



**Chelule & another v Kasaine (Civil Miscellaneous Application
E241 of 2025) [2025] KEHC 6261 (KLR) (Civ) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 6261 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL MISCELLANEOUS APPLICATION E241 OF 2025**

TW CHERERE, J

APRIL 24, 2025

BETWEEN

YVONNE CHEMUTAI CHELULE 1ST APPELLANT

PHILIP KIBET KISABIT 2ND APPELLANT

AND

ADAM MAYIANI KASAINI RESPONDENT

RULING

1. The right of access to justice and fair hearing is constitutionally protected under Article 50 of the *Constitution*. This right includes the opportunity to appeal an adverse decision where meritorious grounds exist. However, applications for stay of execution are governed by clear legal thresholds to balance competing interests between an appellant and a successful litigant. This ruling concerns an application seeking leave to appeal out of time and stay of execution pending the intended appeal.

Background

2. By a ruling delivered on 29th November 2024 in Milimani MCCC No. E2623 of 2023, summary judgment was entered for the Respondent against the Appellants for KES. 900,000 plus costs and interest.
3. The Appellants filed a Notice of Motion dated 03rd March 2025 seeking:
 1. Leave to appeal out of time;
 2. Stay of execution of the judgment pending hearing and determination of the intended appeal;
 3. Costs of the application.



4. The application is premised on Section 3A of the *Civil Procedure Act*, Order 42 Rule 6, and Order 50 Rule 6 of the Civil Procedure Rules. It is supported by an affidavit sworn by the 2nd Applicant on 03rd March 2025. The Applicants contend that they have a good defence to the claim which was summarily determined and stand to suffer substantial loss if execution proceeds.
5. The Respondent opposed the motion through a replying affidavit sworn on 20th March 2025, asserting that:
 1. The ruling was delivered on 29th November 2024 and the application was only filed after execution commenced;
 2. The Applicants have not demonstrated substantial loss;
 3. No security for due performance has been offered.
6. I have considered the affidavit evidence on record and identified the following issues for determination:

SUBPARA 1. leave to appeal out of time should be granted;

 2. Whether the Applicants have met the threshold for grant of stay of execution under Order 42 Rule 6 of the Civil Procedure Rules.

1. Leave to appeal out of time

7. The guiding principles for extension of time to file an appeal are well-settled. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court held that extension of time is an equitable remedy and should be granted on a case-by-case basis depending on, inter alia, the length of delay, the reason for the delay, and whether the intended appeal raises arguable issues.
8. The impugned ruling was delivered on 29th November 2024, and the application was filed on 03rd March 2025, approximately three months later. The delay, though not negligible, is not inordinate in the circumstances. Having considered the draft memorandum of appeal annexed to the supporting affidavit, I find that it raises triable issues that deserve judicial consideration.
9. In the spirit of substantive justice and the right to be heard, the application for leave to appeal out of time is thus merited.

2. Stay of Execution

10. The legal requirements for stay of execution are provided under Order 42 Rule 6(2) of the Civil Procedure Rules. An applicant must demonstrate:
 1. Substantial loss may result unless the order is made;
 2. The application has been made without unreasonable delay;
 3. Security for the due performance of the decree has been provided.
11. The Applicants have not demonstrated the kind of substantial loss contemplated by law. The mere fact of execution, or inconvenience, does not suffice. In *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another* [1986] KLR 410, the Court of Appeal held that substantial loss is the cornerstone of the jurisdiction to grant a stay.
12. Furthermore, the Applicants have not offered any security for the due performance of the decree. As stated in *Equity Bank Ltd v West Link Mbo Ltd* [2013] eKLR, the requirement for security



presupposes the existence of an enforceable decree and ensures that a successful litigant is not prejudiced.

13. Consequently, I find that the failure by the Applicants to satisfy the requirements under Order 42 Rule 6, tilts the scales against the equitable exercise of this Court's discretion in their favour.

Disposition

14. From the foregoing analysis, the court makes the following orders:

1. The application for leave to appeal out of time is hereby allowed.
2. The appeal shall be filed within 14 days from today's date
3. The prayer for stay of execution pending appeal is hereby declined.
4. Each party shall bear their own costs of the application.

Orders accordingly.

DELIVERED AT NAIROBI THIS 24th DAY OF APRIL 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Appellant - Mr. Loitong for Kiskan Law Arica LLP

For Respondent - Mr. Kiplagat for KOMM Advocates

