



REPUBLIC OF KENYA



**KENYA LAW**  
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**PEO Agency v Matswa (Miscellaneous Application E030 of 2024)  
[2025] KEHC 3017 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3017 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
MISCELLANEOUS APPLICATION E030 OF 2024**

**DK KEMEL, J  
MARCH 14, 2025**

**BETWEEN**

**PEO AGENCY ..... APPLICANT**

**AND**

**LYDIA ATIENO MATSWA ..... RESPONDENT**

*(In the matter of an intended appeal from the judgment and decree of the  
Hon.T.K. Nambisia delivered on 29/9/2024 in Ukwala PMCC No. E016/2022)*

**RULING**

1. The Applicants have approached this court vide a Notice of Motion application dated 26<sup>th</sup> November, 2024 seeking the following orders:
  - i. Spent.
  - ii. Spent
  - iii. That this Honourable court be pleased to grant stay of execution of the judgment and/or decree delivered on 29<sup>th</sup> September, 2024 for Kshs 307,850/= plus assessed costs of Kshs98,800/= in Ukwala PMCC No. E016/2022 pending the hearing and determination of the intended appeal.
  - iv. That this Honourable court be pleased to grant leave to the Applicant to file an appeal out of time from the judgment and decree of the Honourable trial court delivered on 29/9/2024 together with costs and interest in Ukwala PMCC E016/2022.
  - v. That the costs of the application be provided for.
2. The application is supported by grounds set out on the face thereof plus the supporting affidavit of Mary Ongong'a, learned counsel for the Applicant sworn on even date. The Applicants' case is inter



alia; that the period of stay granted by the trial court has since lapsed; that the delay in lodging an appeal was due to the fact that the Applicant had to engage with their insurer and that some time passed before instructions were given for the filing of the present application; that the delay was also caused by management wrangles in the insurance company which affected communication between the advocates and the instructing client; that the insurance company was recently able to access funds from the bank after the court issued a ruling vide Nairobi HCC No. E328/2024( Commercial and Tax Division; that the delay is excusable and has been explained; that the Applicant contends that the award was erroneous and that should execution proceed the Applicant stands to suffer reparable loss and prejudice as the ability of the Respondent to refund the amounts is unknown; that the intended appeal raises triable issues, meritorious with high chances of success and that the same stands to be rendered nugatory if the stay is not granted; that the Applicant is ready, willing and able to provide a bank guarantee from Family Bank as security for stay of execution pending determination of the intended appeal; that the Respondent will not be prejudiced if this application is allowed.

3. The said application is opposed by the Respondent through her Counsel F. Omondi ESQ, who filed a replying affidavit sworn on 3<sup>rd</sup> February 2025 wherein he averred inter alia; that the judgment was delivered way back in September 2024 and that the Applicant ought to have lodged the appeal in good time; that the Applicant was able to lodge appeals in Kisumu and Busia High Courts regarding similar matters yet it was not able to do so in this matter; that the failure by the Applicant to lodge appeal in time is not excusable; that there exists Siaya HC Misc. Application No. E027/2024 filed by the present counsel for the Applicant and which seeks the same reliefs and therefore there is no reason why the Applicant did not lodge the appeal in time; that the application has been brought after undue delay with no valid reasons being given; that the application is bereft and should be dismissed with costs.
4. The Applicant filed a further affidavit sworn by Mary Ong'ong'a dated 7<sup>th</sup> February 2025 wherein she deposed inter alia; that the instructions by the insurance company were given to different advocates and that each case ought to be handled differently from the others.
5. The Application was canvassed by way of written submissions. It is only the Applicant who complied. The Applicant's submissions are dated 24<sup>th</sup> February 2025.
6. On its part, the Applicant relied on the provisions of section 79G of the Civil Procedure Act which provides as follows:

“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. It was submitted that the delay was not because of their indolence but because of the reasons explained in the grounds and supporting affidavit.
8. It was submitted further that a party should not be denied the right to appeal due to procedural technicalities of timelines, while placing reliance on the case of Samuel Mwaura Muthumbi vs. Josephine Wanjiru Ngugi & Another (2018) eKLR which held thus: “...statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not in themselves a core substantive value in the same sense...”



9. It was likewise submitted that the delay was not inordinate and excusable and that they were ready and willing to provide security for the due performance of the decree.
10. In conclusion, the Applicant submitted that it has satisfied the conditions for granting an order for stay of execution pending appeal as espoused under section 79G of the *Civil Procedure Act* and Order 42 Rule 6 of the Civil Procedure Rules and prayed that the same be granted.
11. The Respondent concluded that the application is bereft of merit and that the same should be dismissed with costs.
12. I have considered the instant application together with the submissions filed. I find the issue for determination is whether the Applicant has satisfied the conditions for the court to exercise its discretion in its favor and grant the orders sought.
13. As regards the issue of delay to lodge appeal on time, the Applicant has rendered a plausible explanation to the effect that the insurance company had some management wrangles which impeded proper communication and instructions to the lawyers. Indeed, the Applicant indicated that the wrangles led to the filing of a case in Nairobi High Court over the same and after its resolution, instructions were thus given to lodge appeal by which time the period had elapsed. It is my view that the Applicant should be given an opportunity to ventilate its appeal. I find the period of delay not inordinate since it was late by two months. Further, the Applicant has indicated that it is ready and willing to deposit security for the due performance of the decree. I find that no prejudice will be caused to the Respondent.
14. Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and that the court will impose such security as the court may find appropriate for the due performance of any decree or order as may ultimately be binding on the Applicant. See *Amal Hauliers Limited Vs Abdunasi Abubakar Hassan* (2017) eKLR & *Butt Vs Rent Tribunal* (1982) KLR 417.
15. To the foregoing, I would add that an order for stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the same, shall also consider the overriding objective stipulated under sections 1A and 1B of the *Civil Procedure Act*. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman vs. Amboseli Resort Limited* [2004] 2 KLR 589.
16. On the likelihood of suffering substantial loss, and security of the appeal, the court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory as well as the interest of the Respondent who seeks to enjoy the fruits of her judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruits of her judgment. See *Attorney General Vs Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd Vs Kibiru & another* (Supreme); *Mukuma Vs Abuoga* (1988) KLR 645.
17. The law is that where the Applicant succeeds, he/she should not be faced with a situation in which he would find himself unable to get back his money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in his intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. See Court of Appeal in the case of *Nduhiu Gitahi Vs Warugongo* (1988) KLR 621; *IKAR 100*; (1988-92) 2 KAR 100.



18. In view of the foregoing observations, I am satisfied that the Applicant has satisfied the conditions set out under Section 79G of the *Civil Procedure Act* as well as Order 42 Rule 6 of the Civil Procedure Rules to warrant the grant of the orders sought. I find that the Respondent will not suffer any prejudice since the decretal sums will be deposited into a joint interest earning account in names of the advocates for the parties pending the determination of the intended appeal. Consequently, the Applicants' application dated 26/11/2024 is allowed in the following terms:

- a. The Applicant is hereby granted leave to file an appeal out of time and that the Memorandum of Appeal be filed and served upon the Respondent within ten (10) days from the date hereof.
- b. An order of stay of execution of the judgement and decree in Ukwala PMCC No. E016 of 2022 is hereby granted upon the Applicants depositing the entire decretal sums plus assessed costs in a joint interest earning account in the names of both advocates within thirty (30) days from the date hereof failing which the stay shall lapse.
- c. The costs of the application shall abide in the appeal.

It is so ordered.

**DATED, AND DELIVERED AT SIAYA THIS 14<sup>TH</sup> DAY OF MARCH 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

Kimondo Gachoka.....for Applicant

Omondi..... for Respondent

Ogendo.....Court Assistant

