



**Kagere & another v Peak Planet Limited (Civil Miscellaneous  
E380 of 2025) [2025] KEHC 12199 (KLR) (Civ) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12199 (KLR)

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

**CIVIL**

**CIVIL MISCELLANEOUS E380 OF 2025**

**TW CHERERE, J**

**MAY 15, 2025**

**BETWEEN**

**ANTONY KAGERE ..... 1<sup>ST</sup> APPLICANT**

**LUCY NGIMA MAGU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PEAK PLANET LIMITED ..... RESPONDENT**

**RULING**

“Justice is not served by speed alone, but by the careful balancing of rights, discretion, and fairness to all parties who seek redress before the court.”

1. By a Notice of Motion dated 22<sup>nd</sup> March 2025 brought under Sections 1A, 1B, 3A, 63(e), 65(1)(b), 67 and 79G of the *Civil Procedure Act* and Order 42 Rule 6, Order 50 Rule 5 and Order 51 Rule 1 of the *Civil Procedure Rules*, the Applicants seek the following orders:
  1. Leave to appeal out of time;
  2. That such leave do operate as a stay of execution of the judgment delivered on 15<sup>th</sup> November 2024 in Milimani SCCC No. E1482 of 2024
  3. Costs of the application.
2. The application is supported by the affidavit of 2<sup>nd</sup> Applicant, Lucy Ngima Magu sworn on 22<sup>nd</sup> March 2025. The Applicants state that:
  1. They are aggrieved by the said judgment
  2. They intend to appeal



3. They are willing to furnish security
  4. They are apprehensive that the Respondent may not be able to refund the decretal sum in the event the appeal succeeds.
3. The application is opposed through grounds of opposition dated 22<sup>nd</sup> April 2025 inter alia, that;
1. The Applicants are guilty of laches
  2. The Applicants have not met the conditions for stay of execution under Order 42 of the [Civil Procedure Rules](#)
  3. The proposed security is insufficient
  4. The Applicants want to create endless litigation

### Issues for determination

4. I have considered the affidavit in support of the application and the notice of preliminary objection on record and I have identified the following issues for determination:
  1. Whether the Preliminary Objection raises pure points of law;
  2. Whether leave to appeal out of time should be granted;
  3. Whether the Applicants have satisfied the requirements for stay of execution;
  4. Who should bear the costs of the application.

### 1) Whether the Preliminary Objection Raises Pure Points of Law

5. The law on preliminary objections is well settled. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, it was held that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

6. The Respondent’s objections, including that the application is an abuse of process, that there is no pending appeal, and that the decretal sum is misstated, are factual matters requiring evidentiary interrogation. As held in *Oraro v Mbaja* [2005] KEHC 3182 (KLR) :

A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

7. Accordingly, the preliminary objection does not raise pure points of law and cannot be taken as a response to matters of fact raised by the Applicants.

### 2) Whether Leave to Appeal Out of Time Should Be Granted

8. Section 79G of the [Civil Procedure Act](#) provides that an appeal from a subordinate court to the High Court shall be filed within 30 days from the date of the decree or order appealed against. However, the



proviso allows the court to admit an appeal out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

9. In the present case, impugned judgment was delivered on 15<sup>th</sup> November 2024. The application was filed on 22<sup>nd</sup> March 2025, resulting in a delay of approximately 127 days. The Applicants have not provided any explanation for the delay in filing the appeal or bringing this application.
10. Ordinarily, an unexplained delay would be fatal to such an application. As the Supreme Court emphasized in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2014] eKLR:

“Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court. A party who seeks extension of time must lay a basis to the satisfaction of the court.”
11. Similarly, the Court of Appeal in *First American Bank of Kenya v Gulab P. Shah & 2 Others* [2002] 1 EA 65 elaborated that:

“Among the factors to be considered are the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and the degree of prejudice to the respondent if the application is granted.”
12. That said, the discretion of the court remains unfettered, provided it is exercised judicially. I have perused the draft memorandum of appeal, which raises questions of both fact and law arising from the trial court's determination. It cannot be said to be frivolous. The court is guided by the decision in *Kimani & Another v Benson*, Civil Appeal No. E006 of 2023, where the Court of Appeal observed:

“An arguable appeal is not one that must succeed but one which deserves consideration by the court.”
13. The Applicants have also demonstrated good faith by depositing KES. 177,400 with the court, indicating their willingness to abide by the terms of security so much so that although the delay has not been explained, I am satisfied that the intended appeal raises arguable issues and that the Respondent has not demonstrated prejudice that would outweigh the Applicants' right to be heard on appeal.
14. In the circumstances, and in the broader interests of justice, the court exercises its discretion to grant leave to appeal out of time.

### 3) Whether Requirements for Stay of Execution have been met

15. The principles governing the grant of stay of execution pending appeal are set out in Order 42 Rule 6(2) of the *Civil Procedure Rules*.
15. In the seminal case of *Butt v Rent Restriction Tribunal* [1982] KLR, the Court of Appeal affirmed that the power to grant stay is discretionary and should be exercised in such a manner as not to render the appeal nugatory or deny the applicant the fruits of a possible success.
15. Further in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court clarified that:

“...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.”



15. In the present case, the Applicants contend that the Respondent may not be in a financial position to refund the decretal sum in the event the appeal is successful. In a bid to secure the Respondent's interests and demonstrate good faith, they have deposited a sum of KES. 177,400 with the court. Although the Respondent contests the sufficiency of the amount vis-à-vis the decretal sum of KES. 196,858.94, the deposit is nonetheless a significant portion and meets the purpose of security.
15. The centrality of security in applications for stay was emphasized in *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates* [2014] eKLR, where the court stated that:

“Security is key in granting stay, as it guarantees the due performance of any decree that may ultimately be binding on the applicant.”
16. Additionally, the Court of Appeal in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR, held that where financial incapacity of the decree-holder is alleged, the burden shifts to that party to rebut the allegation. In the present case, no such rebuttal has been offered by the Respondent.
15. Considering the above principles and the Applicants' demonstrated willingness to comply with conditions for stay, I am satisfied that the threshold for grant of stay pending appeal has been met.

#### **4) Costs**

15. Even though the Applicants have substantially succeeded and the objection has failed, the interest of justice dictate the costs abide the outcome of the intended appeal.

#### **Disposition**

15. For the foregoing reasons, the court makes the following orders:
  1. The Applicants are granted leave to appeal out of time.
  2. The memorandum of appeal shall be filed and served not later than 7 days from today's date
  3. The leave granted in order (1) shall operate as a stay of execution of the judgment delivered on 15<sup>th</sup> November 2024 in Milimani SCC E1482 of 2024, pending the hearing and determination of the intended appeal upon the Applicants depositing the total decretal sum with the court.
  4. Applicants shall bear the costs of this application
  5. This being a miscellaneous file, it is closed

**DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MAY 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Abdirizack

For Applicants - Mr. Omollo for COOTOW & Associates

For Respondent - Mr. Otieno for Lugano & Achura Advocates

