by the 2<sup>nd</sup> Applicant on even date.



3. He states that the Applicants are dissatisfied with quantum in the judgment delivered on 31<sup>st</sup> March, 2023, in favour of the Respondent against the Applicants and therefore, they wish to appeal against the said decision. However, the time for lodging the appeal has lapsed.
4. He depones that the intended appeal raises serious legal issues with high chances of success, necessitating a stay of execution and enlargement of time for filing the appeal. He depones that if the orders are not granted, the appeal will be rendered nugatory, hence they will suffer substantial loss and prejudice. Further that they face imminent execution.
5. Further, he states that the application is brought promptly, in good faith, and no prejudice will be suffered by the Respondent if the orders sought are granted. Moreover, that this Court has the discretion to grant the orders, and the Applicants are willing to abide by any terms and conditions.
6. He states that they have applied for certified copies of typed proceedings on 20<sup>th</sup> April, 2023. He has offered to pay half of the decretal sum plus costs and deposit half of the decretal sum ve in a joint interest-earning account.
7. The application is opposed vide a Replying Affidavit sworn 17<sup>th</sup> September, 2024 by Moses Cheruiyot Advocate for the Respondents. He terms the application misconceived, incompetent, without merit and an abuse of the court process and prays for its dismissal.
8. He asserts that the Applicants moved the Court seeking the orders as stated in the application only after the Respondent had sought payment, when he has been patient all along due to the Applicants' promises to pay the decretal sum and costs.
9. Furthermore, the deponent claims that post-judgment negotiations took place where the Respondent offered a settlement proposal, but the Applicants failed to respond to any correspondence. He states that the Applicants have not provided good or sufficient cause for the delay in lodging the appeal; have not satisfactorily explained the loss they would suffer if execution proceeds and have failed to furnish security for costs and therefore, the application for a stay of execution and enlargement of time for appeal lacks merit.
10. It is the Respondent's position that the trial court's decretal sum is reasonable, and the intended appeal has zero chances of success. He states that the application herein seeks to defeat the Respondent's interest as the decree holder. He terms the application a clear afterthought and a ploy meant to buy time, delay, deny and frustrate the Respondent from enjoying the fruits of judgment
11. He states that judgment was rendered on 31<sup>st</sup> March, 2023, but the instant application was filed on 15<sup>th</sup> June, 2023 with no steps taken to prosecute it since then thus indicating indolence.
12. He further states that the Respondent became aware of the application recently stumbling upon it on the cause list indicating that it was coming for mention on 8<sup>th</sup> August, 2024. Further, he elaborates that the application served on the Respondent on 5<sup>th</sup> April, 2024 had no particulars, such as a case number and directions, as evidenced by an email printout attached as exhibit MC-3.
13. He concludes that the matter has been treated casually and reluctantly, and the application is unnecessary, filed purely to delay and frustrate execution, and wastes precious judicial time.
14. On the prayer for extension of time, he argues that the said prayer is an equitable remedy available only to a deserving party at the discretion of the court and given the circumstances herein, the Applicants do not deserve to have this discretion exercised in their favour.



15. He urges the Court to disallow the application for being an abuse of the court process. He however states that should the Court be inclined to grant the application, it be on condition that the Applicants release half of the decretal sums payable by them to the Respondents' Advocates, and the other half be deposited with the Court to protect the Respondent.

### **Applicants Submissions**

16. The Applicants submit that this Court has broad and unfettered discretion to extend time for filing an appeal, citing Section 79G of the *Civil Procedure Act* and Section 95 of the *Civil Procedure Act*, as well as Order 51 Rule 1 of the Civil Procedure Rules. They emphasise that this discretion should be exercised judicially and with regard to the particular facts of each case.
17. They contend that they have demonstrated sufficient cause for the delay, noting that judgment was delivered on 31<sup>st</sup> March, 2023, and by the time they issued instructions to their advocates, the time for lodging an appeal had lapsed. While highlight that their advocates promptly applied for certified copies of the proceedings, a crucial first step in preparing a Memorandum of Appeal, they have cited the case of Deepak Chanderial Kamani & another v Kenya Anti-Corruption Commission & 3 others [2010] eKLR to support the proposition that delay alone, if excusable, should not be a ground to deny an extension of time.
18. Further reference is made to the case of Faruq Bakali & another v Mohamed Gulamrasul & another [2019] eKLR to emphasise that the court should consider whether the delay has occasioned prejudice to the Respondent that cannot be compensated by costs.
19. The Applicants maintain that their intended appeal has overwhelming chances of success and raises weighty legal issues, primarily concerning the quantum of damages awarded by the trial court. They believe the trial magistrate erred in using the wrong principle for assessing damages and awarding inordinately high amounts not pleaded or proved. They cite the case of Kenya Tea Packers Limited v Fredrick Okongo [2014] eKLR to underscore that courts should be slow to deny a party the right to appeal if a plausible appeal exists.
20. Regarding the stay of execution, the Applicants maintain that they will suffer substantial loss if execution is not stayed and that the appeal will be rendered nugatory. They propose to deposit half of the decretal sum into a joint interest-earning account, demonstrating their willingness to abide by the court's terms.
21. While relying on Order 42 Rule 6 (2) of the Civil Procedure Rules for the conditions of granting a stay, which include proving substantial loss and providing security, they have cited the case of Kenya Shell Limited v Kobil Petroleum Limited [2004] eKLR and National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR to support their arguments on substantial loss and the purpose of stay orders. They emphasise that the Respondent will suffer no prejudice if the orders are granted.
22. Lastly, the Applicants reiterate that their application is brought in good faith and without undue delay and that the court's discretion should be exercised to ensure justice and fairness. They prayed to be allowed to pursue their appeal against the judgment.

### **Respondent's Submissions**

23. Regarding the enlargement of time, the Respondent maintains the contents of the Replying Affidavit and emphasises that the Applicants did not seek leave to appeal immediately after the judgment and also failed to request proceedings in a timely manner but made the request on 20<sup>th</sup> April, 2023, after the appeal period had expired. He asserts that courts should not aid a party that has been indolent.



24. The Respondent cites *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR to outline the principles for extending time, including the length of delay, the reason for the delay, the chances of the appeal succeeding, and the degree of prejudice to the Respondent. Accordingly, it was argued that the applicants fail on these points.
25. Further reliance is placed on the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Civil Application No. Nai 255 of 1997 (unreported) for the principle that the court's discretion to extend time is unfettered but must be exercised judicially.
26. Concerning the stay of execution, the Respondent specifically maintains that the Applicants have not satisfied the conditions for a stay under Order 42 Rule 6 of the Civil Procedure Rules and specifically contends that the Applicants have not demonstrated that they will suffer substantial loss if a stay is not granted. He submits that that substantial loss does not merely refer to the amount of the judgment but rather the inability of the Respondent to repay the decretal sum if the appeal succeeds.
27. Further, he argues that the Applicants have not offered security for the performance of the decree, which is a mandatory requirement for a stay. In support of this, reliance is placed on the case of *Halal & Another Vs. Thornton & Turpin* [1990] KLR 365 to illustrate that substantial loss involves a risk that the appeal, should it succeed, would be rendered nugatory.
28. On the flip side, he cites the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR to support the principle that a court should not deprive a successful litigant of the fruits of their judgment without good reason.
29. Further reference is made of the case of *Global Tours & Travel Ltd; Nairobi HC Winding Up Cause No. 43 of 2000* to explain that an arguable appeal is not an assurance of success. He maintains that the intended appeal has no chances of success and that the application is merely a tactic to delay and frustrate the enjoyment of a validly obtained judgment.
30. He submits that if the Court is inclined to grant the stay, the Applicants should deposit the entire decretal sum in a joint interest-earning account, or at least release half of the decretal sum to the Respondent's advocates and deposit the other half in Court. To buttress its rights, the Respondent cites *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC. 795 of 1997* emphasising the balance of ensuring an appeal is not rendered nugatory while ensuring a successful party enjoys the fruits of judgment. In conclusion, he urges the court to dismiss the application with costs.

### **Analysis and Determination**

31. Having considered the material before this Court, the issues for determination are: -
  1. Whether this Court should enlarge time for Applicants to file Appeal out of time.
  2. Whether they should be granted stay of execution.
32. On the first issue, Section 79G of the 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.”

33. Further, it is settled law that the Court has discretion to grant application for extension of time under Section 79G of the *Civil Procedure Act* if the Applicants satisfies the court that they have good and sufficient cause for not filing the appeal on time.
34. In regard to the exercise of the Courts discretion to either, grant or withhold an Order for extension of time, the Court of Appeal case of Leo Sila Mutiso versus Rose Hellen Wangari Mwangi Nairobi *CA No. 255 of 1997* held:-
- “It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that, in general, the matters which this Court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly the reason for the delay; thirdly possibly the chances of the appeal succeeding if the application is granted; and fourthly the degree of prejudice to the respondent if the application is granted.”
35. Further, the Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others [2014] eKLR emphasised thus: -
- “...It is clear 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. This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:
1. 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.
  2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
  3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted.
  6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
36. In this case, the impugned judgement was delivered on 31<sup>st</sup> March, 2023, while the present application dated 8<sup>th</sup> June, 2023 was filed on 15<sup>th</sup> June, 2023 which is a delay of about 45 days. The reason given for the delay in lodging the appeal is that the statutory time for doing so had already lapsed by the time they issued instructions to their advocates to prefer an appeal to the High Court. Further that they promptly applied for certified copies of the typed proceedings on 20<sup>th</sup> April, 2023, after realising that the time had run out.



37. The law requires the party seeking extension of time to explain to the satisfaction of the Court, the reason for the delay. A mere acknowledgement of delay is not sufficient.
38. The letter from their Advocates seeking for typed proceedings is dated 20<sup>th</sup> April, 2023. There is no urgency indicated in that letter and the purpose of the proceedings was not indicated. It is not shown what follow up they made in regard to supply of those proceedings and there is no request for a copy of decree or judgment.
39. However, they have a Draft Memorandum of Appeal showing what they were aggrieved of which means that it was not crucial in the circumstances to wait for the typed proceedings to file this application. Indeed, in the case of Paul Njage Njeru v Karija K Mugambi [2021] eKLR, P. J. Otieno, J held that:-
- “The Court takes the learning that the timeline of filing a memorandum of appeal is different from the timeline of filing a record of appeal. Filing a memorandum of appeal does not require the filing of typed and certified proceedings. An Advocate may peruse the Judgment and craft grounds of appeal which can be amended later. Nothing stopped the Applicant from filing a Memorandum of Appeal within the stipulated 30 days and if need be, upon the receipt of the typed proceedings, apply to make amendments.”
40. What is clear in this matter is the casual manner in which the Applicants have acted in filing the Appeal which conduct gives an indication that the intention to appeal was an afterthought. However, in the circumstances, the delay herein may be considered as inordinate.
41. On whether orders for stay of execution, should be granted, it was incumbent upon the Applicants to satisfy the condition for granting stay of execution pending the intended appeal as provided for under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:-
1. No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
  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.”
42. The Court of Appeal in the case of Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365 held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 42 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.



43. In this case, the Applicants state that they filed this application promptly but as stated above, this Court has found that there was delay in filing this application.
44. On substantial loss, M. A. Warsame, J (as he then was) stated in *Samvir Trustee Limited vs. Guardian Bank Limited* [2007] eKLR:-

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

45. In this case, the Applicants merely state that they will incur damages and further, the intended appeal will be rendered nugatory. On security, the Applicant deponed:- “We are willing to pay half the decretal sum plus cost and half of the decretal sum to be deposited interest in the joint interest earning account an interest earning account.”
46. In the circumstances herein, and in order to balance the rights of both parties, that is, the Applicants’ quest to appeal and the Respondent’s right to enjoy the fruits of his judgment, this Court disposes of the application dated 8/6/2023 in the following terms:-
1. A stay of execution of the decree herein be and is hereby issued pending the hearing and determination of the intended Appeal on condition that within 30 days of this Ruling, the Applicants release to the Advocates for the Respondent half the decretal sum payable to Respondent and the other half be deposited in court.
  2. Leave be and is hereby granted to the Applicant to file Appeal out of time on condition that he files a Memorandum of Appeal and the Record of Appeal within 30 days from today.



3. Costs of this application to abide the outcome of the Appeal.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 25<sup>TH</sup> DAY OF JUNE, 2025.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:

Ms Odhiambo holding brief for Mr. Nyachillo for the Applicants

Mr. Cheruiyot for Respondent

Kamau, Court Assistant

