REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

FAMILY MISC. APPLICATION NO. E021 OF 2025

LEAH WANGUI MAINA.....APPLICANT

VERSUS

TABITHA NJOKI MAINA.....

RESPONDENT

RULING

1. This is a ruling over an application dated 26.08.2025. The prayers sought are as follows: -
    a) This Honourable court be pleased to grant leave to the appellant to appeal out of time against the ruling made by the Hon. Grace Kirugumi on 22.07.2025.
    b) The grant of leave to file the appeal out of time do operate as a stay of execution of the ruling in succession cause number MCSUCC E172 of 2021.
    c) Costs be in the cause.
2. The grounds upon which the application is made is that the Applicant intends to appeal against the judgment of the trial court. There was a delay of 4 days. They blame this on an oversight.

3. On the question of stay, they state that lack of stay will prevent substantive justice when reviewing the impugned ruling. There was no indication of any security pending appeal.

Analysis

4. I have perused the application, response and submissions and authorities filed by respective parties in support and opposition to the application.

5. The issue before me is whether the delay in lodging a Memorandum of Appeal has been satisfactorily explained. If the reason for delay is not sufficient, then the issue as to whether stay of execution should be granted will not fall for determination because there will be no appeal. Waki, JA in **Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company Civil Application No. Nai. 349 of 2005** held that:

> *"As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on*

public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors…In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves…The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant's counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay… Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle."

6. I have perused the reasons for the delay and the period for delay. The period is barely 4 days. The raison d'être for not filing in time is an inadvertent mistake of counsel. The period is short hence no inordinate delay. As to mistakes of counsel the mistake is understandable. It is a mistake that can arise in the normal vagaries of life and practice. In the case of **Philip Keipto Chemwolo & another v Augustine Kubende [1986] KECA 87 (KLR)**, the court of appeal [Platt, Gachuhi & Apallo JJA] per Apaloo JA posited as follows:

> Whatever it is, there is a triable issue on the plea of contributory negligence. That being the view of the matter that commends itself to me, it would seem to me to be opposed to principle to shut out the defendants from putting forward their version of the facts. As to the strictures the judge made with regard to the defendants' alleged indifference in entering appearance or their casual treatment of correspondence, I agree with what has fallen from the lips of Platt JA and I need say no more on it.
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> True, there was some delay in entering appearance but I cannot accept it was an unreasonable delay, or it was the type that disables a plaintiff from relief in equity. At all events, such delay was satisfactorily explained. When I asked counsel for the respondent what loss or damage would result to him if this suit were admitted to a hearing on the merits, he said nothing that I think should inhibit the court from allowing this suit to be heard on its merits. I recorded counsel as saying that a court's

discretion should not be exercised in favour of a negligent applicant. I think the charge that the appellants were negligent is one that can be questioned. But counsel seems to think the defendants are deserving of punishment and must be shut out for their negligence.

I think a distinguished equity judge has said:

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits."

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.

7. The imperatives for extension of time were settled by the Supreme Court of Kenya *(M.K. Ibrahim & S.C. Wanjala SCJJ)* in the case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR* where the learned Judges held as follows:-

> *"(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.*

(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

(3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.

(4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

8. The court is aware that an application for extension of time is an exercise in discretion. The discretion must be carried out judiciously and not capriciously. In the case of **Dilpack Kenya Limited v William Muthama Kitonyi** [2018] eKLR Odunga J. observed that:-

> "In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See Ratman vs. Cumarasamy [1964] 3 All ER 933; Savill vs. Southend Health Authority [1995] 1 WLR 1254 at 1259.

9. It follows therefore that the Applicant's explanation for the delay is key in guiding the Court's exercise of discretion on the issue of leave to appeal out of time. In this case, the burden was discharged.

10. The factors to consider in dealing with such an application are: -

    (a) The length of delay

    (b) The reason for delay

    (c) The animus of the applicant

    (d) The prejudice to the Respondent

11. The Applicant has explained the delay and the length of delay is short. The applicant applied within three to 4 days of expiry of time to appeal. The Applicant delayed for 4 days. In addressing the length of delay, the Court of Appeal [*Asike-Makhandia J* in *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another [2020] eKLR* stated that:-

> "There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR this Court stated:-
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> "The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is

the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

12. Further, the Respondent did not oppose the application despite being served. It is evident that there is no prejudice to be suffered if the application for extension of time is allowed. Consequently, all the factors were met. The application for extension is thus allowed.

13. On the issue of stay of execution there are principles guiding the grant of a stay of execution pending appeal which are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules that:

"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.

14. Further to the above, stay may only be granted for sufficient cause. In light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no

longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.

15. Section 1A(2) of the Civil Procedure Act provides that *"the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective,"* while under section 1B some of the aims of the said objectives are; "the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

16. Therefore, an applicant seeking stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See **Antoine Ndiaye v African Virtual University** [2015] eKLR.

17. As to what substantial loss is, it was observed in **James Wangalwa & Another v Agnes Naliaka Cheseto** [2012] eKLR, that:

> 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."

18. The application is not even for stay, but for the leave to act as stay. Secondly, the matter arises from a succession cause. Orders that the court issues in succession causes are different from the ones in civil cases. Such other orders have not been sought. What had been sought relates to the ruling of 22.07.2025. The ruling was in a nature of a dismissal order. There is nothing to stay in a dismissal order.

19. The lower court dismissed the applicant's application seeking for revocation of grant, which is in effect a negative order. Notably, the court cannot grant stay of the impugned ruling as it dismissed the applicant's application which in essence is a negative order and incapable of execution. This principle was enunciated by the Court of Appeal in **Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)** [2015] eKLR where the court held as follows:

> **An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.**

20. Clearly, the lower court did not order any of the parties to do anything or refrain from doing anything. As was held in **Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others** [2016] eKLR, the Court of Appeal expounded itself as follows:

> In Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:

The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.

The same reasoning was applied in the case of Raymond M. Omboga vs Austine Pyan Maranga (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:

The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

21. Therefore, whereas I grant leave to appeal, I am unable to allow leave to operate as stay of execution of a negative order.

Determination

22. The upshot of the foregoing is that I partly allow the Notice of Motion dated 26.08.2025 as follows:

a) Leave be granted to the applicant to file appeal within 14 days.
b) The prayer that the said leave acts as stay is dismissed as there is nothing to stay in a dismissal order.
c) No order as to costs.
d) File is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **2nd** day of **October, 2025**.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Gwembere for the Applicant

Mr. Nyaga for the Respondent

Court Assistant – Michael