



**Khushi Motors Limited v Cheruiyot (Civil Appeal E342 of 2024)  
[2025] KEHC 4007 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 4007 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E342 OF 2024  
F WANGARI, J  
FEBRUARY 20, 2025**

**BETWEEN**

**KHUSHI MOTORS LIMITED ..... APPELLANT**

**AND**

**SILAH LAGAT CHERUIYOT ..... RESPONDENT**

**RULING**

1. For ruling is the Appellant’s Notice of Motion dated 09/10/2024 seeking the following orders;
  - a. Spent
  - b. That the court do grant a temporary stay of execution of the judgment delivered on 5<sup>th</sup> December 2023 until this application is heard and determined That the Applicant be granted leave to appeal out of time and the annexed Memorandum of Appeal be deemed as filed upon the payment of the requisite court fee
  - c. That the court do make an order of stay of execution of judgment made on 5<sup>th</sup> December 2023 pending the hearing and determination of this appeal
  - d. That the cost of this application be bound by the outcome of the appeal
2. In support of the application, the Appellant states that judgment in Mombasa Small Claims Court Civil Case No. E345 of 2023 condemned the Appellant to pay Kshs. 150,000/= based on alleged admission, contrary to its claim against the Respondent for Kshs. 795,000/=. The Appellant made an application to have the judgment reviewed as it was premised on misapprehension of facts and misrepresentations apparent on the record. The application for review dated 03/09/2024 was dismissed Being dissatisfied with the judgment, the applicant states that it is desirous of challenging the decision of the trial court, but the time within which to file an appeal has lapsed.



3. On the prayer for stay of execution of judgment, it was stated that unless this Court intervenes, the Respondent will proceed with execution which will lead to irreparable harm including premature disposal of assets that are integral to the Appellant's business operations. This Court granted interim stay of execution on pending the hearing and determination of this application.
4. The Respondent opposed the application by filing Grounds of Opposition dated 05/11/2024 stating that the appeal is time barred for the Appellant did not prefer an appeal since 05/12/2023 to 25/09/2024 when it filed the appeal herein, nearly 11 months since judgment was delivered. This appeal was filed out of time and without leave of this Court, and the only remedy is to strike out the Memorandum of Appeal together with the appeal with costs.
5. It was further stated that the Appellant was not going to suffer any irreparable loss as it had been paid the full purchase price as at the time it repossessed the vehicle and resold it to another person, thus making double profit. Further, the appeal does not raise any triable issues and it has no chances of success for it has also been brought on a foundation that has already collapsed.
6. The court directed that the application be disposed of by way written submissions. Both parties complied by filing their rival submissions. In its submissions, the Appellant relied on Order 42 Rule 6 of the Civil Procedure Rules stating that the application was filed without unreasonable delay. In utmost good faith and it was willing to issue a bank guarantee as security.
7. It also relied on Section 79G of the *Civil Procedure Act* for it filed this application expeditiously after its application for review was dismissed. It relied on the case of *Thuita Mwangi vs Kenya Airways Ltd [2003] eKLR*. That the delay was occasioned by its genuine attempt to seek redress through an application for review addressing an error apparent on the record thus demonstrating its diligence and sincere attempt to resolve the matter without unnecessarily burdening the appellate process.
8. That it was the principles of natural justice and audi alteram partem which require it an opportunity to pursue its appeal and seek fair administration for its grievances. In granting the orders sought, the Respondent was not going to suffer any prejudice that cannot be adequately be remedied by reasonable conditions imposed by the court, but the Appellant stood to suffer irreparably by being barred on account of procedural technicalities. For this it relied on the case of *Bank of Africa Kenya Limited vs Put Sarajevo General Engineering Co. Ltd & 2 Others [2020] eKLR* and Article 159(2)(d) of *the Constitution*.
9. The Respondent submits that the appeal herein was filled eleven (11) months after delivery of judgment thus being filed out of time without leave of the court. The appeal being statutorily time barred, it ought to be dismissed with costs. The purchase price of the motor vehicle having been fully paid, which vehicle the appellant repossessed and resold to another person, it made double profit. Further, it was submitted that the Appellant filed the application herein under Order 40 Rule 1 instead of Order 42 Rules 6 of the Civil Procedure Rules, he asked the court to dismiss both the application and appeal with costs.

### **Issues for determination**

10. I have duly considered the Notice of Motion application, the response thereto, parties' rival submissions and the authorities cited therein as well as the law and I accordingly find that the following are the issues for determination: -
  - a. Whether the application dated 09/10/2024 is merited;



- b. If the answer to (a) above is answered positively, whether the Appellant’s explanation for the delay is plausible; and
  - c. Who bears the costs?
11. Section 79G of the *Civil Procedure Act* 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 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 Court of Appeal as observed by Odek JJA in *Edith Gichungu Koine vs Stephen Njagi Thoithi* [2014] eKLR thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
13. The Court of Appeal further guided that there is also a duty imposed on Courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.
14. Applying the above principles to the present case, the judgment herein was delivered on 05/12/2023 and the Appellant filed the current application on 09/10/2024. This is 11 months outside the time limited for filing an appeal and the appellant has attributed the delay in filing its appeal to the review application it had filed in the trial Court.
15. This Court also takes cognizance of Article 48 of *the Constitution* which guarantees every person access to justice, in addition, under Article 50(1) of *the Constitution*, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The ultimate goal and purpose of the justice system is to hear and determine disputes fully.
16. It therefore follows that no person who has approached the court seeking an opportunity to ventilate its grievances fully should be locked out. In the instant case, the appellant filed the appeal 11 months late and has approached this Court for extension of time. Reasons for that delay is that the Appellant waited for the application for review it had filed before the trial Court, only for the application to be dismissed with cost. This application was therefore not an afterthought.
17. Courts have over time excused parties where delay is not inordinate but in this case there is inordinate delay. However, depending on the circumstances of each case and reasons for the delay, Courts have accorded parties an opportunity to be heard on appeal. No doubt, the discretion of this court to enlarge time for filing of a late appeal is unfettered and the said discretion must be exercised judiciously and not capriciously.
18. I am satisfied that though there was 11 months’ delay which may be deemed as inordinate or unreasonable, this Court is inclined to overlook the delay as the explanation given is merited.



19. Whether the appellant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal, it is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules as hereunder;
1. “No appeal or second appeal shall operate as a stay of execution or proceedings 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 orders 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.
20. The Appellant should satisfy the court that: substantial loss may result to him/her/it unless the order is made; that the application has been made without unreasonable delay; and the applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:
- “No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
21. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution and so the appellant is required to show the manner in which execution will irreparably affect it or will alter the status quo to its detriment therefore rendering the appeal nugatory thus proving one of the grounds herein. As discussed herein above, the Appellant has shown that it is likely to suffer irreparable damage if stay orders are not granted.
22. For security of costs, this is discretionary and it is upon the Court to determine it and set its terms. The Appellant offered a Bank Guarantee as security for the performance of the decree. It is imperative that the right of appeal must be balanced against an equally weighty rigid right of the Respondent to enjoy the fruits of the judgment delivered in his favour. Upon perusal of the grounds of appeal and without going into the merits of the appeal noted that the appellant has raise arguable points of law. The decretal sum awarded should be deposited as security.



23. Based on the foregone discourse, the application dated 9<sup>th</sup> October 2024 is allowed in the following terms:
- a. That the Appellant is granted leave to file the appeal out of time against the judgment in Mombasa Small Claims Court No. E345 of 2023 delivered on 5<sup>th</sup> December 2023.
  - b. That the Memorandum of Appeal and the Record of Appeal filed is deemed to be properly on record, and the same be served upon the Respondent within next 7 days.
  - c. The Appellant do deposit Kshs 150,000 in an escrow account in the names of both counsels on record within next 30 days as a condition for stay of execution of judgment,
  - d. That each party shall bear their own costs of this application.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025**

.....

**F. WANGARI**

**JUDGE**

In the presence of: -

Mr. Ndiku Advocate h/b for M/S. Asega Advocate for the Appellant

M/S. Auma Advocate h/b for Mr. Mwarandu Advocate the Respondent

M/S. Salwa, Court Assistant

