



REPUBLIC OF KENYA



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**Great Rift Shuttle v Mayobe (Civil Miscellaneous E016 of 2025)
[2025] KEHC 7920 (KLR) (4 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 7920 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL MISCELLANEOUS E016 OF 2025**

S MBUNGI, J

JUNE 4, 2025

BETWEEN

GREAT RIFT SHUTTLE APPLICANT

AND

ALEX MAYOBE RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated 14th March, 2025 under certificate of urgency seeking, inter alia, orders for stay of execution of the judgment and decree delivered on 12th September, 2024 in Butali PMCC No. 211 of 2018, leave to file an appeal out of time, and interim relief to stop further execution and/or sale of various motor vehicles registered in its name.
2. The application was brought under Section 1A, 3A of the *Civil Procedure Act*, Order 42 Rule 6, Order 51 Rule 1, Order 22 Rule 22 of the Civil Procedure Rules, Section 5(b) of the Insurance (Motor Vehicle Third Party Risks) Act (Cap 405), and Articles 50 and 159 of *the Constitution* of Kenya, 2010.
3. The motion is premised on grounds that the judgment in the lower court awarded the Respondent a sum of Kshs. 403,000/= plus costs and interest, following a 50:50 apportionment of liability. A 30-day stay of execution was granted but has since lapsed, exposing the Applicant to imminent execution proceedings.
4. The Applicant avers that the delay in filing an appeal was occasioned by internal challenges within its insurer, Directline Assurance Company Limited, including system failures and shareholder wrangles which delayed communication and instruction to appeal. The Applicant contends that the delay is excusable and not inordinate.
5. It is further deponed that the Respondent has already commenced execution by obtaining and serving warrants of attachment and proclamation dated 14th March 2025 in respect of several motor vehicles



- belonging to the Applicant, and that unless stay orders are granted, the vehicles are at risk of being seized and sold.
6. The Applicant argues that the intended appeal is arguable and has high chances of success, and that if execution proceeds and the appeal succeeds, it will suffer irreparable loss given that the Respondent's financial capacity to refund the decretal sum is unknown.
 7. The Applicant expresses readiness to furnish a bank guarantee from Family Bank as security for the decretal amount pending hearing and determination of the intended appeal.
 8. The Application is supported by the affidavit of CHRISTINE MUSANDO, counsel on record for the Applicant, who has annexed various documents including the judgment, letters of instruction from the insurer, the draft memorandum of appeal, warrants of attachment, proclamation notices, bill of costs, and the bank guarantee.
 9. The Applicant prays that in the interest of justice and fairness, the court allows the Application, grants stay of execution, and leave to appeal out of time.
 10. On 18th March, 2025, the court issued interim orders staying the execution of the judgment and decree delivered on 12th September, 2024 in Butali PMCC No. 211 of 2018 together with all consequential orders, pending the hearing and determination of the application inter partes.
 11. In addition, the Court granted an interim order staying any further execution and/or sale of motor vehicle registration numbers KBX 946A, KCP 6X1L, KCP 6X2L, KCX 6X1A, KCN 1X0G, KDN 9X3G, KCC 6X7Q, KDR 2X1R, and KDN 1X9H, which had been proclaimed by Razor Sharp Auctioneers on 14th March, 2025.
 12. The Respondent, ALEX MAYOBE, subsequently filed a replying affidavit sworn on 24th March, 2025 opposing the application. In the said affidavit, the Respondent deposed that the application was incompetent, improperly before the Court, and brought in bad faith.
 13. He averred that as the successful litigant, he was entitled to the fruits of the judgment delivered on 12th September, 2024. The Respondent challenged the competence of the Applicant's supporting affidavit, arguing that it had been sworn by counsel on record instead of the party, thus descending into the arena of litigation contrary to established legal practice.
 14. He further contended that the application was filed more than six months after delivery of judgment, rendering it time-barred and a calculated move to delay lawful execution.
 15. The Respondent maintained that the internal issues within the Applicant's insurance agency did not warrant a stay and could not justify the delay in pursuing an appeal.
 16. He stated that the application lacked merit, failed to demonstrate substantial or irreparable loss, and that execution of a lawful decree did not in itself constitute prejudice.
 17. Further, he deposed that the Applicant had not established that the Respondent was incapable of refunding the decretal sum in the event the appeal succeeded. The Respondent further decried the proposal to rely on Directline Assurance Company Ltd as security, arguing that the insurer had numerous unpaid claims and its guarantees were unreliable.
 18. In the alternative, and without prejudice, the Respondent proposed that in the event the Court was inclined to grant a stay, then the same should be conditional upon the Applicant paying half of the decretal sum to the Respondent's advocates and depositing the other half in a joint interest-earning account held in the names of both advocates on record.



19. When the matter came up for hearing interpartes on 2nd April, 2025, the court directed that the application be disposed off by way of written submissions limited to three pages each.

Applicant's Case.

20. Vide written submissions dated 11th April, 2025, the applicant submitted that the delay in filing the appeal was occasioned by internal communication and approval processes within the instructing client, Directline Assurance Company Limited. The applicant averred that the delay was not deliberate, and was compounded by internal wrangles that led to a four-month shutdown of the said company. It was only after resumption of operations that instructions were received by counsel to file the intended appeal. The applicant relied on two letters annexed to the supporting affidavit (marked CM1 and CM2) as evidence of this explanation.
21. The applicant cited Section 79G of the *Civil Procedure Act*, which provides that an appeal from a subordinate court to the High Court ought to be filed within thirty days of the decree or order. However, the section permits the court to admit an appeal out of time if sufficient cause is shown. The applicant relied on the decisions in *Nicholas Kiptoo Arap Salat v IEBC & 7 Others* [2014] eKLR, *Diplack Kenya Ltd v William Muthama Kitonyi* [2018] eKLR, and *Paul Musili Wambua v Attorney General & 2 Others* [2015] eKLR, where the courts set out guiding principles for extension of time. It was the applicant's submission that the six-month delay, though notable, had been reasonably and satisfactorily explained.
22. The applicant further submitted that the intended appeal was arguable, raising substantive issues of law and fact, particularly on liability and the assessment of damages. The draft Memorandum of Appeal (annexed as CM3) and the judgment of the trial court were cited as demonstrating the existence of weighty issues meriting appellate consideration.
23. On the prayer for stay of execution, the applicant invoked Order 42 Rule 6(2) of the Civil Procedure Rules, submitting that unless stay was granted, it stood to suffer substantial loss. It was deponed that the respondent had already commenced execution proceedings and issued warrants and proclamations (as evidenced by annexure CM4). The applicant submitted that the respondent was unlikely to refund the decretal sum in the event the appeal succeeded, thereby rendering the appeal nugatory.
24. In addressing the requirement for security, the applicant submitted that it was ready and willing to provide a bank guarantee for the entire decretal amount from Family Bank Limited. The applicant argued that a bank guarantee was a recognized form of security under Order 42 Rule 6, and referred the court to the decisions in *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co Advocates & 2 Others* [2014] eKLR and *Justin Mutunga David v China Road & Bridge Corporation (K) Ltd* [2019] eKLR, which affirmed the adequacy of such guarantees.
25. The applicant further contended that no prejudice would be occasioned to the respondent if the entire decretal sum was secured through a bank guarantee, and objected to the respondent's proposal for partial settlement and joint account deposit. It was submitted that the respondent had not given any cogent reason as to why the bank guarantee was not an appropriate security. The applicant stressed that it had a long-standing arrangement with Family Bank, which would ensure timely performance of the decree should the appeal fail.
26. The applicant prayed that the application be allowed in its entirety, submitting that the right of appeal should be preserved and that the proposed security would sufficiently safeguard the interests of both parties.



Respondent's Case.

27. The respondent filed submissions dated 24.03.2025 and isolated their main issue for determination as whether this court should issue stay of execution.
28. On substantial loss, it was submitted that the applicant had not demonstrated any concrete or exceptional prejudice that would result if stay were not granted. The respondent referred the court to *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, where it was held that the mere fact of execution is not in itself proof of substantial loss. Similarly, reliance was placed on *Kenya Shell Ltd v Kibiru* [1986] KLR 410, to argue that generalized claims of hardship or irreparable damage were insufficient. The respondent maintained that they had the financial ability to refund the decretal sum should the appeal succeed, and that the applicant had not provided any evidence to the contrary.
29. The respondent argued that the burden lay with the applicant to demonstrate that the respondent lacked means to repay the judgment sum in the event of a successful appeal. In the absence of such proof, the respondent contended that the applicant's fears were speculative. Authorities cited included *Equity Bank Ltd v Taiga Adams Co. Ltd* [2006] eKLR and *Caneland Ltd & 2 Others v Delphis Bank Ltd Civil Application No. Nai. 344 of 1999*, in which courts underscored that substantial loss must be specifically pleaded and proved.
30. On the issue of security, the respondent submitted that the applicant had not proposed an appropriate form of security. While the applicant offered a bank guarantee from Family Bank Ltd, the respondent argued that this was not sufficient in the circumstances. Citing *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* [2015] eKLR, the respondent submitted that security must cover the full extent of the decree, including interest and costs, and be structured in a manner that ensures its enforceability without further litigation.
31. The respondent further submitted that the most appropriate security in the circumstances would be the deposit of the entire decretal sum into a joint interest-earning account held in the names of both parties' advocates. This, they argued, would balance the interests of both parties without giving an undue advantage to either side.
32. On delay, the respondent pointed out that the application was filed on 14th March 2025, six months after the trial court judgment and well beyond the thirty-day stay period initially granted. It was their submission that this delay was inordinate and had not been sufficiently explained. In their view, the delay alone was enough to warrant dismissal of the application.
33. In conclusion, the respondent urged the court to dismiss the applicant's application with costs, submitting that the applicant had failed to meet the threshold for enlargement of time and for stay of execution. The respondent maintained that they were entitled to enjoy the fruits of their judgment and should not be prejudiced by the applicant's delay and lack of diligence.

Analysis and determination.

34. I have looked at the application and the grounds adduced thereof, the supporting affidavit, the replying affidavit, the rival submissions by both parties and annexures therein.
35. I isolate the main issues for determination as:
 - i. Whether the court should grant leave to the applicant to file the appeal out of time;
 - ii. Whether the applicant has satisfied the conditions for grant of stay of execution pending appeal.



Issue 1: Whether the court should grant leave to the applicant to file the appeal out of time

36. 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 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.”

37. The provision of section 79 G of the *Civil Procedure Act* provides that an appeal may be admitted out of time if the court is satisfied that the appellant adduced good and sufficient cause for not filing the appeal in time.
38. Further, in deciding whether to grant an extension of time, the court should take into account 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. (See Court of Appeal Case of Edith Gichungo Koine vs Stephen Njagi Thoithi(2014) eKLR)
39. The judgment in Butali CMCC No. 211 of 2018 was delivered on 12.09.2024. The current application was filed on 14.03.2025. The appeal was expected to have been filed within 30 days. The applicant lodged the application six months after the lower court judgment. The reason adduced by the applicant as to the delay is that the insurer, Directline Assurance Company Limited, experienced internal wrangles and a shutdown which disrupted instructions to file an appeal until normalcy resumed.
40. In rebuttal, the Respondent submitted that the applicant had failed to act diligently and had not shown any sufficient reason for the delay. The Respondent maintained that the delay was inordinate and amounted to an abuse of court process.
41. This court has considered the explanation for failing to file the intended appeal as submitted by the Applicant. In the circumstances, this court finds that the delay was not inordinate as to deny the Applicant an opportunity to ventilate its grievances by way of an appeal to this Court, since the delay has been reasonably explained and was occasioned by factors beyond the applicant’s control.
42. On whether the intended appeal has high chances of success, I have looked at the draft Memorandum of Appeal annexed by the applicant. This court is satisfied that the intended appeal is arguable. The parties will have an opportunity to argue the appeal in relation to the merits or demerits of the appeal before the appellate court.
43. In the upshot, this court is satisfied that the Applicants’ application for leave to file an appeal out of time is found to have merit.
44. The right to appeal, being a constitutional right, it is prudent to allow the applicant to exercise his right.

Issue 2: Whether an order for stay of execution should be granted.

45. Stay of execution is provided under Order 42 rule 6 of the Civil Procedure Rules which states that:

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such



stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

- (2) 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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

46. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:-

- i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- ii. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
- iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- iv. 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. The special circumstances in this case were that there



was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

- v. The court in exercising its powers under order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

47. This court enjoys discretion to grant stay of execution of decree pending appeal. Refer to the case of JMM v PM [2018] eKLR where it was stated thus:-

“As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

48. Order 42 rule 6 of the Civil Procedure Rules grants this court as an appellate court, as well as the trial court wide discretion to stay execution of decrees pending appeal. In the instant case, the court herein has already granted leave to appeal out of time as stated herein above. Subsequently, from a perusal of the draft Memorandum of Appeal, this court can safely conclude that the appeal is arguable as the appellate court is being called upon to find out whether the trial court pronounced sound judgment in favor of the respondent.

49. The applicant has given an explanation which this court deems fit regarding the cause of the delay.

50. Secondly, the applicant has stated that they stand to suffer loss if the orders sought are not granted since the appeal has high chances of success and they may experience financial loss if the decretal sum is paid to the respondent.

51. In the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR the court expressed itself as follows with regard to substantial loss:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

52. The applicant avers that the respondents herein are unlikely to pay back the decretal sum since they are impecunious. The applicant never filed any documents in support of the allegation to prove the financial capabilities of the respondent or lack thereof. In rebuttal, the respondents submitted that it is trite law that whoever alleges must prove, and the applicant did not demonstrate or file any evidence to support his averment.



53. In the case of *Muthui v Kasivu (Civil Appeal E268 of 2023)* [2024] KEHC 9627 (KLR) (29 July 2024) (Ruling), the court held as follows:

“On the ability of the Respondent financial incapability of paying back the decretal sum being one of the reasons the orders should be granted as submitted by the Applicant, I beg to differ. The onus of proving the Respondent’s inability goes beyond throwing an allegation without evidence. It is upon the Applicant who alleges the same to go ahead and prove it. Nonetheless, the court has settled this matter and stated that this should not be the reason an order of stay is granted. This was held in *Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991*, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income.”

54. While the onus is upon the applicant to demonstrate that he is likely to suffer substantial loss, it is not likely that the applicant will know the particulars of the respondents’ financial status. The burden is therefore upon the respondents to prove their financial capability.

55. That was the position taken by the Court of Appeal in the case of *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike Civil Application No. 238 of 2005* [2006] eKLR where it held;

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

56. The applicant has expressed doubt as to the respondents’ financial capacity to refund the decretal sum if they are allowed to proceed with execution before the hearing and determination of the appeal. The respondents did not swear an affidavit to demonstrate that they are financially capable of refunding the decretal sum to the appellant. Consequently, this court has no feel of the financial liquidity of the respondents as no such evidence was filed. I therefore find that the applicant as shown that he is likely to suffer substantial loss if the intended execution is not stayed.

57. On the issue of security, the law under Order 42 Rule 6(2)(b) mandates that the applicant must furnish such security as the court may order for the due performance of such decree or order as may ultimately be binding. The purpose of security is to ensure that the respondent will not be prejudiced by the delay in execution due to the appeal and to strike a balance between the appellant’s right of appeal and the respondent’s right to enjoy the fruits of their judgment.

58. The applicant has expressed willingness to provide security through a bank guarantee via Family Bank for the decretal sum. On the other hand the respondent submitted that this was not sufficient, since security must cover the full extent of the decree, including interest and costs, and be structured in a manner that ensures its enforceability without further litigation.

59. I have perused the annexures attached. The applicant claimed to have attached a copy of the bank guarantee in the supporting affidavit. However, the annexure referenced, ‘CM-4’ shows the warrant of attachment by Razor Auctioneers. Whereas a bank guarantee is an acceptable form of security, this court, cannot confirm the existence or adequacy of any bank guarantee as alleged. The absence of a valid



and enforceable bank guarantee undermines the applicant's assertion that they are ready and willing to furnish security as required under Order 42 Rule 6(2)(b) of the Civil Procedure Rules.

60. The court has to balance the interests of the Applicant/Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the Appeal is not rendered nugatory and interests of the Respondent taking into account that a successful litigant has a right to enjoy fruits of his/her litigation.
61. The above analysis makes me find that the applicant has made out a case to warrant this court to exercise its discretion in its favor. And I will allow the prayer for stay of execution in following terms: -
 - I. That the applicant to file and serve the memorandum of appeal upon the respondent within seven (7) days from today.
 - II. An order for stay of execution in a judgment /decree issued in Butali PMCC No. 211 of 2018 is hereby granted pending the hearing and determination of this Appeal on condition that the Applicant deposits a sum of Ksh. 400,000/= a joint interest earning account in the names of the advocates of the parties within thirty (60) days from today as security.
 - III. The costs of this Application shall be in cause.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF JUNE, 2025.

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Elizabeth Angong'a.

