

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

MISCELLANEOUS CIVIL APPLICATION NO. E014 OF 2025

**KENYA POWER & LIGHTING CO. LTD
.....APPLICANTS**

-VERSUS-

**WILSON WANDIGA WANGOMBE.....1st
RESPONDENT**

**JOSEPH AKUTE NDAKALU.....2ND
RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3RD
RESPONDENT**

RULING

1. The Applicant approached this court through an application dated 28th April, 2025, seeking orders that;

1) Spent

2) This Honourable Court be pleased to grant leave to the Applicants to lodge an appeal out of time against judgment/decree of the Chief Magistrate Court in Nyahururu CMCC No. 209 of 2019 out of time the same having been delivered by the trial court on 25th November 2024.

3) There be stay of execution Warrants of Attachment dated 14th April 2025 and

Proclamations dated 25th April 2025 pending hearing and determination of the application inter-partes.

4) Spent.

5) The such orders be made as are just and expedient.

6) Costs be in the cause.

2. The stated application is premised on grounds that;

(a) Judgment was entered against the Applicant and 2 others in Nyahururu CMCC No. 209 of 2019 in the sum of Ksh.491,744 being the decretal sum, plus costs a judgment that the Applicant is dissatisfied with.

(b) That failure to appeal on time was not deliberate as the Applicant, a corporation based in Nairobi was recently informed of the judgment and had to make consultations on the way forward hence the delay in instructing the advocate to appeal.

(c) That it was necessary to obtain a copy of judgment from court for perusal before deciding on the way forward. That the Applicant has a good appeal with overwhelming chances of succeeding and wishes to pursue appeal against the entire judgment.

(d) That the appeal will be rendered nugatory if stay of execution of the warrants of attachment is not granted and the appeal succeeds and that the Applicant is willing to abide with such reasonable stay terms as the court may order in the interest of both parties and justice

- 3.** In response, the 1st Respondent filed a replying affidavit where he deposes that the judgment was delivered in the presence of the Applicant's advocate. That the decree and certificate were served upon the Applicant's advocate and there having been no response execution did issue hence the attachment.
- 4.** That the delay in filing the application has not been explained, and execution being a lawful process does not amount to substantial loss and/or render the appeal nugatory.
- 5.** I have duly considered the application, supporting affidavits and annexures thereto.
- 6.** The initial issue I should consider is the question of leave to appeal out of time. **Section 79G of the Civil Procedure Act** provides as follows;

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.

7. The judgment concerning the matter in question was delivered on 25th November, 2024 and the instant application was filed on 28th April, 2025. An appeal in a civil matter is supposed to be filed in 30 days' time from the date of the decree. An approximate duration of five (5) months passed prior to action being taken.
8. The explanation given for the delay making the instant application is that there was delay in informing the Applicant of the judgment, and upon receipt of the decree action was taken immediately save that being a government parastatal internal mechanisms that are lengthy caused the delay. It is admitted the decree and certificate were served on the Applicant's advocate on 11th March 2025, Therefore the application was filed soon after obtaining the knowledge of the same.
9. This court has discretion to consider and grant the order sought guided by principles for granting extension of time. In ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1991] 2EA 231*** the Court of Appeal held as follows;

"It is now well settled that the decision whether or not to extend the time for

appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.

10. Additionally, the court would also consider whether it is just and fair to all parties to allow the application.

11. On the subject matter of stay of execution, the principles governing the same are provided by **Order 42 Rule 6(1) (2) of the Civil Procedure Rules** which enacts 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.

12. In that regard, the court must be satisfied that substantial loss may result; the application was made without due delay and the Applicant must be willing to provide security for due performance of the decree.

13. I have afore addressed the question of due delay. On the issue if substantial loss. In **Kenya Shell Ltd v Benjamin Karuga Kibiru & Another [1986] eKLR** the court stated that;

“...substantial loss, and such loss cannot be inferred in this case.

But this court must look at the matter from the point of view of rule 5(2) of Court of Appeal Rules, and here the test would be whether the appeal would be rendered nugatory, unless payment of the decretal sum were stayed. It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory.”

14. In **James Wangalwa & Another v Agnes Naliaka Chesoto [2012] eKLR** the court stated thus;

“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. This is what substantial loss would entail, a question

that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

- 15.** The loss stated is that there is an arguable appeal that will be rendered nugatory to the detriment of the Appellant. However, the contention of the Respondent is that he will suffer prejudice as he will be denied the fruits of judgment. That mere existence of warrants and proclamation does not in itself establish that the Applicant will suffer irreparable harm. That it has not been demonstrated that the respondent is a man of straw who cannot refund the decretal amount if the same is paid and the appeal succeeds.
- 16.** The Appellant has expressed fear of the right of appeal being curtailed and the ability of the Respondent to

refund the decretal amount if the appeal succeeds being unknown. In the circumstances the evidential burden shifts to the Respondent to demonstrate that he is a man of sufficient means with the capacity to refund the amount if the appeal succeeds. This was succinctly stated in **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eklr** where the Court of Appeal stated that:

“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”

- 17.** In the instant case, the Respondent has not made an attempt of demonstrating how he will repay the sum, therefore, there may be the risk of nonpayment resulting into loss of the decretal money incase of the appeal succeeding.
- 18.** On the question of arguability of the appeal, it is apparent that the intended appeal raises legal issues that are not frivolous hence should be ventilated so that the court determines its merits.
- 19.** Security for due performance is offered. The Applicant states that It is ready and willing to abide by the order of the court to secure their obligations under the decree and costs of the Respondents.

20. In the premises, I grant orders as follows;

- (1) The Applicant is granted leave to file the appeal out of time within 30 days hereof.**
- (2) There be stay of execution of the judgment and decree in Nyahururu CMCC No. 209 of 2019 pending filing, hearing and determination of the intended appeal on condition that the Applicants' deposit Kshs.362,000/- in court as security for the due performance within 30 days of today, September,10th 2025.**
- (3) In default, the orders granted shall stand vacated.**
- (4) The record of appeal be filed within 60 days' of today.**
- (5) Costs of the application shall be in the cause.**

Dated, signed and delivered virtually this 10th day of September, 2025.

.....
L.N. MUTENDE
JUDGE