

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**MISC. CIVIL APPLICATION NO. E023 OF 2025**

**ANGELA NDAMBUKI.....1<sup>ST</sup>**  
**APPLICANT**  
**ROY MUTUNGI.....2<sup>ND</sup>**  
**APPLICANT**  
**-VERSUS-**  
**E-GAP SOLUTIONS**  
**LIMITED.....RESPONDENT**

**RULING**

**The Application**

1. For determination is the Notice of Motion dated 15.01.2025 (the Motion) filed by **Angela Ndambuki** and **Roy Mutungi** (hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Applicants) seeking a substantive order for the enlargement of time to enable the Applicants file an appeal against the judgment delivered by Honourable J. Asiago on 14.11.2024 in Nairobi SCCCOMM No. E988 of 2024 upon which the relevant memorandum of appeal be filed within a period of seven (7) days of such order; and a further order for

a stay of execution of the aforesaid judgment together with all consequential orders arising therefrom, pending the hearing and determination of the intended appeal.

2. The Motion is anchored under Sections 1A, 1B, 3A, 63(e) and 95 of the Civil Procedure Act (CPA); Order 42, Rule 6, Order 50, Rule 6 and Order 51, Rules 1, 3 and 4 of the Civil Procedure Rules (CPR); and Article 159 of the Constitution of Kenya, 2010.
3. The grounds on the face of the Motion are amplified in the supporting affidavit sworn by the 2<sup>nd</sup> Applicant. He has averred that the delay in timeously lodging the appeal was unintentional and was occasioned by the fact that on the date of delivery of the impugned judgment, the learned Adjudicator had indicated that copies of the said judgment had been forwarded to the email addresses availed by the respective advocates on record.
4. The 2<sup>nd</sup> Applicant avers that, nevertheless, it was noted that the Applicants' advocates had not received a copy of the aforesaid judgment, which position was conveyed to the learned Adjudicator who undertook to share the same at the earliest opportunity. That it was not until 10.01.2025 that the

Applicants' advocates received a copy thereof, the same having previously been forwarded to an erroneous email address ([litigation@mohamedmuigai.com](mailto:litigation@mohamedmuigai.com)) whereas that belonging to the said advocates is ([litigation@mohammedmuigai.com](mailto:litigation@mohammedmuigai.com)).

5. The 2<sup>nd</sup> Applicant states that upon perusing the impugned judgment, his advocates discovered that the Applicants had originally been granted a stay of execution to last 30 days, which lapsed on or about 15.12.2024.
6. It is the assertion by the 2<sup>nd</sup> Applicant that being aggrieved by the impugned judgment, the Applicants herein intend to challenge the same on appeal, adding that they have annexed a draft memorandum of appeal to that effect, which raises arguable grounds requiring consideration.
7. Regarding a stay of execution, it is the assertion by the 2<sup>nd</sup> Applicant that unless the stay order now sought is granted, **E-Gap Solutions Limited** (hereafter the Respondent) will proceed to execute the decree arising from the judgment. On the premise of those averments, the court is urged to allow the Motion as prayed.

## **Replying Affidavit**

8. The Respondent has opposed the Motion by way of the replying affidavit sworn by its Director, **Gibbon Akifuma**, on 21.01.2025. It is deposed that contrary to the averments being made in the Motion, a copy of the impugned judgment was forwarded to the correct email address belonging to the Applicants' advocates going by their website, namely [info@mohammedmuigai.com](mailto:info@mohammedmuigai.com) in addition to the erroneous address referenced above. That, consequently, the Applicants' advocates ought to have received the said copy.
9. He deposed that, furthermore, all relevant court users have access to the Judiciary's Case Tracking System (CTS) platform to which the impugned judgment was uploaded on 15.11.2024. That in the circumstances, the Applicants, through their advocates, were at all material times aware of the judgment and hence the delay in timeously filing an appeal has not been sufficiently explained.
10. On the subject of a stay of execution, the deponent avers that if the order for a stay sought is granted, the Respondent will suffer prejudice, adding that in the unlikely event that the

appeal succeeds, the Respondent is capable of refunding the decretal sum if necessary. Otherwise, the deponent urges the court to dismiss the Motion with costs.

### **Directions of the Court**

11. Court record shows that when the parties' respective advocates attended court on 22.01.2025 counsel for the Applicants sought and was granted leave to file a further affidavit within seven (7) days thereof. This court further directed the parties to file and serve written submissions within seven (7) days each. However, when the matter subsequently came up before this court on 10.02.2025 for further directions, it was noted that the Applicants' advocates had not, at all, complied with the previous directions of 22.01.2025 and that only the Respondent had availed its submissions for this court's consideration.

### **Written Submissions**

12. The Respondent has cited Section 79G of the CPA which sets the timelines for filing an appeal from a subordinate court to the High Court at 30 days from the date on which the impugned judgment or order is made.

13. The Respondent has reiterated its earlier averments that in the present instance, no plausible reasons have been given by the Applicants to explain the delay in filing their appeal within the stipulated timelines. The Respondent has equally submitted that whether or not to grant a party an extension of time to file an appeal is purely discretionary, which discretion ought to be exercised judicially, borrowing from the case of **Wambui v Ngethe [2023] KEHC 18414 (KLR)** in which the High Court reasoned that:

***“The court of appeal discussed some factors to be considered by the court before exercising its discretion to enlarge time to file an appeal in Thuita Mwangi vs Kenya Airways Ltd (2003) eKLR to include:***

- 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 Respondent if 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.”**

14. The Respondent has contended that in the absence of any sufficient material to support the delay herein, this court ought to decline to grant the order seeking leave to lodge an appeal out of time.

15. On the subject of a stay of execution, it is the contention by the Respondent that in order for the same to be granted here, the Applicants ought to satisfy the conditions set out under Order 42, Rule 6(2) of the Civil Procedure Rules namely:

- a) That substantial loss may result to the applicant unless the order is made;**
- b) That the application has been made without unreasonable delay; and**
- c) That 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.**

16. The Respondent has argued that the Applicants have not satisfied any of the above conditions, echoing its earlier averments that being a solvent company, it is fully capable of refunding the decretal sum if the appeal is successful. The Respondent has equally argued that if granted, the orders sought will serve no legitimate purpose and will hinder its rights. On those grounds, the court is urged to dismiss the Motion with costs.

### **Analysis and Determination**

17. The court has considered the Motion accompanied by its supporting affidavit, the replying affidavit and the submissions on record plus the authorities cited therein.

18. It is clear that the orders sought are two (2)-fold in nature. The foremost order is for leave to appeal out of time, or the enlargement of time for filing an appeal. The power of the court to enlarge time for filing an appeal out of time is expressly donated by **Section 95** of the CPA as read with **Order 50, Rule 6** of the CPR. The cited provisions further express that

such enlargement of time may be granted even in instances where the period for performing the necessary action may have expired, which would regularize an appeal filed out of time, in any event.

19. According to **Section 79G** of the CPA, an appeal to the High Court against the decision rendered by a subordinate court shall be filed within a period of 30 days from the date of such decision.

20. The principles governing leave to appeal out of time are well-settled. A successful applicant must demonstrate “*good and sufficient cause*” for not filing the appeal in time. In **Thuita Mwangi v Kenya Airways [2003] eKLR**, the Court of Appeal while considering **Rule 4** of the Court of Appeal Rules which was in *pari materia* with **Section 79G** of the CPA, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

***“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 general the matters which this court takes***

***into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”***

21. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court can exercise its discretion in his or her favor.

22. That said, the Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [2014] eKLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

***“(T)he underlying principles a court should consider in exercise of such discretion include;***

***1. Extension of time is not a right of any 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 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.**

**7. ....”**

23. On the length of delay, from a perusal of a copy of the impugned judgment which has been annexed to the instant Motion, it is apparent that it was delivered on 14.11.2024 whereas the instant Motion was brought two (2) months later on or about 15.01.2025. In the court's view, the delay is not unreasonable.

24. Concerning the reasons for the delay, the court has considered the explanation given by the Applicants that the delay in filing the appeal within the statutory timelines was occasioned by the delay in obtaining a certified copy of the impugned judgment upon delivery thereof.

25. Upon perusal of the record, I have observed that the Applicants' annexed various email correspondences including an email dated 14.11.2024 sent by the learned Adjudicator and forwarding a copy of the impugned judgment to the parties' respective advocates. Upon a further study of the aforesaid email, I noted that while the learned Adjudicator addressed the email to the purportedly erroneous email address referenced hereinabove, it is also apparent that the said Adjudicator in addition copied the relevant email to [info@mohammedmuigai.com](mailto:info@mohammedmuigai.com) also said to belong to the Applicants' advocates. There is nothing on the record to indicate that the said email address is invalid. On the contrary, the same suggests that the Applicants' advocates received or ought to have received a copy of the impugned judgment via the above address, as was rightly pointed out by the

Respondent. In the circumstances, I hold the view that the explanation given by the Applicant is unsatisfactory and unconvincing.

26. Be that as it may, and regarding the principle whether or not the intended appeal is of arguable nature, from a perusal of the draft memorandum of appeal annexed to the Motion, it is clear that the same is challenging the finding by the learned Adjudicator on three (3) grounds primarily arguing that the said Adjudicator did not consider the evidence tendered on behalf of the Applicants. Upon taking into account the nature of the appeal but without delving into the merits thereof at this stage, the court is satisfied that it contains arguable grounds.

27. Concerning the principle on prejudice to be suffered by the Respondent herein, in the absence of any specific material to demonstrate the manner in which it stands to be prejudiced, the court finds that the prejudice, if any, that may befall the Respondent can be compensated through an award of costs.

28. In view of all the foregoing circumstances, the court is satisfied to exercise its discretion in favour of the Applicants on the subject of leave to appeal out of time.

29. The second order seeks a stay of execution pending the appeal. It is trite law that the courts have discretionary power to grant an order for a stay of execution of a decree or order pending appeal and which discretion ought to be exercised judicially. See **Butt v Rent Restriction Tribunal (supra)**. The applicable provision surrounding a stay of execution is **Order 42, Rule 6** of the **CPR** which stipulates that:

***“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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”.***

30. Having already addressed the first condition touching on whether the Motion has been brought without unreasonable delay, the second condition for consideration here is whether the Applicants have demonstrated the likelihood of suffering substantial loss if a stay is denied. The importance of substantial loss in any application for a stay of execution was aptly addressed by the Court of Appeal case in the renowned

case of **Kenya Shell Ltd v Kibiru & Another [1986] KLR 410** when it held that:

***“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”***

31. The Court went on to set out the following still on the subject of substantial loss:

***“1. ....***

***2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.***

***3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.***

***4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the***

***case involved a money decree capable of being repaid.”***

32.The court has considered the averments by the Applicants on the manner in which they stand to suffer substantial loss, namely that the Respondent will proceed to execute the decree. The Respondent has rebutted by stating and submitting that no substantial loss has been shown and that in any event, it has the means to refund the decretal sum should the circumstances require it.

33.It is the ordinary course of principle for a successful party to be granted the privilege of enjoying the fruits of his or her judgment, as is the case with the Respondent. It is therefore not enough for the Applicants to convey their apprehension of imminent execution by the Respondent.

34.That notwithstanding, upon considering the argument by the Respondent on its ability to refund the decretal sum, the court has observed that the Respondent has not tendered any credible material to ascertain its financial capacity or ability to refund the decretal sum of Kshs. 559,347.25 if called upon to do so, which sum is fairly substantial in nature.

35. In the circumstances, the court is of the view that the Applicants are likely to suffer substantial loss if the order for a stay of execution is denied.

36. None of the parties addressed this court on the condition of provision of security. Be that as it may, the law is clear that the provision of security is a mandatory condition for granting a stay of execution.

37. Consequently, the court will allow the Notice of Motion dated 15.01.2025, giving rise to the following orders:

***a) Leave be and is hereby granted to the 1<sup>st</sup> and 2<sup>nd</sup> Applicants to file their appeal out of time.***

***b) There shall be a stay of execution of the judgment delivered on 14.11.2024 in Nairobi SCCCOMM No. E988 of 2024 on the condition that the Applicants deposit the decretal sum Kshs. 559,347.25 in court within 30 days from the date of this ruling, failing which the stay order shall automatically lapse.***

***c) The Applicants shall file Record of Appeal and serve it on the Respondents within 60 days from the date of this Ruling.***

***d) In the circumstances, the Respondent shall have the costs of the Motion.***

***e) This file, being a Miscellaneous file, shall stand closed upon filing of the Appeal in the Civil Appeals Division.***

38. Orders shall be issued accordingly.

**Dated, signed and delivered on 24<sup>th</sup> March 2025.**

**S. N. MUTUKU  
JUDGE**

**In the presence of:**

1. Ms Nynachera holding brief for Mr. Magambo for the Respondent.
2. Mr. Wakhisi for the Applicant.