



**Thongu t/a Eldoret Express v Olisa (Suing as the Legal Representative
Of The Estate of Jackline Kwendo - Deceased) (Civil Appeal
E186 of 2024) [2025] KEHC 10936 (KLR) (2 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10936 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E186 OF 2024
JM OMIDO, J
JULY 2, 2025**

BETWEEN

SIMON MBUGUA THONGU T/A ELDORET EXPRESS APPELLANT

AND

**ANNE KWENDO OLISA (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF JACKLINE KWENDO - DECEASED) RESPONDENT**

RULING

1. On 19th September, 2024, this court (Shariff J.) vide a ruling rendered on even date in HCCC Misc No. E212 of 2024 Simon Mbugua Thongu v Ann Kwendo Olisa, made the following orders:
 - a. The Applicant is granted leave to file an appeal against the judgment in Kisumu CMCC No. E051 of 2023; Ann Kwendo v Simon Mbugua Thongu within 3 days from the date hereof.
 - b. An order of stay of execution of the judgement delivered on 28th March, 2024 in Kisumu CMCC No. E051 of 2023; Anne Kwendo v Simon Mbugua Thongu t/a Eldoret Express is hereby granted until the intended appeal is heard and determined on condition that the Applicant do deposit in a joint interest earning account of parties' advocates the sum of Ksh.3,484,432/- within 45 days from the date hereof.
 - c. In the event of default in compliance with order (b) hereinabove, the stay orders shall automatically lapse and the Respondent shall be at liberty to execute.
 - d. This file is marked as closed.
2. Pursuant to the above orders (particularly order (b), the Appellant herein filed his Memorandum of Appeal on 23rd September, 2024 (a Monday), hence complied with the timelines for filing the appeal.



3. The Appellant did not, however, comply with the order that required him to deposit security within 45 days. He then, following that position, filed the application that is the subject of this ruling.
4. The Appellant's Notice of Motion dated 19th November, 2024 is expressed to be brought under Sections 1A, 1B, 3A and 95 of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 22 rule 22, Order 42 rule 6, Order 50 rule 5 and Order 51 rule 1 and 3 of the Civil Procedure Rules and all other enabling provisions of the law and seeks the following orders:
 - a. [Spent].
 - b. [Spent].
 - c. [Spent].
 - d. That this Honourable Court be pleased to extend stay of execution orders and enlarge time within which the Applicant can comply with the Honourable Court's conditions on stay that was issued on 19th September, 2024.
 - e. That this Honourable Court do make any such further orders and issue any other relief it may deem just to grant in the interest of justice.
 - f. That the costs of the application be in the cause.
5. Although not specifically stated, it is clear to me that what the Appellant is seeking for is that this court reviews the orders of Shariff J. made on 19th September, 2024 and allows for more time for the Appellant to deposit security. I will explain that later in this ruling.
6. The grounds upon which the application is premised are that the time within which to comply with the order to deposit security has since lapsed and that the Applicant stands to suffer immense prejudice if the orders sought are not granted. The Applicant further states that the Respondent stands to suffer no prejudice if the application is allowed.
7. The application is supported by the affidavit sworn on 19th November, 2024 by Christine Musando, Advocate, who is on record for the Appellant.
8. The deponent to the supporting affidavit expounds on the above grounds and states that the reason for the delay in filing the Memorandum of Appeal was due to the fact that the instructing client (Directline Assurance Company Limited), as per correspondence to its Advocates, had difficulty in processing the security amount as its accounts had been frozen pursuant to a court order issued on 7th November, 2024 in Milimani Commercial HCCC No. E328 of 2024 Directline Assurance Co. Ltd v Samuel Kamau Macharia & 11 others. The said order is annexed as CM-5 to the affidavit in support of the Motion.
9. The Applicant states that he is still keen on depositing the security and urges that this court grants him more time to deposit the security. He states that he has an arguable appeal.
10. The application is opposed by the Respondent, who to that end filed a replying affidavit sworn by her Counsel, Maureen Akoth Okumu on 26th November, 2024.
11. In precis, the deponent of the replying affidavit resists the application on the grounds that the law firm on record for the Respondent forwarded to the Applicant's Counsel the account opening documents but the latter did not act on the same. The Applicant instead waited for the 45 days to lapse and only moved this court when the Respondent sought to proceed with execution.



12. The Respondent proffers the position that the Applicant ought to have moved this court before the expiry of the 45 days if indeed there was difficulty in complying with the order directing that the security be deposited in a joint interest earning account.
13. The application was urged by way of oral submissions and the parties herein restated in their submissions the contents of their respective affidavits.
14. I have perused and considered the application, the Applicant's affidavit in support thereof, the Respondent's replying affidavits and the submissions of the parties. The issues for determination, as discernible from the material before me are as follows:
 1. Whether this court should extend the period within which the Applicant is to deposit security for the performance of the decree;
Subject to (1);
 2. Whether this court should grant and/or issue an order of stay of execution pending the determination of the instant appeal.
15. With respect to the first issue, I have stated above that the order that the Applicant seeks is that I review the ruling and order of this court that was issued on 19th September, 2024 and allow more time for the Applicant to deposit security for the performance of the decree. Thus then, the application ought to have been brought under Sections 80 and 95 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.
16. I say so because my sister issued the timelines for depositing of the security in a substantive ruling, whose terms can only be adjusted through an application for review or through an appeal.
17. Be that as it may, I will proceed to consider whether the grounds presented by the Applicant are sufficient to warrant this court to enlarge the time within which to deposit the security for the performance of the decree. To that end, I will treat the Applicant's Motion as one that seeks review of Shariff J.'s orders (to enlarge the time within which to comply with the order to deposit security).
18. Review of decrees and orders is provided for under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Under rule 1(1) of Order 45, one can only seek for review on the ground of discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.
19. In the present case, the review sought with the view of expanding or enlarging time for furnishing security has not been pursued on the basis of discovery of new and important matter of evidence or an error apparent on the face of the record. So then, those grounds are not available for this court's consideration.
20. As to whether there is any other sufficient reason for this court to review the order of 19th September, 2024 and extend time to furnish security, I will proceed and consider the reasons that the Applicant has given for failure to comply with the order to deposit within 45 days.
21. In her affidavit in support of the application, Counsel for the Applicant merely stated that the Applicant's insurers who are the instructing client was faced with financial difficulty as there was a court order in the matter cited above whose effect was to freeze the insurer's bank accounts. Is this a sufficient reason for the court to extend time?



22. The period within which to comply with the order directing that the amount be deposited in the respective Counsel's joint interest earning account lapsed on or about 4th November, 2024. The order of the court that froze the insurer's account was issued on 29th October, 2024. Despite being aware of the existence of the said freezing order, the Applicant did not move this court to explain the difficulty it was facing before the lapse of the 45 days. As a matter of fact, the Applicant filed the instant Motion on 19th November, 2024, a period of about 14 days after the 45-day timeline had lapsed, and only so following the fact that the Respondent had moved to execute the decree.
23. In my view, the delay is not only inordinate but also unexplained. The maxim equity aids the vigilant, not the indolent, emphasizes the importance of acting promptly. The Applicant has been indolent and will not benefit from the delay or neglect to act.
24. Having said as much, I am not persuaded that the Applicant has provided sufficient reasons for me to enlarge the time within which to deposit the security.
25. Having determined that the prayer for extension of time within which to deposit security for the performance of the decree is not merited, I find it preposterous to determine the prayer that seeks an order for stay of execution pending the hearing and determination of the appeal. The same stands spent.
26. The result I then reach, based on the reasons above, is that the Notice of Motion application dated 19th November, 2024 is without merit. I proceed to dismiss it with costs to the Respondent.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 2ND DAY OF JULY, 2025.

JOE M. OMIDO.

JUDGE

For Appellant: Ms. Turgutt.

For Respondent: No appearance.

Court Assistants: Mr. Ngoge & Mr. Juma.

Ms. Turgutt: I seek leave to appeal.

Court: A formal application to be filed.

JOE M. OMIDO

JUDGE

