



**Wanjohi (Suing as the Administrator of the Estate of John Mwangi) v Mhasibu Sacco Society Limited (Civil Miscellaneous E224 of 2025) [2025] KEHC 6029 (KLR) (Civ) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 6029 (KLR)

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

**CIVIL**

**CIVIL MISCELLANEOUS E224 OF 2025**

**TW CHERERE, J**

**APRIL 3, 2025**

**BETWEEN**

**ALICE MUTHONI WANJOHI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOHN MWANGI) ..... APPLICANT**

**AND**

**MHASIBU SACCO SOCIETY LIMITED ..... RESPONDENT**

**RULING**

1. This ruling pertains to the Notice of Motion dated 24<sup>th</sup> February 2025 by the Applicant, Alice Muthoni Wanjohi (suing as the Administrator of the Estate of John Mwangi), brought under Order 42 Rule 6, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, and Sections 3A, 79, and 95 of the *Civil Procedure Act*.
2. The application seeks the following substantive reliefs:
  1. Leave to file an appeal out of time against the judgment delivered on 19th December 2024 in Nairobi CTC E517 of 2023;
  2. An order for stay of execution of the said judgment pending the hearing and determination of the intended appeal.
  3. The application is premised on the grounds that the Applicant took some time to instruct her advocate to lodge an appeal and that the Respondent paid her late husband's dues to a third party, making the intended appeal arguable.



4. The application is supported by an affidavit sworn by the Applicant on 24th February 2025, in which she avers that the deceased's dues were paid by the Respondent to one Daniel Njoroge Waithaka, whom she claims was not entitled to receive them.
5. The Respondent, Mhasibu Sacco Society Limited, opposed the application via a replying affidavit sworn on 14<sup>th</sup> March 2025 by their advocate, Farida Bina Makobe, asserting that the judgment was sound and that the intended appeal does not raise any triable issue. The Respondent contends that any payment made was in accordance with the deceased member's valid nomination on record.
6. In response, the Applicant filed a further affidavit challenging the propriety of the replying affidavit on the grounds that it was sworn by counsel and contained contested facts. The Respondent maintained that the affidavit concerned only procedural matters and legal position, citing *Hakika Transporters Services Ltd v Albert Chulah Wamimitaire* [2016] KECA 255 (KLR) and *Salama Beach Ltd v Mario Rossi*.
7. From the affidavit evidence on record, I have identified the issues for determination as follows:
  1. Whether the replying affidavit sworn by the Respondent's advocate offends Rule 9 of the Advocates (Practice) Rules and should be struck out.
  2. Whether the Applicant has demonstrated sufficient cause and an arguable ground to justify extension of time to file an appeal.
  3. Whether the intended appeal raises any triable or arguable issue.
  4. Whether the Applicant is entitled to an order for stay of execution pending appeal.
  5. Whether stay can issue against a judgment dismissing a suit with costs (i.e., a negative order).

## **Analysis and Determination**

### **Objection to the Replying Affidavit**

8. The Applicant objected to the replying affidavit on the ground that it was improperly sworn by counsel for the Respondent and contained contentious material. However, the court notes that the affidavit primarily addresses procedural history and legal arguments. Rule 9 of the Advocates (Practice) Rules prohibits advocates from swearing affidavits on contested matters of fact, particularly where they may later be required to testify.
9. The Court of Appeal in *Hakika Transporters Services Ltd v Albert Chulah Wamimitaire* [2016] KECA 255 (KLR) affirmed that counsel may swear affidavits on non-contentious or procedural matters within their knowledge. This position was also upheld in *Salama Beach Ltd v Mario Rossi*.
10. In the present case, the affidavit by Ms. Makobe falls within the permissible scope. The objection is therefore without merit and is dismissed.

### **Whether the intended appeal raises any triable or arguable issue**

11. The Applicant contends that the Respondent wrongly paid the deceased's dues to one Daniel Njoroge Waithaka. It is not denied that Daniel Njoroge Waithaka was the nominee of the deceased. In *Wanjiru*



(Suing as Administrator of Estate of Francis Njoroge Waweru) v Mwalimu National Sacco Society Ltd [2023] KEHC 23285 (KLR), the court held:

“It is trite law that property that is subject to a nomination does not form part of the estate of a deceased person.”

12. Accordingly, once a Sacco makes payment to a validly nominated person, the funds do not form part of the deceased’s estate and are not available for distribution under the *Law of Succession Act* and the Applicant cannot lay claim to those funds.

**Whether the Applicant has demonstrated sufficient cause to warrant extension of time to file an appeal out of time**

13. Pursuant to Section 79G of the *Civil Procedure Act*, an appeal may be admitted out of time where the applicant demonstrates good and sufficient cause for the delay. In this case, the Applicant attributes the delay to the time taken to instruct counsel.
14. It is well established that the existence of an arguable appeal is a key consideration in the exercise of the Court’s discretion to extend time.
15. Having found that the intended appeal does not disclose any triable or arguable issue, the Court is not satisfied that the Applicant has met the threshold for the grant of leave. An extension of time would, in the circumstances, serve no useful or lawful purpose. The prayer for leave to appeal out of time is therefore declined.

**Whether the Applicant is entitled to stay of execution pending appeal**

16. Order 42 Rule 6(2) of the Civil Procedure Rules requires an applicant for stay to demonstrate:
  1. Substantial loss must be shown;
  2. Application made without unreasonable delay;
  3. Provision of security for performance.
17. In the present case, the judgment sought to be stayed merely dismissed the Applicant’s suit with costs. Such a dismissal constitutes a negative order, which does not require the successful party to take any positive step to enforce it except for recovery of costs.
18. As held in *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union (Kenya)* [2015] eKLR:

“A negative order is incapable of being stayed. The order dismissing the suit did not require any positive step to be taken by the Respondent... save for costs.”
19. Similarly, in *Western College of Arts and Applied Sciences v Oranga & Others* [1976–80] 1 KLR 63, the court stated:

“An order for dismissal of a suit is a negative order which does not call for any enforcement and therefore no stay can issue against it.”
20. Accordingly, there is nothing to stay beyond costs, which do not amount to the kind of substantial loss contemplated under Order 42 Rule 6(2). The prayer for stay is therefore declined.



21. In light of the foregoing, the court makes the following orders on the Notice of Motion dated 24<sup>th</sup> February 2025:

1. The objection to the Respondent's replying affidavit is dismissed.
2. The prayer for leave to appeal out of time is declined as the intended appeal does not raise any triable issue.
3. The prayer for stay of execution is declined, the judgment being a negative order not capable of execution save as to costs.
4. The notice of motion dated 24<sup>th</sup> February 2025 is accordingly dismissed in its entirety.
5. Applicant shall bear the costs of this application

**DELIVERED AT NAIROBI THIS 03<sup>rd</sup> DAY OF April 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Ubah

For Applicant - Ms Njue for Teddy & Co. Advocates

For Respondent - Ms. Bina Advocate

