



Quick Shuttle /Kwich Shuttle Services v Muchiti & another (Suing as the Legal Representative of the Estate of Patrick Mavere Tela - Deceased) (Miscellaneous Civil Application E001 of 2025) [2025] KEHC 4445 (KLR) (4 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4445 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E001 OF 2025**

AC BETT, J

APRIL 4, 2025

BETWEEN

QUICK SHUTTLE /KWICH SHUTTLE SERVICES APPLICANT

AND

FUCHINGO MUCHITI 1ST RESPONDENT

MARY MUTULA 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PATRICK
MAVERE TELA - DECEASED**

RULING

1. By way of Notice of Motion application dated 14th January 2025, the applicant sought the following orders:-
 - a. That this Application be certified urgent and be heard ex parte in the first instance (spent)
 - b. That this Honourable court be pleased to grant interim orders for stay of execution of the judgment and/ or decree delivered on 04/12/2024 for Kshs 3,152,516.80/= and costs, interests, and taxation proceedings in Butali CMCC No 160 of 2022 pending the hearing and determination of this Application interparties.
 - c. That this Honourable court be pleased to grant a stay of execution of the judgment and/or decree delivered on 04/12/2024 for Kshs 3,152,516.80/= together with costs, interests, and taxation proceedings in Butali CMCC No 160 of 2022 pending hearing and determination of the intended appeal.



- d. That the 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 04/12/2024 from Kshs 3,152,516.80/= together with costs and interest in Butali CMCC No 160 of 2022
 - e. That the costs of this application be provided for.
2. The application is based on the grounds stated on its face and the supporting affidavit sworn on the same date by the applicant's counsel, who noted that she was aware of the judgment in Butali CMCC No 159 of 2022, which awarded the respondent Kshs 3,152,516.80 and a 30-day stay of execution had already lapsed, and the applicant seeks to be executed.
 3. She acknowledged that, after being notified of the judgment, the applicant instructed them to file for leave to appeal late, as the period for filing the appeal had lapsed.
 4. She indicated that the application was submitted promptly, that the appeal has a strong chance of success, and that the stay has expired.
 5. The applicant asserts that they will suffer significant loss if the order of stay is not granted and the decree is executed, especially given that the intended appeal is likely to succeed and the decree holders have not disclosed their financial capacity to repay if the appeal is successful.
 6. They claim that they are willing to provide a bank guarantee from Family Bank as security for the stay of execution pending appeal.
 7. In their replying affidavit dated 28th January 2025, the respondents admitted that they were awarded a decree of Kshs 3,152,516.80/= against the applicant who applied for a stay of execution, which had since lapsed.
 8. They assert that the applicant has not met the requirements for a stay of execution, as they have not demonstrated that the respondents would be unable to pay the decretal sum if the appeal is successful, nor have they established the substantial loss they would incur if the stay were not granted.
 9. They further assert that denying the stay would not render the appeal meaningless, as it relates to a monetary decree that could be repaid.
 10. Regarding the request for leave to appeal out of time, they argue that the applicant failed to demonstrate in their memorandum of appeal how the trial magistrate erred in awarding Kshs 3,152,516.80, considering that the matter was heard and the liability rested solely with the applicant/appellant.
 11. According to the respondents, litigation must come to an end, and they should have a chance to enjoy the fruits of their judgment. They assert that they have the means to offer restitution if the appeal succeeds; therefore, the applicant would not incur any significant loss.
 12. They finally pray that the application be dismissed with costs to the respondent.
 13. The parties were given directions to file written submissions but at the time of writing the ruling none of the parties had complied.

- Analysis and Determination

14. I have carefully considered the application and the corresponding affidavits on record, and the two main issues for determination here are:-



- a. Whether the applicant has fulfilled the prerequisite for granting a stay of execution pending appeal.
 - b. Whether the court should exercise its discretion to allow the applicant to file his appeal late.
15. The law governing the granting of orders for a stay of execution pending appeal is codified in Order 42, Rules 6 (1) and (6) of the *Civil Procedure Rules*, which stipulate the following:
- “(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 referred may apply to the appellate court to have such order set aside.
 2. No order for stay of execution shall be made under sub-rule (1) unless—
 - a. The court is satisfied that a 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.
 - c. The above provision requires an Applicant seeking orders for stay of execution to establish that he/she has a sufficient cause for seeking the orders, that he stands to suffer substantial loss if the orders are not granted and lastly, that he is willing to furnish security for the due performance of the decree. In addition to the above conditions, an application for stay of execution pending appeal must be made without unreasonable delay.”
16. Flowing from the above provisions, the three conditions to be fulfilled can therefore be summarized as follows;
- a. That substantial loss may result for the applicant unless the order is made.
 - b. That the Application has been made without unreasonable delay.
 - c. Security is offered by the Applicant for the due performance of such decree or order as court may eventually issue.
17. Substantial loss was clearly explained in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR:-
- “No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the



case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the [CPR](#). This is so because execution is a lawful process. 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...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

18. According to the applicant's affidavit, it asserts that it will incur substantial loss if the stay is not granted, as its motor vehicle will be proclaimed and attached, posing a risk of the vehicle being sold.
19. It further stated that it won't be able to recover the decretal amount should the appeal succeed, as the decree holders had not produced evidence of their financial status.
20. In [Century Oil Trading Company Ltd v Kenya Shell Limited](#), Nairobi (Milimani) HCMCA No 1561 of 2007, Kimaru J. (as he then was) stated as follows:-

“The word 'substantial' cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case, and since the Code expressly prohibits stay of execution as an ordinary rule, it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent become an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum if the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

21. The respondents did file a replying affidavit to rebut the averments made by the applicants in which they averred that, the applicants had not proved that they wouldn't be able to refund them the money decree. They, however, never filed any affidavit of means to show or prove that, indeed, if they are paid the decretal sum and the appeal is successful, they would be in a position to refund the decretal sum paid to them.
22. In the case of [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another](#) (2006) eKLR, the Court of Appeal held thus:-

“Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has, since that is a matter which is peculiarly within his knowledge.”

23. In the absence of the required proof from the respondents that they are individuals of financial means, I find that the applicant has demonstrated to this court that it will suffer significant loss if the entire decretal sum is paid to the respondents before the appeal is heard and determined.
24. Regarding the issue as to whether the application has been made without unreasonable delay, I note that the judgment was delivered on 4th December 2024 and the application was filed on 14th January 2025. This indicates that it took the applicant 1 month and 10 days to request a stay and leave to appeal. In my view, this period is not excessive and would benefit the applicant if the other conditions under Order 42 Rule 6 are met.



25. On the element of security of costs; in the case of *Arun C. Sharma v Ashana Raikundalia T/A Raikundalia & Co. Advocates* (2014) eKLR, the Court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt, hence the Applicant becomes a judgment debtor against the respondent. That is why any security given under Order 42 Rule 6 of the *Civil Procedure Rules* acts as security for the due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one that can serve that purpose.”

26. In its affidavit, the applicant stated that they are willing to provide security in the form of a bank guarantee from the Family Bank. The security offered by the applicant is not specifically connected to the intended appeal.

27. This court is not bound by the type of security offered by an applicant. It can issue appropriate orders that serve the interests of justice.

28. Regarding whether the court should grant leave to file the appeal out of time, Section 79G of the *Civil Procedure Act* states:-

“Every appeal from a subordinate court to the High Court shall be filed within 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 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.”

29. 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: -

“The underlying principles a court should consider in the exercise of such discretion should include:-

- c. 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.
- d. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- e. Whether the court should exercise the discretion to extend time is a consideration to be made on a case-by-case basis;
- f. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
- g. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- h. Whether the application has been brought without undue delay.”



30. In the court of Appeal case of Paul Musili Wambua v Attorney General & 2 Others [2015] eKLR, in considering an application for extension of time, it stated as follows: -

“...it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal, the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

31. The applicant’s counsel claimed that they had notified the applicant of the judgment and waited for further instructions, which were delayed by the internal transmission of communication, hence the delay in filing the appeal on time. As earlier stated, the applicant was ten (10) days late in filing its appeal. To any reasonable man, the ten days delay cannot be said to be inordinate.

35. I am inclined to allow the applicant leave to file its intended appeal, noting that the few days are not excessive and the Respondent would not be prejudiced if leave is granted.

36. Section 79G permits the extension of time to file an appeal. Once the delay is convincingly explained, the time should be extended.

37. After considering all relevant factors, I am convinced that the application is justified and it is therefore allowed on the following terms:

- a. An order for the stay of execution of the judgment/decreed issued in Butali CMCC No 159 of 2022 is hereby granted pending the hearing and determination of this appeal, on condition that the applicants deposit half of the decretal sum in an interest-earning account at a reputable commercial bank, to be held by both advocates for the parties involved in this appeal.
- b. The appellant shall have 30 days within which to comply with order (a) above, and in default, the orders staying execution of the decree issued in Butali CMCC No 159 of 2022 shall lapse, and the respondents shall be at liberty to execute.
- c. Leave is granted to the applicant to file an appeal out of time against the judgment delivered in Butali CMCC No 159 of 2022, who are directed to file and serve the appeal within 14 days from the date of issuance of this order.
- d. The costs of this Application will be in the cause.

38. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 4TH DAY OF APRIL 2025.

A. C. BETT

JUDGE

In the presence of:

Ms. Wesonga for Ms. Musando for Applicant

Ms. Karani for Respondents

Court Assistant: Polycap

