



**Pearl Motors Limited & another v Mwang'ombe (Miscellaneous Application E283 of 2024) [2025] KEHC 7018 (KLR) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7018 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION E283 OF 2024  
SM MOHOCHI, J  
MAY 22, 2025**

**BETWEEN**

**PEARL MOTORS LIMITED ..... 1<sup>ST</sup> APPLICANT**

**ABDALLA MOHAMMED BADI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**CONSTANCE WAKESHO MWANG'OMBE ..... RESPONDENT**

**RULING**

1. The Applicant moved Court under certification of urgency, invoking the High Court Practice and Procedure Vacation Rules and on the 3<sup>rd</sup> September 2024 this Court directed that service be effected, Response be filed and parties appear before Court on the 26<sup>th</sup> September 2024 inter parte for further direction. By the 26<sup>th</sup> September 2024 the Applicants were yet to effect service of the Application upon the Respondent the Matter was adjourned to the 26<sup>th</sup> of March 2025.
2. By the 25<sup>th</sup> of March 2025 the Applicant once more Appeared in the Absence of the Respondent indicating that service had been effected upon the firm of Gekonga & Company Advocates and a return of service had filed electronically.
3. The Applicant accordingly prayed that the Application be allowed as unopposed.
4. This Court reserved a ruling date for the 15<sup>th</sup> of May 2025 to ascertain the said service from the e-File as the transition of the Court into digital platforms is such that no paper copies of the motions filed are being printed for the physical files. This ruling was deferred once, owing to work related exigencies on the part of the Court.
5. Before Court for determination is the Applicants Notice of Motion Application dated 30<sup>th</sup> August, 2024 brought under Article 159 159(2)(d) of the Kenya Constitution 2010; Sections 1A, 1B, 3A, 79G



and 95 of the Civil Procedure Act, Order 42 Rule 6 (1) (2) & (7), Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 wherein they seek:

- a. Spent
  - b. This Honourable Court be pleased to grant the Applicants leave to appeal out of time in respect to the judgment/decree delivered in MOLO CMCC NO. E038 of 2023 by Hon. Kristine Gathoni Mugo(RM)
  - c. This Honourable Court be pleased to grant a temporary order of stay of execution of the judgment and/or the decree delivered on 03/06/2024 and all consequential orders arising therefrom pending the hearing and determination of this application inter-parties.
  - d. This Honourable Court be pleased to grant an order of stay of execution of the judgment and/or the decree delivered on or about 03/06/2024 and all consequential orders arising therefrom pending the hearing and determination of the intended Appeal herein
  - e. This Honourable Court be pleased to issue an Order for provision of a Bank Guarantee of the entire decretal sum awarded by the trial Court of Kshs.816,500/= plus costs and interests only as security pending hearing and determination of the intended Appeal herein
  - f. This Honourable Court be pleased to issue any other Order as it may deem just, appropriate and expedient in the interest of justice.
  - g. Costs of this application be provided for.
6. The Application was predicated on the grounds on its face, the Supporting Affidavit of Cherotich Faith, Advocate sworn on the same date.

### **Applicants Case**

7. The judgment in Molo CMCC E038 of 2023 was delivered vide a judgment dated 3<sup>rd</sup> June, 2024 in favour of the Plaintiff/Respondent as against the Defendants/Applicants in the following terms; Liability 100% against the Applicants, General damages Kshs.800,000/-, Special damages Kshs. 16,500/-plus costs of the suit & interest at Court rate together with stay of execution of 30 days.
8. That the delay in filing the appeal was inadvertent and excusable due to delay in receiving instructions from their instructing clients, the time allowed to file an appeal has run out, their appeal has good chances of success and that they are apprehensive that the Respondent will commence execution proceedings to their detriment.
9. That the Applicants stand to suffer substantial loss and damage if orders sought herein are not granted and further that the intended Appeal will be rendered nugatory if stay is not granted.
10. That, this application is made timely and the Respondent will not be prejudiced in any way if the orders sought herein are granted as prayed.
11. That it is in the interest of Justice that the execution of the Judgment and/or decree delivered on or about 3<sup>rd</sup> June, 2024 herein be stayed to pave way for the Applicants to exercise their right of Appeal once leave to appeal out of time is granted. That there will be no irreparable damage that will be occasioned to the Respondents herein if the orders sought herein are granted.
12. That the judgment subject matter herein is substantial and should the execution process commence the Applicants stand to suffer irreparable loss and prejudice as their right of appeal will be curtailed; and the ability of the Respondent herein to refund the decretal amount is unknown.



13. The Applicants indicates their willingness and readiness, to furnish a bank guarantee for the entire decretal sum pending the hearing and determination of the intended Appeal; as a condition for allowing this application for leave to appeal out of time and stay of execution pending appeal. Emphasizing that this Honourable Court has powers to grant the orders sought herein in the interest of justice and fairness
14. The Applicants depone that following the delivery of the impugned judgment on the 3<sup>rd</sup> June 2024 the Advocates informed their instructing client, Directline Assurance Ltd of the terms of the judgment for further instructions or forwarding of the payment to the Plaintiff/ Respondent. Unfortunately, the claims officer who received the terms left the employment of M/S Directline Assurance Ltd before issuing further instructions.
15. That upon follow-up by the Advocates the instructing client dissatisfied with the judgment instructed them to file an appeal a time which the period provided for to file appeal had lapsed.
16. That the Applicants Advocates verily believe that, the intended Appeal raises numerous triable issues and points of law, as shown by the draft memorandum of appeal, and thus it has very high chances of success.
17. That, stay of execution that was granted when judgment was delivered has since lapsed and the applicants are exposed to execution and they are apprehensive that the Respondent will commence execution proceedings against them and thereby rendering their intended Appeal nugatory.
18. That, if the application is not allowed, the Applicants will have been denied the right to be heard on appeal and suffer substantial loss and damage.
19. That, it is in the best interest of justice and fair play that this application be allowed in the circumstances and I humbly pray that this Honourable Court be pleased to allow this application as prayed.

#### **Respondent's Case**

20. The Respondent never entered appearance or filed any response.
21. The Court directed parties to file written submissions. Neither party has complied and filed submissions.

#### **Analysis and Determination.**

22. I have considered the applications and the affidavits in support and against it and the the issues for determination are: -
  - a. Whether the Application is merited
23. The Applicable law for extending time pending appeal is found in Section 79G of the Civil Procedure Rules and judicial pronouncements which have set forth the trajectory for what is to be considered when dealing with an application to extend time to file an appeal.
24. Section 79G of the *Civil Procedure Act* provides that:-

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

25. In *Nicholas Kiptoo Korir arap Salat vs IEBC & Others* [2014] eKLR the Supreme Court stated that: -
- i. 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;
  - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court
  - iii. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
  - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - v. Whether there will be any prejudice suffered by the respondents if the extension is granted
  - vi. Whether the application has been brought without undue delay; and
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
26. The applicant's advocate argued that the delay was because the claims officer who received the terms left the employment of M/S Directline Assurance Ltd before issuing further instructions. The Court has not been told who this claims officer, when he was contacted and when he left the insurer employ.
27. With regards to the Applicants offer to deposit a bank guarantee issued by Family bank, the Court notes that bank guarantee FBL/00/000033721 is dated 6<sup>th</sup> July 2023 was to last for twelve (12 months and thus the same has so far expired. Security must be one that shall achieve due performance of the decree which might ultimately be binding on the Applicant. see *Safaricom Limited vs Dickson Kimweli King'oo & another* [2022] KEHC 3141 (KLR).
28. The Court has equally considered service of process, noting that despite repeated directions by the Court that the Applicants serve the Application upon the Respondent the same was finally being effected on the 15<sup>th</sup> February 2025 so the service upon the Respondent was once.
29. Notwithstanding the failure and want, by the parties to comply with any of my directions herein, I am duty bound to nonetheless evaluate the Application and make my determination.
30. The Court of appeal in *BUTT VS RENT RESTRICTION TRIBUNAL* (1982) KLR 417 gave guidance on how a Court should exercise discretion and held that:
- a. The power of the Court to grant or release an application for stay of execution is a discretionary power.
  - b. The Court in exercising its discretion whether to grant or refuse an application for stay will Consider the special circumstances of the case and unique requirements.
  - c. The Court in exercising its powers under order XLI Rule 4(2)(b) of Civil Procedure Rules can order security upon application by either party or on its own motion. Failure to put security for costs as awarded will cause the order for stay of execution to lapse".



31. In the case of Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd [2019] eKLR, the Court thus held that: -

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower Court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a Court which has delivered the matter in his favour. This is therefore to provide a situation for the Court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The Court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that Courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the Court to determine

32. This Court is unpersuaded that, the three pre-conditions for grant of stay been demonstrated, the manifest disregard of Court directions failure to comply with conditions set is demonstrative of the Applicant undeserving of the interlocutory reliefs sought.
33. Interlocutory orders of stay against execution of judgment decree ought to be made in an application made within an Appeal and not in such a miscellaneous Application. Injunctive orders cannot be issued in a vacuum.
34. Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the *Civil Procedure Act* provides that:

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

35. In this particular instance no memorandum of appeal has been presented as filed out of time to enable the appropriate leave and extension of time, sought to be granted and what the Applicant has opted for, is to annex therewith a draft memorandum of Appeal.
36. I associate with the reasoning of Emukule, J. in Gerald M’limbine Vs. Joseph Kangangi [2008] eKLR, where he stated that: -

“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the Court’s



leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the Court's permission to admit a non-existent appeal out of the statutory period."

37. I find no merit in the Application dated 30<sup>th</sup> March 2025 and the same is accordingly dismissed with no orders as to costs.

It is so Ordered.

**SIGNED, DATED AND VIRTUALLY DELIVERED AT NAKURU THIS 22<sup>ND</sup> DAY OF MAY, 2025.**

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**MOHOCHI S.M**

**(JUDGE)**

