



Quick Shuttle /Kwich Shuttle Services v Nashiloli & another (Suing as the legal representatives of the Estate of Abraham Mwaka Kivelenge - Deceased) (Miscellaneous Civil Application E002 of 2025) [2025] KEHC 4396 (KLR) (4 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4396 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E002 OF 2025**

AC BETT, J

APRIL 4, 2025

BETWEEN

QUICK SHUTTLE /KWICH SHUTTLE SERVICES APPLICANT

AND

CYNTHIA NASHILOLI & SIMON KIVELANGE MWAKHA (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ABRAHAM MWAKA KIVELANGE - DECEASED) RESPONDENT

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 exparte in the first instance (spent)
 - b. That this Honorable court be pleased to grant interim orders for stay of execution of the judgment and/ or decree delivered on 04/12/2024 for Kshs. 4,132,496 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 Honorable court be pleased to grant a stay of execution of the judgment and/ or decree delivered on 04/12/2024 for Kshs. 4,132,96 together with costs and interests and taxation proceedings in Butali CMCC No. 160 of 2022 pending hearing and determination of the intended appeal.
 - d. That the Honorable court be pleased to grant leave to the Applicant to file an appeal out of time from the judgment and decree of the honorable trial court delivered on 04/12/2024 from Kshs. 4,132,496 together with costs and interest in Butali CMCC No.160 of 2022



- e. The costs of this application be provided for.
2. The application is based on the grounds stated on its face and in the supporting affidavit sworn on the same date by the Applicant's Counsel, who noted her awareness of the judgment in Butali CMCC No. 160 of 2022, which awarded the Respondents Kshs. 4,132,496. The 30-day stay of execution had already lapsed.
3. She acknowledged that, after being notified of the judgment, the Applicant instructed them to file an appeal after the deadline for submitting the appeal had passed.
4. She stated that the application was submitted promptly, the appeal has a strong chance of success, and the orders of stay have expired.
5. The Applicant asserts that they will incur significant losses if the order of stay is not granted and the decree is enforced, particularly if the appeal is successful, as the Decree Holders have not disclosed their financial capacity to repay should the appeal prevail.
6. They assert they are willing to provide a bank guarantee from Family Bank as security for stay of execution pending appeal.
7. In response, the Respondents argue 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 shown the substantial loss they would incur if the stay is not granted.
8. They further assert that denying the stay would not render the appeal insignificant, as it pertains to a monetary decree that can be repaid.
9. Regarding the prayer for leave to appeal out of time, they assert that the Applicant, in its Memorandum of Appeal, did not demonstrate how the trial Magistrate erred in his award given that the subject matter was heard and liability was 100% against the Applicant/Appellant.
11. According to the Respondents, litigation must come to an end, allowing them to enjoy the fruits of their judgment. They assert that they possess the means to offer restitution if the appeal is successful; therefore, the Applicant would not incur any significant loss.
12. The parties were directed to file written submissions; however, at the time of writing this ruling, none of them had complied.

Analysis and Determination

13. I have carefully reviewed the application and the associated affidavits on record. The two main issues for determination are:-
 - a. Whether the applicant has met the prerequisite for the grant of stay of execution pending appeal.
 - b. Whether the court should exercise its discretion to allow the applicant to file his appeal late.
14. The law governing the issuance 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.”

15. In summary, the three conditions that need to be fulfilled can therefore be restated as follows:
 - a) That substantial loss may result for the applicant unless the order is made.
 - b) Application has been made without unreasonable delay.
 - c) The Applicant has offered security for the due performance of such decree or order that the court shall eventually pass.
16. Substantial loss was clearly explained in the case of James Wangalwa & Another vs 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.”
17. The Applicant asserts that it will suffer significant loss if the stay is not granted, as its motor vehicles will be proclaimed and attached, with a risk of the vehicles being sold off.
18. The Applicant also stated that it would not be able to recover the decretal amount if the appeal succeeded, as the decree holders failed to provide evidence of their financial status.



19. In *Century Oil Trading Company Ltd vs. Kenya Shell Limited, Nairobi (Milimani) HCMCA No. 1561 of 2007*, Kimaru J as he 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.”

20. The Respondents filed a replying affidavit to rebut the claims made by the Applicant in the supporting affidavit, asserting that the Applicant had not demonstrated their inability to refund the money decree. However, they never submitted any affidavit of means to show or prove that if they were paid the decretal sum and the appeal was successful, they would be able to refund the decretal sum paid to them.

21. In the case of *National Industrial Credit Bank Ltd Vs 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.”

22. In the absence of the requisite proof from the Respondents that they are persons of means, I find that the Applicant has satisfied this court that it will suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined.

23. Regarding the submissions that the application was filed without unreasonable delay, I note that the judgment was delivered on 4th December 2024 and the application was filed on 14th January 2025. This shows that the applicant took one (1) month and ten (10) days to seek orders of stay and leave to appeal out of time. In my opinion, this period is not excessive and would favor the Applicant, provided that the other conditions outlined in Order 42 Rule 6 are met.

24. On the element of security of costs, in the case of *Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & 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.”



25. In its affidavit, the Applicant stated that they are willing to provide security in the form of a bank guarantee from the Family Bank. However, the security offered by the Applicant is registered in the name of a party not involved in the appeal or application.
26. This court is not bound by the type of security offered by an Applicant. It can issue appropriate orders that serve the interest of justice, in order to secure the award as the decree being appealed against is a money decree.
27. On 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 must be filed within thirty days from the date of the decree or order being appealed, excluding any time that the lower court certifies as necessary 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.”

28. 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:-

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

29. 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.”



30. The Applicant's Counsel claimed that they had notified the Applicant of the judgment and awaited further instructions, which were delayed by the internal transmission of communication, hence the delay in filing the appeal. However, they had a good chance of success in the appeal. The Applicant had 30 days to file the appeal and the present application was filed ten (10) days after the lapse of the date for filing appeal.
31. I am inclined to permit the Applicant to file its intended appeal, noting that the delay is not inordinate and the Respondents would not suffer any prejudice if the leave is granted.
32. Considering all relevant factors, I am satisfied that the application is warranted and is hereby granted on the following terms: -
- a) An order of stay of execution of the Judgment/decree issued in Butali CMCC No. 160 of 2022 is hereby granted pending the hearing and determination of this appeal on condition that the Applicant deposits half the decretal sum into an interest-earning account in a reputable commercial Bank, to be held by both advocates for the parties to this appeal.
 - b) The Applicant 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. 160 of 2022 shall lapse, and the Respondents shall be at liberty to execute.
 - c) Leave is granted to the Applicant to file appeal out of time against the judgment delivered in Butali CMCC No. 160 of 2022, who is directed to file and serve the same within 14 days from the date of issuance of this order.
 - d) The costs of this Application will be in the cause.
37. 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 holding brief for Ms. Musando for Applicant

Ms. Karani for Respondents

Court Assistant: Polycap

