



REPUBLIC OF KENYA



**Waweru & another v Msagha (Civil Miscellaneous Application
E270 of 2025) [2025] KEHC 6262 (KLR) (Civ) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 6262 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL MISCELLANEOUS APPLICATION E270 OF 2025**

TW CHERERE, J

APRIL 8, 2025

BETWEEN

PATRICK NDUNGU WAWERU 1ST APPELLANT

SIMON NJERU KANGATA 2ND APPELLANT

AND

ATHANUS PHILIP MSAGHA RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated 4th March 2025, in which the Appellants seek the following orders:
 1. Leave to appeal out of time
 2. Stay of execution of the judgment rendered on 30th September 2024 in Milimani CMCC No. E1169 of 2023
 3. That the Appellants be allowed to furnish security for the due performance of the decree.
2. The impugned judgment awarded the Respondent a sum of KES 1,694,322 plus costs and interest. Aggrieved by the said decision, the Appellants filed the present appeal and contemporaneously filed the notice of motion dated 04th March 2025.
3. The application is supported by the affidavit of Eunice Ndisya, Advocate for the Appellants, sworn on 04th March 2025. The grounds advanced are that:
 1. The Appellants are dissatisfied with the judgment;
 2. Delay in lodging the appeal was occasioned by the late instructions from the insurer;



3. The appeal is arguable and risks being rendered nugatory if stay is not granted;
 4. The Respondent may not be able to refund the decretal sum if paid out and the appeal eventually succeeds;
 5. The Appellants are willing to provide security.
4. In opposition, the Respondent filed a replying affidavit sworn on 21st March 2025. He contends that:
1. He sustained injuries over three years ago and continues to suffer;
 2. The Appellants should be directed to pay half the decretal sum and deposit the balance in an interest-earning account within seven (7) days.

Analysis and Determination

5. The Court has considered the application and the respective affidavits on record. The principles governing stay of execution pending appeal are well settled under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, which provides:

“No order for stay of execution shall be made under subrule (1) unless—

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made
- (b) the application has been made without unreasonable delay; and
- (c) 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.”

5. From the affidavit evidence, two issues falling for determination are:
1. Whether the Appellants should be granted leave to file the appeal out of time;
 2. Whether the Appellants have satisfied the conditions for grant of stay of execution pending appeal.

1. Leave to Appeal Out of Time

6. Under Section 79G of the *Civil Procedure Act*, an appeal from a subordinate court must be filed within 30 days from the date of the decree or order appealed from. However, the proviso to that section allows the court to admit an appeal out of time if sufficient cause is shown.
7. The delay in this case is approximately one month and a few days and has been explained as due to delayed instructions from the Appellants’ insurer. This explanation is plausible, particularly considering that insurance matters often involve internal administrative processes.
8. The Court of Appeal in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231 set out the principles for extension of time:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary... the court is required to consider the length of the delay, the reason for the delay, the chances of the appeal succeeding and the degree of prejudice to the respondent...”



9. Applying the above test, the delay is not excessive, a reasonable explanation has been provided, and the draft appeal raises triable issues. The Respondent has not demonstrated any prejudice that cannot be compensated by costs.
10. Accordingly, I find merit in the prayer for leave to appeal out of time and I grant the same.

Stay of Execution

11. The principles governing stay of execution are set out under Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010, which provides:
 - “No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that 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.”
12. On substantial loss, the Court of Appeal in *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR stated:
 - “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
13. The Appellants assert that the Respondent may not be in a position to refund the decretal sum in the event the appeal succeeds. The Respondent has not controverted this claim or provided any evidence of financial capacity. The Court in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR held that once the applicant raises the issue of inability to repay, the burden shifts to the respondent to show capacity.
13. The application was brought without undue delay, and the Appellants have expressed willingness to furnish security. The Court is also guided by the holding in *Butt v Rent Restriction Tribunal* [1982] KLR 417, that the power to grant stay is discretionary and should be exercised to avoid rendering an appeal nugatory.

Disposition

15. In the premises, I make the following orders:
 1. Leave is hereby granted to the Appellants to file an appeal out of time within seven (7) days from the date hereof
 2. There shall be a stay of execution of the judgment and decree in Milimani CMCC No. E1169 of 2023 pending the hearing and determination of the intended appeal on condition that the Appellants shall deposit the sum of KES. 1,000,000 in court within thirty (30) days from the date of this ruling as security for the due performance of the decree
 3. In default of compliance with (2), the stay herein shall automatically lapse
 4. Costs of this application shall be in the cause.

DELIVERED AT NAIROBI THIS 08TH DAY OF APRIL 2025



WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Applicant - Ms. Ndisya for Kimondo Gachoka & Co. Advocates

For Respondent - N/A for Musili Mbiti Advocates LLP

