



REPUBLIC OF KENYA



**Robert v Mutisya (Civil Miscellaneous E367 of 2025)
[2025] KEHC 12207 (KLR) (Civ) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12207 (KLR)

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

**CIVIL
CIVIL MISCELLANEOUS E367 OF 2025**

TW CHERERE, J

MAY 15, 2025

BETWEEN

MUTITU MUGO ROBERT APPLICANT

AND

MUNYAKA MBUTO MUTISYA RESPONDENT

RULING

“Delay, though regrettable, is not always fatal. Where explanation is offered and merit exists, the door of justice must remain ajar—for the right of appeal, though time-bound, is ultimately rooted in the right to be heard.”

1. The Applicant by way of a Notice of Motion dated 19th March 2025 seeks orders for:
 1. Leave to withdraw HCCMISC E271 of 2025;
 2. Leave to appeal out of time against the judgment delivered on 29th October 2024 in Milimani CMCC No. 8761 of 2019
 3. Stay of execution of the said judgment pending the intended appeal
2. The application is brought under Order 22 Rule 22, Order 42 Rules 4, 6, and 7, Order 51 Rules 1 and 3 of the Civil Procedure Rules, and Sections 3 and 3A of the *Civil Procedure Act*. It is supported by an affidavit sworn by Dennis Wanyama, advocate, deposing that:
 1. The Applicant is aggrieved by the judgment
 2. The instructions to appeal were given late
 3. The intended appeal raises arguable issues
 4. There is a risk that the Respondent may not be able to refund the decretal sum should the appeal succeed.



3. The Respondent opposed the application through a replying affidavit sworn on 25th April 2025, contending, inter alia, that:1. The application is an afterthought2. No substantial loss has been demonstrated3. The intended appeal is not arguable.

Issues for Determination

4. From the affidavit evidence on record, the issues arising for determination are:
 1. Whether withdrawal of HCCMISC E271 of 2025 should be allowed
 2. Whether leave to appeal out of time should be granted;
 3. Whether stay of execution pending appeal should be granted

Analysis and Determination

1. Whether withdrawal of HCCMISC E271 of 2025 ought to be allowed

5. The Applicant seeks leave to withdraw HCCMISC E271 of 2025. Withdrawal of a suit is governed by Order 25 Rule 1 of the Civil Procedure Rules, which provides:

“At any time before the setting down of a suit for hearing, the plaintiff may by notice in writing withdraw his suit against all or any of the defendants or may discontinue all or part of the claim.”

6. In *Madrugada Limited v Kenya Power and Lighting Company Limited* [2019] eKLR, the Court emphasized:

“Where substantive steps have been taken or orders obtained, a party may not simply withdraw the suit without leave. The Court must exercise discretion to ensure that no party is prejudiced by the withdrawal.”

7. In the present case, there is no evidence that HCCMISC E271 of 2025 has proceeded beyond preliminary steps. The withdrawal appears motivated by a desire to properly regularize the intended appeal process, and the Respondent has not demonstrated any prejudice that would arise from the withdrawal.
8. In the interests of facilitating the just, expeditious, proportionate, and affordable resolution of disputes as required under Sections 1A and 1B of the *Civil Procedure Act*, the Court is inclined to grant leave to withdraw HCCMISC E271 of 2025.

b. Leave to Appeal out of Time

9. The principles governing extension of time were discussed by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, where it was stated:

“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 explain the delay to the satisfaction of the Court.”



10. In *Jaber Mohsen Ali & Another v Priscillah Boit & Another* [2014] eKLR, the Court emphasized that justice should be administered without undue regard to procedural technicalities and that where a plausible reason for delay is given, the Court ought to lean towards sustaining a meritorious claim.
11. A perusal of the draft Memorandum of Appeal reveals that the Applicant challenges the quantum of damages, which constitutes a bona fide and arguable point.
12. The Applicant attributes the delay in filing the appeal to the late receipt of instructions to appeal. The five-month delay is in my considered view not inordinate, and the explanation, though not robust, is sufficient in the circumstances to persuade the Court to exercise its discretion in favour of granting leave.

(c) Stay of Execution Pending Appeal

13. An applicant seeking stay must satisfy the conditions in Order 42 Rule 6(2) of the Civil Procedure Rules:
 1. Application must be filed without unreasonable delay;
 2. Substantial loss may result unless stay is granted;
 3. Security for due performance must be furnished.
14. On substantial loss, the Court of Appeal in *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR stressed that substantial loss is the cornerstone of stay applications. The Court stated:

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
15. The Applicant asserts that the Respondent may not be in a position to refund the decretal sum.
16. In *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR, the Court observed:

“The burden of proving that an appeal would be rendered nugatory lies with the Applicant.”
17. In the absence of a rebuttal by the Respondent concerning his financial capacity to refund the decretal sum if called upon and guided by the principles in *Jaber Mohsen Ali & Another v Priscillah Boit & Another* (supra) and balancing the interests of both parties, the Court finds it just to grant stay of execution on terms.
18. Provision of security is a mandatory requirement. In *National Industrial Credit Bank Limited v Aquinas Francis Wasike and Another* [2006] eKLR, the Court emphasized the need for reasonable security to safeguard the rights of the decree-holder.

Disposition

18. From the foregoing analysis, the Court orders as follows:
 1. Leave is granted to withdraw HCCCMISC E271 of 2025
 2. The Applicant is granted leave to appeal out of time against the judgment delivered on 29th October 2024 in Milimani CMCC No. 8761 of 2019;
 3. The appeal shall be filed within 14 days from today’s date



4. There shall be stay of execution of the judgment delivered on 29th October 2024 in Milimani CMCC No. 8761 of 2019 pending the hearing and determination of the intended appeal on condition that the Applicant deposits Kshs. 1,500,000 into court within thirty (30) days from the date of this ruling;
5. In default of compliance with order (4) above, the stay shall automatically lapse
6. Costs of this application shall abide the outcome of the intended appeal.
7. This being a miscellaneous file, the same is hereby closed

DELIVERED AT NAIROBI THIS 15TH DAY OF MAY 2025.

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Nyambala

For Applicant - Mr. Wanyama for Kairu & Mc Court Co. Advocates

For Respondent - Ms. Muthiani for Morara Apiemi & Nyangito Advocates

