



REPUBLIC OF KENYA



**Wanjiru & another v Gapangwa (Civil Miscellaneous E1150 of 2024)  
[2025] KEHC 4744 (KLR) (Civ) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4744 (KLR)

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

**CIVIL**

**CIVIL MISCELLANEOUS E1150 OF 2024**

**TW CHERERE, J**

**MARCH 13, 2025**

**BETWEEN**

**JAMES MBURU WANJIRU ..... 1<sup>ST</sup> APPLICANT**

**PETER MWAURA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**FRED GAPANGWA ..... RESPONDENT**

**RULING**

1. By Notice of Motion dated 11<sup>th</sup> December 2024 brought under Section 3A, 79G and 95 of the [Civil Procedure Act](#), Order 22 rule 22, Order 42 rule 6(2), Order 50 rule 6 and Order 51 rule 1 and 3 of the [Civil Procedure Rules](#), Applicants seek the following orders
  1. Leave to appeal out of time
  2. Stay of execution of the judgment in Milimani Small Claims Court Case No. SCCC E793 of 2024 pending the hearing and determination of the intended appeal
  3. Costs to abide by the outcome of the intended appeal
2. The application is based on the following grounds:i. Applicants are aggrieved by the judgment and intend to appeal.ii. They are willing to provide security for the stay.iii. They may suffer substantial loss because the Respondent might not be able to refund the decretal sum if the appeal succeeds.
3. The application is supported by an affidavit sworn by Winnie Arek on 11<sup>th</sup> December 2024 in which she reiterates the grounds for the application.
4. In a replying affidavit dated 04<sup>th</sup> March 2025, the Respondent opposes the application on the following grounds:i. The applicants have not provided a plausible reason for the 8-month delay in applying.ii.



The application is intended to frustrate the Respondent by preventing him from benefiting from the judgment.

5. The Respondent also requests that if the application is granted, the Applicants should:
  - a. Be ordered to pay him half of the decretal sum.
  - b. Deposit the other half of the decretal sum into an interest-earning account managed by both advocates within 21 days.
6. From the affidavit evidence on record, I have determined the issues for determination as follows:
  1. Whether the Applicants should be granted leave to file an appeal out of time,
  2. Whether a stay of execution should be granted pending the hearing and determination of the intended appeal,
  3. Whether the conditions sought by the Respondent in the event the application is granted should be imposed.

### **Analysis and determination**

7. Section 79G of the *Civil Procedure Act* allows the Court discretion to grant leave to appeal out of time. While the Applicants have not provided an elaborate explanation for the eight-month delay, the Court can still grant leave, especially considering the likelihood of substantial loss and the Applicants' willingness to provide security.
8. In *Kenya Shell Limited v Kobil Petroleum Limited* [2006] eKLR, the Court of Appeal spelt out the considerations attaching to an application seeking leave to file an appeal, and stated inter alia that:

“Whether or not the court would grant leave to appeal is a matter for the discretion of the court. As in all discretions exercisable by courts, however, it has to be judicially considered. Some guidance in that regard was given by this Court in *Machira t/a Machira & Company Advocates v Mwangi & Anor.* [2002] 2 KLR 391 as follows: -“The Court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word “realistic” makes it clear that fanciful prospect or an unrealistic argument is not sufficient. When leave is refused, the Court gives short reasons which are primarily intended to inform the applicant why leave is refused. The Court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the Court is not satisfied that the appeal has no prospects of success. For example, the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law requires clarifying. There must, however, almost always be a ground of appeal which merits serious judicial consideration.”
9. Order 42 Rule 6(2) of the *Civil Procedure Rules* provides that a stay of execution may be granted if the applicant demonstrates:
  - a. That substantial loss may result to the applicant unless the order is made,
  - b. That the application has been made without unreasonable delay,
  - c. That the applicant is willing to give such security as the Court may order for the due performance of the decree.



10. Substantial loss is the cornerstone for granting a stay of execution. The applicants have argued that they may suffer substantial loss if the decretal sum is paid to the respondent and the appeal succeeds, as the respondent may not be in a position to refund the sum.
11. This concern has been recognized in numerous decisions. In *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR, the Court emphasized that substantial loss is the most important factor when considering an application for stay of execution especially if the Applicant demonstrates that if the decretal sum was paid out, there was a likelihood that it would not be recoverable if the appeal succeeded.
12. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR), the Court held that the applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.
13. In the current case, the Applicants argue that the Respondent's financial means are unknown, making it difficult to recover the decretal sum should the appeal succeed.
14. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR, the Court of Appeal held that:

“Once an applicant expresses doubt as to the respondent's financial capability, the evidentiary burden shifts to the respondent to prove that he can refund the decretal sum if paid and the appeal succeeds.”
15. The Respondent has not provided any evidence to demonstrate his financial ability to refund the decretal sum. This in effect raises a legitimate concern of substantial loss on the part of the Applicants.
16. Order 42 Rule 6(2) of the *Civil Procedure Rules* requires that an application for stay of execution be made without unreasonable delay. The impugned judgment was delivered on 11<sup>th</sup> October 2024, and the application was filed on 11<sup>th</sup> December 2024. There was a two-month delay between the delivery of the judgment and the filing of the application. Although the delay is not sufficiently explained, justice demands that the Applicants be granted an opportunity to ventilate their appeal.
17. Under Order 42 Rule 6(2)(c), the applicant must provide security for the due performance of the decree. The Applicants have shown a willingness to provide security. In *Gianfranco Manenthi & Another -vs- African Merchant Assurance Co. Ltd* [2019] eKLR, the court held that:

“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.....”
18. To balance the interests of both parties, this Court finds that the notice of motion dated 11<sup>th</sup> December 2024 is merited.
19. In light of the foregoing, I make the following orders:
  - a. Leave to file an appeal out of time is granted within 14 days from the date of this ruling.
  - b. Stay of execution of the judgment in Milimani Small Claims Court Case No. SCCC E793 of 2024 is granted, subject to the Applicants depositing the decretal sum with the court within 30 days from the date of this ruling.
  - c. In default of compliance with (a) and (b) above, the stay order shall automatically lapse



d. Costs of this application shall abide by the outcome of the appeal.

**DELIVERED AT NAIROBI THIS 13th DAY OF MARCH 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Ubah

For Applicant - N/A for Kimondo, Gachoka & Co. Advocates

For Respondent – Mr. Khafumi for Musili Mbiti & Associates Advocates

