



REPUBLIC OF KENYA



**Mochama & another v Onsare (Miscellaneous Civil Case E012 of 2025)
[2025] KEHC 13320 (KLR) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13320 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
MISCELLANEOUS CIVIL CASE E012 OF 2025
WA OKWANY, J
SEPTEMBER 18, 2025**

BETWEEN

DENNIS MOKAYA MOCHAMA 1ST APPLICANT

MOGO AUTO COMPANY LIMITED 2ND APPLICANT

AND

EVANS ONSARE RESPONDENT

RULING

1. This ruling is in respect to the Application dated 14th May 2025 wherein the Applicant seeks orders for stay of execution of the decree in Nyamira CMCC No. E069 of 2023 and leave to appeal out of time against the judgment in Nyamira CMCC No. E067 of 2023.
2. The Application is brought under Sections 1A, 3A, 79G of the *Civil Procedure Act*; Order 42 Rule 6 (1), (2) and (6); Order 51 of the Civil Procedure Rules; Section 5(b) of the Insurance Motor Vehicle Third Party Risks Act; and Article 159 of the *Constitution*.
3. The Application is supported by the affidavit of Michael Shisia, Assistant Legal Manager of Occidental Insurance Co. Ltd, who attributes the delay to restructuring at the insurer and inadvertence by counsel.
4. The Respondent opposed the Application through a Replying Affidavit dated 23rd May 2025, wherein he contends that; the Applicants failed to show substantial loss; that the delay of over three months is inordinate and that the security proposed is vague.
5. I have carefully considered the pleadings filed herein and the parties respective submissions. I find that the main issues for determination are: -
 - i. Whether leave to file an appeal out of time should be granted.
 - ii. Whether stay of execution pending appeal should be granted.



Leave to Appeal Out of Time

6. Section 79G of the *Civil Procedure Act* provides that every appeal from a subordinate court shall be filed within 30 days, but allows admission of an appeal out of time if sufficient cause is shown.
7. In *Nicholas Kiptoo Korir arap Salat vs. IEBC & 7 Others* [2014] eKLR, the Supreme Court stated: -

“Extension of time is not a right of any party. It is an equitable remedy... a party who seeks for extension of time has the burden of laying a basis... the delay should be explained to the satisfaction of the court...”
8. Similarly, in *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* [1999] 2 EA 231, the Court emphasized discretion, considering length of delay, reason, arguability, and prejudice.
9. In the instant case, judgment was delivered on 12th February 2025. This Application was filed on 14th May 2025. There was thus a delay of about 3 months. The explanation advanced for the delay was inadvertence due to counsel’s clerk resigning and insurer restructuring.
10. In *Itute Ingu & another vs. Isumael Mwendwa* [1994] eKLR, the Court of Appeal held:

“...a mistake by counsel, particularly where such a mistake is bona fide, can entitle an applicant to the exercise of the court’s discretion in his favour. But before doing so, the Court must, of necessity, examine the nature or quality of the mistake.”
11. Further, in *Belinda Murai & Others vs. Amos Wainaina* [1978] eKLR, the Court cautioned that mistakes of counsel should not be visited upon litigants.
12. I find that the delay of 3 months is not inordinate. The reasons advanced are bona fide. Leave to appeal out of time is therefore granted.

Stay of Execution Pending Appeal

13. Order 42 Rule 6(2) of the Civil Procedure Rules provides that stay may be granted if: Substantial loss may result unless stay is made; The application is made without unreasonable delay; and Security for due performance is provided.
14. In *Butt vs. Rent Restriction Tribunal* [1982] KLR 417, the Court held:

“The power of the court to grant or refuse a stay is discretionary... exercised so as not to prevent an appeal... if there is no overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory...”
15. On substantial loss, the court held as follows in *James Wangalwa & Another vs. Agnes Cheseto* [2012] eKLR, the Court explained:

“...execution is a lawful process... the applicant must establish other factors which show that the execution will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...”
16. Similarly, in *National Industrial Credit Bank Ltd vs. Aquinas Wasike* [2006] eKLR, the Court held that inability to recover decretal sums amounts to substantial loss.



17. The decretal sum herein is Kshs. 4,067,140/= plus costs. The Respondent did not demonstrate financial ability to refund the decretal sum if paid.
18. My finding is that the Applicants risk substantial loss and the balance of convenience tilts in their favour. Since the Respondent is entitled to enjoy fruits of judgment a conditional stay will be appropriate.
19. For the reasons that I have stated in this ruling, I find that the Applicants have established a case for the granting of orders for stay of execution. I therefore allow the Application in the following terms:-
 - i. Stay of Execution pending appeal is hereby granted to the Applicants on the following conditions: -
 - a. The Applicants shall pay to the Respondent half the decretal sum and the full sum of the costs awarded in the trial court being Kshs. Kshs. 2,033,570/= and the full sum of the costs within 30 days from the date of this ruling.
 - b. The other half of the decretal sum shall be deposited in a joint-interest earning account, to be held in the names of the parties' advocates, within 45 days from the date of this Ruling.
 - c. The Applicants are hereby granted leave to appeal out of time and are directed to file and serve their Memorandum of Appeal within 30 days from the date of this Ruling.
 - ii. That in the event of failure to comply with Orders in a) to c) above, the Respondent shall be at liberty to proceed with execution of the judgment decree issued by the trial court.
20. The costs of this Application shall abide the outcome of the Appeal.
21. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 18TH DAY OF SEPTEMBER 2025.

W. A. OKWANY

JUDGE

