



REPUBLIC OF KENYA



**Angwenyi & another v Karagai (Civil Miscellaneous E966 of 2024)
[2025] KEHC 4781 (KLR) (Civ) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4781 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL MISCELLANEOUS E966 OF 2024

TW CHERERE, J

MARCH 20, 2025

BETWEEN

PETERSON MATONGA ANGWENYI 1ST APPLICANT

EDWIN NYANCHWA OCHOKI 2ND APPLICANT

AND

LINDA KARAGAI RESPONDENT

RULING

Introduction

1. The Applicants have filed a Notice of Motion dated 22nd October 2024, brought under Order 22 rule 22, Order 42 rules 4, 6, and 7 of the Civil Procedure Rules, as well as Sections 3 and 3A of the [Civil Procedure Act](#). Through this application, they seek the following orders:
 1. Leave to appeal out of time.
 2. Stay of execution of the judgment.
 3. Stay of attachment and sale of motor vehicle KCZ 549Y.
 4. Unconditional release of motor vehicle KCZ 549Y.
2. The application is based on the following grounds:
 1. A judgment for the sum of KES 1,106,924 was entered in favor of the Respondent against the Applicants jointly and severally in MILIMANI MCCC 11915 OF 2021 on 15th February 2024.
 2. The Applicants did not file an appeal within the stipulated time.



3. The Applicants' Motor vehicle registration number KCZ 549Y has been attached in execution of the decree.
4. The sale of the motor vehicle will cause substantial loss to the Applicants.
5. The Applicants express willingness to provide security in the form of a bank guarantee.
3. The application is supported by an affidavit sworn on 22nd October 2024 by Emily Bor, the Applicants' advocate. The affidavit reiterates the grounds set out in the application, asserting that the delay in filing the appeal was occasioned by the late instruction of counsel by the Applicants. Additionally, it is contended that the Respondent lacks the financial means to refund the decretal sum should the appeal succeed
4. The Respondent opposes the application through a replying affidavit sworn on 11th November 2024 by his advocate, Ichaura Wachira. He contends that the Applicants have failed to satisfy the requirements under Order 42 Rule 6 of the Civil Procedure Rules. Additionally, he asserts that the motor vehicle was lawfully attached in the execution of a valid decree, which remains unsatisfied.

Analysis

5. Section 79G of the *Civil Procedure Act* stipulates:

“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... 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.”
6. The Supreme Court set out the guiding principles that a Court should consider in the exercise of discretion on the extension of time in *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR) and stated as follows:
 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 Respondent 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.
8. The Supreme Court in *County Executive of Kisumu v. County Government of Kisumu & 8 Others* [2017] eKLR reaffirmed the above principles and emphasized that each case must be determined on its own merit and circumstances, with due consideration of whether the delay is inordinate and whether there is a justifiable reason for the extension.



9. The Court, in exercising its discretion, may grant leave to appeal out of time if the Applicant establishes a sufficient cause for the de.
10. In the present case, judgment was delivered on 15th February 2024, while the application for leave to appeal out of time was filed on 22nd October 2024, amounting to a delay of over eight months. The Applicants attribute this delay to the late issuance of instructions to their counsel.
11. While the Applicants have not provided a satisfactory explanation for the delay, the Court finds that the delay is not excessively inordinate. Furthermore, there is no evidence to suggest that granting the extension would occasion prejudice to the Respondent.
12. Consequently, the Court, in the exercise of its discretion, grants the Applicants leave to appeal out of time.
13. Order 42 rule 6(2) of the Civil Procedure Rules provides:
 - “No order for stay of execution shall be made under subrule (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.”
14. The Court of Appeal in *Kenya Shell Limited v Benjamin Karuga Kibiru & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* emphasized that when considering an application for stay of execution, the key issue is whether substantial loss has been demonstrated. The court stated:
 - “As a general rule, an applicant must satisfy the requirements under Order 41 Rule 4 of the Civil Procedure Rules. In the absence of evidence showing substantial loss, it would be uncommon for an appeal to be rendered nugatory due to other factors. Substantial loss, in its various forms, is the fundamental consideration in granting a stay.”
15. The Applicants contend that if the stay is not granted, they will suffer substantial loss as their motor vehicle KCZ 549Y has been attached and is due for sale, and the Respondent might not be able to refund the decretal sum if the appeal succeeds.
16. The Respondent, on the other hand, maintains that execution is lawful and that the Applicants have not demonstrated substantial loss.
17. Once an applicant expresses a reasonable fear, as in this case, that a respondent may be unable to refund the decretal sum in the event of a successful appeal, the evidential burden shifts to the respondent to demonstrate their financial capacity. This is because the respondent’s financial status is a matter within their peculiar knowledge. (See *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & another [2006] KECA 333 (KLR)*).
18. The record indicates that the Respondent did not controvert the assertion that he lacks the financial means to refund the decretal sum. Consequently, the Court finds that the Applicants have sufficiently demonstrated the likelihood of suffering substantial loss, which is a material consideration under Order 42 Rule 6 of the Civil Procedure Rules.



19. Order 42 rule 6(2)(b) makes it mandatory for an applicant seeking a stay of execution to provide security for the due performance of the decree. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, the court held that the requirement for security is meant to balance the rights of both parties. A reasonable form of security must be provided to safeguard the interests of the decree-holder.
20. The Applicants have demonstrated a willingness to furnish security and have thus complied with Order 42 rule 6(2)(b).

Conclusion

21. In light of the foregoing, the court makes the following orders:
 1. Leave is granted to the Applicants to file the intended appeal within 14 days from the date of this ruling.
 2. A stay of execution of the judgment delivered on 15th February 2024 in Milimani MCCC 11915 of 2021, including the sale of motor vehicle KCZ 549Y, is granted pending the hearing and determination of the intended appeal, subject to the Applicants depositing the total decretal sum with the Court.
 3. Motor vehicle KCZ 549Y shall be released to the Applicants upon them paying incidental attachment costs and depositing the total decretal sum with the court
 4. Costs of the application shall abide by the outcome of the intended appeal.

DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Applicant - Mr.Magero for Kimondo, Gachoka & Co. Advocates

For Respondent – Ms.Kisiang’ani for Waiganjo Wachira & Co. Advocates

