

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA NAIROBI
CIVIL DIVISION
MISC. CIVIL APPLICATION NO. E983 OF 2024

LEAH JEPKEMBOI T/A NETTY'S CREATION APPLICANT
VERSUS
FIRST COMMUNITY BANK.....1ST
RESPONDENT
JOSEPH GIKONYO T/A GARAM
INVESTMENTS.....2ND
RESPONDENT

RULING

1. By the **motion** dated **28.10.2024** brought pursuant to **Section 1A & 3A** of the **Civil Procedure Act (CPA)** and **Order 42 Rule 6** of the **Civil Procedure Rules (CPR)**, **Leah Jepkemboi t/a Netty's Creation** (*hereafter the Applicant*) seeks the following orders-
 - i. Spent.*
 - ii. Spent.*
 - iii. That the Honourable Court be pleased to grant leave and extend time to the Applicant to file its appeal out of time in respect of the ruling delivered in Nairobi Milimani CMCC No. E399 of 2023 (hereafter the lower Court suit)*
 - iv. That the Honourable Court be pleased to grant stay of execution of the ruling delivered in Nairobi Milimani*

CMCC No. E399 of 2023 on 13.08.2024 pending hearing and determination of the appeal or intended appeal

v. That the costs of the motion be in the cause.

2. The application is premised on the grounds on its face thereof amplified by the supporting affidavit deposed by **Applicant** on even date. The gist of her disposition is that the lower Court suit was slated for ruling on 13.08.2024 vide a ruling notice issued on 03.07.2024. Upon her counsel logging in on 13.08.2024 she was informed that the Court was not sitting and that a new date would be issued. She goes on to depose that despite waiting on the new date the same was not forthcoming, to wit, on 02.10.2024 her counsel received an SMS alert that the ruling had been delivered. She deposes that counsel later logged onto the judiciary portal and realized that the ruling was uploaded on 18.09.2024 however delivered on 13.08.2024, to wit, she was unaware that the ruling had been rendered and as such unable to file an appeal within the stipulated time period. That counsel has since requested for a copy of the ruling and proceedings towards filing the intended appeal, which appeal is arguable and meritorious therefore likely to be rendered nugatory should the orders sought herein not be granted. She concludes that no prejudice will be visited on either of the parties in the matter should the application be allowed as prayed.
3. **First Community Bank Ltd** (hereafter the 1st Respondent) **opposes** the motion by way of a **replying affidavit**

deposed by **Claris Ogombo** dated **17.02.2025**. She asserts that the impugned ruling of the lower Court was rendered on 13.08.2024 whereas the Applicant had lodged the instant motion more than three (3) months late pursuant to **Rule 55(5)** of the **Auctioneer Rules**. In summation she deposes that delay in lodging the motion and appeal is inordinate therefore the instant application ought to be dismissed with costs.

4. **Joseph Gikonyo t/a Garam Investments** (*hereafter the 2nd Respondent*) opposes the motion vide grounds of opposition **dated 28.11.2024**. He takes issue with the motion on grounds that the same is bad in law, incompetent, fatally defective and ought to be struck out; that the Applicant has not complied with **Rule 55(5)** of the **Auctioneer Rules** rendering the anticipated appeal unsustainable; and that the Applicant is guilty of laches.
5. In rejoinder by way of a **supplementary affidavit dated 18.03.2025** the Applicant iterates that from the Case Tracking System (CTS), the impugned ruling was uploaded on 18.09.2024 whereafter a notification on the same was received on 02.10.2024 via SMS. That he counsel is yet to obtain proceedings to ascertain that the lower Court sat on 13.08.2024 given that when counsel logged in on the latter date, the Court was not sitting. She asserts that the instant motion is not an appeal but merely seeks leave to file an appeal out of time therefore **Rule 55(5)** of the **Auctioneer Rules** has no application herein. In conclusion, she maintains that the instant motion was filed without inordinate delay

therefore the Court ought to exercise its discretion and allow the motion.

6. Directions were taken on disposal of the Applicant's motion by way of written submissions. The parties duly complied.
7. That said, the Court has considered the rival affidavit material alongside the submissions in support, to wit, the Court's postulation that the issues for **determination concerns:**
 - a. ***Whether the Court ought to grant the leave and extend the time to the Applicant to file its appeal?***
 - b. ***Whether the Court ought to grant an order stay execution of the ruling delivered in Nairobi Milimani CMCC No. E399 of 2023 pending hearing and determination of the appeal or intended appeal?***
 - c. ***Who ought to bear the costs of the motion?***

Whether the Court ought to grant the leave and extend the time to the Applicant to file its appeal?

8. At the outset, it warrants mentioning that in opposition to the motion, the 2nd Respondent preferred to file grounds of opposition. While **Order 51 Rule 14 (1)** of the **CPR** recognizes grounds of opposition as one of the modes, to wit, a party may oppose an application. Recently the Court of Appeal in **Blue Thaitian SRL (Owners of the Motor Yacht 'Sea Jaguar') v Alpha Logistics Services (EPZ) Limited (Civil Appeal (Application) E012 of 2020) [2022] KECA 1240 (KLR)** observed that the effect of filing grounds of

opposition in response to an application confines a party to issues of law and legal arguments only. That said, the 1st and 2nd Respondent have raised two (2) salient preliminary issues concerning the competency of the Applicant's motion-; being failure to annex a draft chamber summons with grounds of appeal and failing to file an appeal within time, all in compliance with **Rule 55(4) & (5)** of the **Auctioneer Rules**. The decisions in **Muli Musembi & Paulina v Ruth Katunga Isika [2018] KEELC 5 (KLR)**, **Gori, Ombongi & Company Advocates v Mary Wangechi Kamara, CM Advocates LLP v Cole (Sued as the administrator of the Estate of Josephine Eleanor Moikobu) [2024] KEHC 4839 (KLR)** and **Ezekiel Kiminza t/a Auto Land Auctioneers v Mistry Valji Naran Mulji [2017] eKLR** were called to aid in the forestated regard.

9. Firstly, while the Court appreciates the said decision, it is notable that the said decisions originate from Courts of concurrent jurisdiction as such the same are persuasive and non-binding. That said, it must be remembered that what is before the Court is an application urging the Court to grant leave and extend the time within which the Applicant may file its appeal. While **Rule 55 (5)** of the **Auctioneer Rules** provides for the timelines within which the Applicant's appeal ought to be filed meanwhile concerning admission of an appeal out of time and or enlargement of time within which to lodge an appeal, the applicable provision would be **Section 3A, 79G & 95** of the **CPA**.

- 10.** Secondly, the latter provisions do not mandate the evincing of a draft-chamber summons or appeal whereas leave is sought towards late admission of an appeal and or enlargement of an appeal. And in any event, based on the language employed in **Mutiso v Mwangi [1997] KLR 630**, to wit, this Court will proceed to address itself late in this ruling, the requirement touching on the viability of the intended appeal, is neither mandatory nor sternly applied in an application of this nature. Consequently, the Respondents' preliminary contestation concerning competency of the Applicant's motion is not well taken and is accordingly dismissed.
- 11.** Moving on the issue at fore, in presenting the instant motion, the Applicant has relied on among other provisions **Section 3A** of the **CPA** which specifically reserves "the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court"", to wit, this Court's inherent powers was judiciously addressed by the Court of Appeal in **Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR** and requires no restatement.
- 12.** That said, the power of the Court to enlarge the time for filing an appeal out of time is expressly donated by **Section 79G** of the **CPA**, as well as generally, by **Section 95** of the **Act**. It is trite that for leave to be granted, an applicant is obligated to sufficiently explain to the satisfaction of the Court the cause of the delay. In **Thuita Mwangi v Kenya Airways**

[2003] eKLR the Court reiterated the rendition in **Mutiso v Mwangi [1997] KLR 630** 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 generally the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

See also: - **Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR)**

- 13.** The circumstances that led to delay in filing the Applicant’s intended appeal within time have been explained in the Applicant’s affidavit. The explanation advanced is singular, that when the impugned ruling was scheduled for delivery on 13.08.2024, the lower Court was not sitting however the ruling was later uploaded onto the CTS on 18.09.2025 and a notification received on the said upload on SMS on 02.10.2024. The Respondents have generally challenged the assertion and maintained that delay in loading the appeal and instant motion has been inordinate.
- 14.** From the affidavit material presented herein, the Court is at a disadvantage to ascertain the veracity of the Applicant’s

assertion that the lower Court failed to sit on 13.08.2024 when the impugned ruling was to be delivered. However, a cursory perusal of **(Annexure LJR-2)** it would appear that indeed the impugned ruling despite being delivered on 13.08.2024 was uploaded onto the CTS on 18.09.2024. Thus, it may in all probability be that the Court failed to sit on 13.08.2024. Further, neither party took the liberty of evincing the proceedings nor evidence contrary to the Applicant's assertion. Thus, the Applicant's explanation may be probable.

- 15.** That said, **(Annexure LJR-1)** the purported SMS notification received on 02.10.2024 concerning the ruling being delivered, is inconclusive as the annexure does not show on the face of it when the said message was received. Well, even if the benefit of doubt was advanced in favour of the Applicant, that was not until 02.10.2024 she came to the realization the impugned ruling had already been delivered, the instant motion was filed more than three (3) weeks later with no explanation for the delay therein.
- 16.** As observed in **Mutiso** (supra), the length of delay and reason for delay are key towards unlocking this Court's discretion. The impugned decision of the lower Court was rendered on 13.08.2024, it would seem that the ruling was thereafter uploaded on 18.09.2024 and the Applicant purported realization on 02.10.2024 whereas the instant motion was filed on 28.10.2024. Here the unexplained delay in presenting the instant motion is more than three (3) weeks. The forestated bring to mind the rendition of **Makhandia JA** in **Patrick Wanyonyi Khaemba v Teachers**

Service Commission, Board of Management, Kapletingi Mixed Day Secondary School & Francis Tanui [2019] KECA 112 (KLR), wherein he observed that -;

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour.

- 17.** Ultimately, a motion of this nature principally stands or falls on the demonstration of *“good and sufficient cause”* by an applicant; it is what unlocks this Court’s discretion. Given the aforestated, while duration in representing the instant motion does not appear inordinate and an explanation for entire duration on delay has plausibly been offered, the Court is just barely persuaded. Indubitably, it would be a travesty of justice for the Court to drive the Applicant from the seat of justice. Besides, it does not seem that the Respondents will suffer any prejudice that cannot be compensated through costs if the motion is allowed.
- 18.** Concerning the arguability of the appeal, the Court, having perused the intended grounds in the affidavit in support and intended memorandum of appeal, is satisfied that they raise issues worthy of consideration on appeal. That said, as earlier noted and at the risk of repetition, the language employed in **Mutiso** (supra) touching on the viability of the intended appeal, is neither mandatory nor sternly applied in an application of this nature. The Court of Appeal in **Vishva Stone Suppliers Company Limited v RSR Stone (2006)**

Limited [2020] eKLR stated that “*an arguable appeal need not (be one that will) succeed so long as it raises a bona fide issue for determination by the Court.*” Lastly, any prejudice that may be occasioned to the Respondent in the circumstance may be easily assuaged by an award of costs. In the circumstances of this case, the Court is persuaded that to facilitate the Applicant’s undisputed right of appeal as equally advanced in **Vishva** (supra), leave is granted to the Applicant to lodge an appeal out of time.

Whether the Court ought to grant an order of stay execution of the ruling delivered in Nairobi Milimani CMCC No. E399 of 2023 pending hearing and determination of the appeal or intended appeal?

- 19.** As earlier noted, alongside other provisions, the Applicant has equally cited the provision of **Order 42 Rule 6** of the **CPR**. It is settled that in order to succeed on an application for stay of execution pending appeal, an applicant must demonstrate that substantial loss may result unless the order of stay is issued; that the motion seeking stay pending appeal has been brought without undue delay; and must give security for the due performance of any decree or order that may ultimately be found to be binding on the applicant. Meanwhile, the cornerstone consideration in a motion to stay execution is whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay is denied.
- 20.** However, it is evident on a plain reading of **Order 42 Rule 6(1)** of the **CPR**, that an order to stay execution pending hearing and determination of an appeal presupposes the

existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this Court's appellate jurisdiction under Order **42 Rule 6 (1)** of the **CPR**. Notably, what is before this Court is a miscellaneous application by the Applicant. As is, no appeal has filed or evinced to have been filed before this Court as at writing of this ruling. Notwithstanding, this Court's earlier finding on leave.

- 21.** That said, this Court has observed time without number that the invocation of this Court's jurisdiction pursuant to **Order 42 Rule 6 (1)** or **6 (6)** of the **CPR** must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal. In the instant matter, the applicable provisions would be **Rule 55 (4) & (5)** of the **Auctioneer Rules**. Thus, where a party specifically seeks stay of execution pending hearing and determination of an appeal not yet filed, the Court may be acting *in vacuo* by considering the Applicant's prayer for stay of execution pending a non-existent appeal. The Court of Appeal in **Abubaker Mohamed Al-Amin v Firdaus Siwa Somo [2018] KECA 202 (KLR)** while addressing itself in part on the issue laconically concurred with above position as pronounced in **Rosalindi Wanjiku Macharia v James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased) [2017] KEHC 5160 (KLR)** that "...in the absence of the appeal there was nothing upon which the stay orders sought under Order 42 of the Civil Procedure Rules could be anchored"

22. Earlier, the Court of Appeal in the case of **Equity Bank Limited v West Link Mbo Limited [2013] KECA 320 (KLR)** while commenting on **Rule 5 (2) (b)** of the **Court of Appeal Rules**, whose wording is substantially similar to **Order 42 Rule 6 (1)** of the **CPR**, and or **Order 42 Rule 6 (6)** of the **CPR**, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (**See also Balози Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga [2012] eKLR**).
23. **Rule 55 (4) & (5)** of the **Auctioneer Rules** provides for the manner in which an appeal is to be presented to this Court. In this case, and at the risk of repetition, an appeal is yet to be filed and therefore, there is no basis upon which this Court can exercise its appellate jurisdiction under the said provision in a miscellaneous matter. This Court often stated that if an applicant desires to seek an order to stay execution alongside the prayer for leave to appeal out of time, they ought to have first filed the appeal alongside the relevant application. The words that “*an appeal may be admitted out of time*” in **Section 79G**, appears to admit both retrospective and prospective applications. So that leave under the forestated Section may be sought before or after an appeal is filed. It may be more prudent for a party who also seeks stay of execution pending appeal in the same motion for leave to appeal out of time to have filed the appeal in advance.

24. Ordinarily, this Court would decline to grant an order of stay of execution in the circumstance. However, it is notable that as at presentation of the instant motion this Court had accorded the Applicant interim stay condition by way of depositing the sum of Kshs. 150,000/- within twenty-one (21) days of 29.10.2024. A perusal of the record reveals that the Applicant complied with the said orders of this Court. Consequently, out of prudence and in order not to defeat the Applicant compliance, the Court will grant an order of stay execution of the ruling delivered in **Nairobi Milimani CMCC No. E399 of 2023** pending hearing and determination of the appeal or intended appeal on condition.
25. Consequently, the Applicant's motion succeeds in the following terms-;
- a) The Applicant is granted leave to file an appeal out time with respect to the decision delivered in Nairobi Milimani CMCC No. E399 of 2023 within fourteen (14) days of this ruling.***
 - b) That the sum of Kshs. 500,000/- already deposited in Court will act as security for the order of stay execution of the ruling delivered in Nairobi Milimani CMCC No. E399 of 2023 pending hearing and determination of the appeal or intended appeal on condition that the Applicant complies with (a) above.***
 - c) Failure to comply with either of the above conditions, the order on leave and stay of execution will dissipate.***

d)The Respondents are awarded costs of the motion.

26. Order Accordingly!

**Delivered, dated and signed at NAIROBI this 17th day of
SEPTEMBER 2025**

**L. P. KASSAN
JUDGE**

Court Assistant - Caro.