



**Machakos Funeral Home Limited v Mutio t/a Riverside Garage (Civil Miscellaneous E1160 of 2024) [2025] KEHC 4742 (KLR) (Civ) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4742 (KLR)

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

**CIVIL**

**CIVIL MISCELLANEOUS E1160 OF 2024**

**TW CHERERE, J**

**MARCH 13, 2025**

**BETWEEN**

**MACHAKOS FUNERAL HOME LIMITED ..... APPLICANT**

**AND**

**STEPHEN MUTIO T/A RIVERSIDE GARAGE ..... RESPONDENT**

**RULING**

**Introduction**

1. The Notice of Motion dated 19th December 2024 is brought under Sections 79G and 95 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya as well as Order 50 Rule 5, Order 42 Rule 6, and Order 22 Rule 22 of the Civil Procedure Rules. The application seeks the following orders:
  1. An extension of time to appeal the judgment delivered on 18th October 2024 in SCCC No. E2693 of 2024.
  2. Stay of execution of the said judgment pending the hearing and determination of the intended appeal.
2. The application is supported by the affidavit of Mutua Makau, advocate for the Applicant, sworn on 19<sup>th</sup> November 2024. The grounds for the application are as follows:
  - a. The Applicant was unable to file the appeal on time as its director could not be reached after the judgment was delivered.
  - b. The intended appeal raises arguable issues with a high chance of success.
  - c. The Applicant is willing to furnish reasonable security for the due performance of the decree.



3. The Respondent opposed the application through a replying affidavit sworn on 03<sup>rd</sup> March 2025, asserting that:
  - a. The judgment was delivered on 18th October 2024, and the application was filed on 19th December 2024, which is a delay of 60 days.
  - b. The Applicant has not provided a sufficient explanation for the delay.
  - c. The Applicant is merely using the appeal process to frustrate the Respondent from enjoying the fruits of the judgment
  - d. The Applicant is seeking to frustrate and delay justice.

## 2. Issues for Determination

4. The court identifies the following issues for determination:
  1. Whether the Applicant has provided sufficient reasons to warrant an extension of time to file an appeal.
  2. Whether the Applicant has met the legal threshold for the grant of a stay of execution pending appeal.

## 3. Analysis and Determination

### (a) Extension of Time to Appeal

5. The power to extend time for filing an appeal is discretionary and is guided by Section 79G of the [Civil Procedure Act](#), which states:

“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 such time as may be certified by the court as 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.”
6. The judgment was delivered on 18<sup>th</sup> October 2024, and the application for an extension was filed on 19<sup>th</sup> December 2024, amounting to a period of 60 days. The delay in filing the appeal is explained by the Applicant’s advocate, who contends that he was unable to reach the director of the Applicant.
7. In *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] KESC 16 (KLR), the Supreme Court held that the whole period of delay should be declared and sufficiently explained.
8. In the present case, there is no evidence detailing how the advocate tried to reach the director of the Applicant nor has the director explained reasons for his unavailability.
9. The foregoing notwithstanding, I have looked at the draft memorandum of appeal and it raises triable issues worthy of consideration on appeal.



## **(b) Stay of Execution Pending Appeal**

10. The grant of a stay of execution is governed by Order 42 Rule 6 of the Civil Procedure Rules, which provides that:

“No order for stay of execution shall be made unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made; (b) the application has been made without unreasonable delay; and (c) such security as the court orders for the due performance of the decree has been given by the applicant.”
11. The Applicant argues that it is ready to furnish security and that the appeal raises arguable issues. However, the Respondent contends that the delay in applying shows a lack of diligence on the part of the Applicant.
12. In *Kenya Shell Limited v Benjamin Karuga Kibiru & Ruth Wairimu Karuga* [1982-88] 1 KAR 1018, the Court of Appeal held that substantial loss is the cornerstone of an application for stay, and in its absence, a stay should not be granted. In *Machira t/a Machira & Co. Advocates v East African Standard (No. 2)* [2002] eKLR, the court held that the applicant must demonstrate that execution would result in irreparable loss that cannot be compensated by damages.
13. In the present case, the Applicant has not demonstrated substantial loss, or that the Respondent would not be in a position to refund the judgment sum in the event that the appeal succeeds.

## **4. Orders**

14. For the foregoing reasons, the court makes the following orders:
  1. The application for extension of time to file an appeal is allowed on condition that the appeal be filed within 14 days from today’s date
  2. The prayer for stay of execution lacks merit and it is dismissed
  3. Costs of this application shall be borne by the Applicant.

**DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MARCH 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Ubah

For Applicant - Mr. Odongo for J.A.Makau & Co. Advocates

For Respondent - Mr. Kanyi for Kanyi Ngatia & Co. Advocates

