



REPUBLIC OF KENYA



**KENYA LAW**  
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**Yetu Dairies Limited v Limuru Milk Processing Limited (Civil Appeal E071 of 2024) [2025] KEHC 9871 (KLR) (18 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 9871 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E071 OF 2024  
DO CHEPKWONY, J  
FEBRUARY 18, 2025**

**BETWEEN**

**YETU DAIRIES LIMITED ..... APPLICANT**

**AND**

**LIMURU MILK PROCESSING LIMITED ..... RESPONDENT**

*(Being an appeal from the Ruling and order of the Principal Magistrate, the Hon. C. N. Mugo, (RM) delivered on 3rd October 2023 in Limuru Civil Case No.119 of 2017)*

**RULING**

1. Before the court for determination is the Notice of Motion application dated 23<sup>rd</sup> April, 2024, wherein the Applicant seeks the following orders:-
  - a. Spent.
  - b. Spent.
  - c. That this Honourable Court be pleased to grant an order of stay of execution pending the hearing and determination of the intended appeal.
  - d. That this Honourable Court be pleased to grant the Applicant leave to appeal out of time against the Judgment of Hon. C. N. Mugo, SRM in Limuru Suit No. 119 of 2017 delivered on 3<sup>rd</sup> October, 2023.
  - e. That the Honourable Court be pleased to grant any other order and/or directions as it deems fit, just and fair.
  - f. That the costs of the application be in the cause.



2. The Application is based on the grounds as set out on its face and the Supporting Affidavit of John Gatumu Njagi sworn on 23<sup>rd</sup> April, 2024. According to the Applicant, Judgment was delivered in favour of the Respondent for the sum of Kshs. 3,567,345.75 on 3<sup>rd</sup> October, 2023. However, the Appellant only became aware of the Judgment against it after the period within which it could file appeal lapsed. The Appellant has averred that the delay in filing the appeal was not intentional but was caused by technical challenges on the part of his advocates and mix up or inadvertent error at the Limuru Registry. The Applicant contends that he is on the verge of losing his properties and stands to suffer substantial loss and irreparable harm if the orders it seeks are not granted.
3. The Application is opposed by the Respondent through the Replying Affidavit of Stephen Kabucho, the Respondent's Advocate, sworn on 28<sup>th</sup> May, 2024, wherein it is confirmed that judgment was delivered on 3<sup>rd</sup> October, 2023 in the absence of the both Counsel. That he followed up with the registry and made a request for a copy of the judgment on 4<sup>th</sup> October, 2023. And upon receipt of the copy of Judgment, counsel prepared a draft decree which he later obtained from court. The Respondent holds that since the Applicant did not pay the decretal sum, he instructed auctioneers to proceed with execution.
4. The Respondent contends that the Applicant has not shown any efforts it has made to obtain a copy of the Judgment. That the Applicant filed an application for stay in the trial court which was dismissed in a ruling delivered on 22<sup>nd</sup> March, 2024. He argues that the Applicant ought to have first lodged an appeal but failed, hence he lost the opportunity after a long inordinate delay.

### **Determination**

5. I have considered the application as well as the supporting affidavit and replying affidavit and find that from the application, the main issues for determination are as follows:-
  - a. Whether the Applicant should be granted leave to file an appeal out of time.
  - b. Whether the court should grant a stay of execution of the Judgment and decree issued against the Applicant
6. With regard to the first issue on leave to file an appeal out of time, it will be appreciated that the law on time to file appeals and extension of time to file appeal 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 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.”
7. The factors which a court ought to consider in granting leave to appeal out of time were set out in the case of *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014]eKLR as follows:-

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision 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.”



8. These factors were also discussed and remunerated by the Court of Appeal in the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR, as follows:-

- “i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;
- iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
- v) The importance of compliance with time limits to the particular litigation or issue; and
- vi) The effect if any on the administration of justice or public interest if any is involved.”

9. In this case, the reasons given by the Applicant are not satisfactory to warrant the orders to grant leave to file appeal out of time and for that reasons this prayer fails. This is because it has not attached any evidence in form of letter made to the court requesting for a copy of the judgment to show the delay.

10. On the second issue, the law on stay of execution is enshrined under Order 42 Rule 6 of the *Civil Procedure Rules* which provides as follows:-

“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”

11. On the purpose of an application for stay of execution pending appeal the court in *RWW v EKW* [2019] eKLR, held:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

12. It is trite law that for the court to grant stay of execution three conditions must be met:-

- a. The application has been made without unreasonable delay.
- b. The Applicant will suffer Substantial loss
- c. The Applicant has offered security for due performance of the decree.

13. On the first condition, the judgment herein was delivered on 3<sup>rd</sup> October, 2024 and the present application was filed on 23<sup>rd</sup> April, 2024 which was six months later and the explanation given for the delay are not satisfactory in court’s view hence this condition has not been fulfilled.



14. On the second condition of substantial loss, the applicant has only stated that they are likely to suffer substantial loss but has not substantiated the claim. The court in the case of *Kenya Shell Limited v Benjamin*

*Karuga Kibiru & Another* [1986] eKLR held:-

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”

15. The court agrees with the case of Kenya Shell supra that without the evidence of the substantial loss it is difficult to grant the stay orders as there is no reason why the Respondent should be kept away from its Judgment.

16. Lastly is the issue of security for the due performance, the Applicant has not offered any security in the Affidavit in order to fulfil this condition. The issue of security was discussed in the case of *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR, held:-

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails...”

17. The Applicant in this case has not fulfilled any of the three conditions for the stay of execution orders to issue. The court therefore finds that application herein lacks merits since the conditions necessary for stay have not been fulfilled and proceeds to issue the following orders:-

- a. That leave be and is hereby granted for the Applicant to file an appeal out of time. The Record of Appeal be filed within sixty (60) days of this ruling
- b. That an order of stay of execution be and is hereby granted staying the execution of the Ruling delivered on 3<sup>rd</sup> October, 2023 by the Hon. C. N. Mugo on the condition that the Applicant deposits the decretal sum of Kshs.3,567,345.75 and costs of Kshs.210,841.00 in a joint interest-earning account in both names of the advocates on record.
- c. Failure to comply with the timelines shall result to the respective orders granted therein to lapse automatically.
- d. Costs of the application to abide with the outcome of the appeal.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

M/S Atieno holding brief for Mr. Okemo counsel for Appellant



No appearance for and by the Respondent

Court Assistant -Kinyua

