

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISCELLANEOUS CIVIL APPLICATION NO. E002 OF 2025

**APOLLO AGRICULTURE
LIMITED.....APPLICANT**

VERSUS

**JANE MUTHONI MBURU.....1ST
RESPONDENT**

**JOSEPH MONDA RIANGA.....2ND
RESPONDENT**

**EUNICE AWUOR OPIYO.....3RD
RESPONDENT**

**JOSEPH MUTUNGI KAVETA.....4TH
RESPONDENT**

**JOSIAH MAITHA MAKAU.....5TH
RESPONDENT**

**ISAAC MAINA KAHACHO.....6TH
RESPONDENT**

**JOSEPH KIPKURUI ARAP MUTAI.....7TH
RESPONDENT**

**PATRICK MWAURA RURIGI.....8TH
RESPONDENT**

**MILKAH WAMBUI KINYUA.....9TH
RESPONDENT**

**JULIANA CHEPKORIR KOSGEI.....10TH
RESPONDENT**

**GLADYS CHELAGAT SAWE.....11TH
RESPONDENT**

**VINCENT STANLEY NGANGA KARANJA.....13TH
RESPONDENT**

**SILAS MPUTHIA KINYUA.....14TH
RESPONDENT**

**PETER NDUNGU GACHARI.....15TH
RESPONDENT**

**JOHNSON KIUNJURI KURIA.....16TH
RESPONDENT**

RULING

1. This is the notice of motion dated 11th June 2025 where the applicant seeks the following orders;

- i. & ii- Spent.***
- iii. That this honourable court be pleased to grant a stay of execution of the Judgment and Decree issued by the trial court in Nakuru Small Claims Court, SCC COMM No. E1437 of 2024, Apollo Agriculture Ltd v Jane Muthoni Mburu, consolidated with SCC Comm No. E1459, 1315, 1409, 1354, 1511, 1302, 1396, 1328, 1506, 1522, 1497, 1259, 1821, and 1268 all of 2024, delivered on 27th February, 2025 and 28th April 2025 respectively, pending the hearing and determination of the intended appeal against the Judgment.***
- iv. That this honourable court be pleased to grant the applicant leave to appeal against the whole of the Judgment delivered by Hon. Edward Obwoye on 27th February, 2025, in Nakuru Small Claims Court, SCC COMM No. E1437 of 2024, Apollo Agriculture Lid v Jane Muthoni Mburu, consolidated with SCC Comm No. 1459, 1315,***

1409, 1354, 1511, 1302, 1396, 1328, 1506, 1522, 1497, 1259, 1821, and 1268 all of 2024.

- v. That this honourable court be pleased to grant the applicant leave to appeal out of time against the Judgment delivered by Hon. Edward Obwoye on 27th February, 2025 in Nakuru Small Claims Court, SCC COMM No. E1437 of 2024, Apollo Agriculture Ltd v Jane Muthoni Mburu, consolidated with SCC Comm No. 1459, 1315, 1409, 1354, 1511, 1302, 1396, 1328, 1506, 1522, 1497, 1259, 1821, and 1268 all of 2024.**
- vi. That upon grant of the aforesaid orders, this honourable Court do deem the draft memorandum of appeal annexed to the supporting affidavit hereto as duly filed and served upon payment of the requisite fees.**
- vii. That this honourable court be pleased to grant any such orders as it may deem fit and just to grant.**
- viii. That costs be in the cause.**

2. The application is premised on the grounds on its face plus the supporting affidavit of Victor Orandi an advocate practising in the firm of Mathew & Partners LLP who are in conduct of this case.

3. The main ground is that the applicant is aggrieved by the dismissal of its claim by the trial court in Nakuru SCC COMM No. E1437 of 2024 as consolidated with E1459, 1315, 1409, 1354, 1511, 1302, 1396, 1328, 1506, 1522, 1497, 1259, 1821, and 1268 all of 2024. The applicant is

fearful of execution of the judgment & decree before the appeal (if allowed to be filed) is heard and determined. He averred that the delay was caused by the unavailability of a certified copy of the judgment.

4. The respondent filed a replying affidavit sworn by the Wanjir Paul advocate on 20th June 2025. He averred that the judgment was delivered on 27th February 2025 in the presence of both counsel who should have acted accordingly. He stated that the application seeking leave to file appeal out of time was only prompted by the proclamation and warrants of attachment. This to him is an effort to frustrate the respondent's enjoyment of the fruits of the judgment.
5. He further averred that the issue of unavailability of a certified copy of the judgment does not hold water as that is not a requirement for filing of an appeal. That the draft memorandum of appeal does not raise any substantive grounds of appeal as the applicant's counsel chose to proceed with the case under section 30 of the Small Claims Court Act. He thus urged the court to strike out the application as it is an abuse of the process of the court.
6. The application was disposed of by written submissions.

Applicant's submissions

7. These were filed by Mathew & Partners Advocates LLP and are dated 11th July, 2025. Counsel gave a brief background of the case and identified three (3) issues for determination.
8. The first issue is whether leave to appeal out of time should be granted. Counsel submitted that the delay in the appeal was neither inordinate nor deliberate and that

the applicant had provided a credible and well-supported explanation. He placed reliance on Article 159 of the Constitution, section 79G of the Civil Procedure Act and the decision in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR**, the Court outlined factors to consider in exercising discretion to extend time: ***“....I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent....”***

9. On the second issue whether the applicant is entitled to stay of execution, counsel cited Order 42 rule 6(2) of the Civil Procedure Rules which established the conditions to be met in the grant of stay. He submitted that the applicant had projected that its loss is not simply financial but also affects its capacity to operate and serve its clients. Thus, the same was justified for the grant of stay. The court’s attention was drawn to the decision in **Matata & another v Rono & another (Civil Appeal E034 of 2024) [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling)**, the court held that:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”

10. See also; **Antoine Ndiaye v African Virtual University [2015] eKLR.**

11. The third issue is whether the draft Memorandum of Appeal should be deemed as duly filed. Counsel submitted that the draft memorandum of appeal (AP-3) annexed to the supporting affidavit dated 11th June, 2025, raises substantive, weighty, arguable grounds of both law and fact.

12. He concluded by submitting that the applicant had satisfied the legal and factual threshold for the grant of both leave to appeal out of time and stay of execution pending appeal.

Respondent's submissions

13. These were by Kipkoech Terer & Associates and are dated 10th July, 2025. Counsel identified one issue for determination which is whether the application is merited.

14. Counsel submitted that the applicant had failed to advance any plausible and convincing reason for the delay in filing the intended appeal. Further, that it had not demonstrated any potential harm it would suffer if the application is dismissed. The court's attention was drawn to the Court of Appeal decision in **Emily Mosonik v Johnston Kimutai Mariandany Nakuru Civil Application E032 of 2023** which cited with approval the decision in **Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees Civil Application No. 190 of 2019** where the court observed as follows

“Some of the considerations, which are by no means exhaustive, in an application for extension of time

include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity."

15. On stay of execution of the judgment and decree, counsel submitted that the applicant had not satisfied the conditions for the grant of stay of execution as stipulated under Order 42 rule 6 (2) of the Civil Procedure Rules. The court's attention is drawn to the decision in **HGE vs SM [2020] eKLR** where the court affirmed the finding in **Absalom Dova vs. Tarbo Transporters [2013] eKLR**, and stated thus:

"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserve. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will

not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

16. See also; **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** and **Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others [2015] eKLR**.

17. In conclusion, he urged the court to dismiss the application with costs to the respondent.

Analysis and determination

18. I have considered the application together with the affidavit sworn in support, the replying affidavit and the submissions by the respective parties. The issue I find falling for is whether the application dated 11th June 2025 is merited.

19. Regarding leave to appeal out time, Section 79G of the Civil Procedure Act is the statutory imperative calling upon an aggrieved party to lodge an appeal from the subordinate court within 30 days of a decision. It 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.”

20. Regarding extension of time to lodge the appeal, the Supreme Court in **County Executive of Kisumu vs. County Government of Kisumu & 8 Others [2017] eKLR**, where expressed itself therein as follows:

“It is trite law that in an application for extension, the whole period of delay should be declared and explained satisfactorily to the court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time. The court delineated the following as:

- 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;***
- 5. Whether there will be any prejudice suffered by the respondent if the extension is granted;***

6. Whether the application has been brought without undue delay...”

21. In view of the above exposition, it is clear that the factors to be taken into consideration when determining an application of this nature are namely; the length of the delay, reasons for the delay, possibility of the arguability of the intended appeal, prejudice to be suffered by the opposite party if the reliefs sought were granted, any public policy issues that may be involved and the right of access to appellate justice. The current jurisprudential trend crystalizing this position states explicitly that being constitutionally entrenched, the leave sought can only be denied in exceptional circumstances.

22. Looking at the first principle as stated above; the length of the delay, the application under consideration was presented approximately four (4) months after the date of the delivery of the impugned judgment. The applicant stated that the main reason for failure to timeously comply with the timelines set in the rules is the delay in receiving a certified copy of the judgment.

23. In **Nick Salat v Independent Electoral and Boundaries Commission & 7 others** (supra), the Apex Judges therein remarked on the significance of time in the following manner:

“Time is a crucial component in dispensation of justice, hence the maxim: Justice delayed is justice denied. It is a litigants’ legitimate expectation where they seek justice that the same will be dispensed timeously. Hence, the various

constitutional and statutory provisions on time frames within which matters have to be heard and determined.”

24. In view of the foregoing it is clear that for time to be extended, the court must strike a fair balance between expeditious disposal of cases and an aggrieved party's right of appeal. I take judicial notice that at times there can be such delays occasioned to a party especially the release of proceedings due to heavy workload.

25. However, I note that there is no evidence showing that the applicant requested for the certified copy of the judgment. Additionally, in **Nick Salat v Independent Electoral and Boundaries Commission & 7 others** (supra) the Supreme Court observed as follows;

“... In those circumstances, it is incumbent on the Applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default.”

26. Despite all the above, this court finds that the applicant has a right to appeal against the decision of the small claims court. In **Muchemi v Roy Trans motors Limited (Employment and Labour Relations Appeal E147 of 2024) [2025] KEELRC 650 (KLR) (28 February 2025) (Ruling)** the court held as follows;

“.....The exercise of jurisdiction of the court in appeal is guided to be to sustain appeals.(Butt -vs

Rent Restriction Tribunal (1982) KLR 417). Any prejudice caused by the delay can be cured by throw-away costs as submitted by the applicant. The court exercised its judicial discretion under Rule 18 of Court (Procedure) Rules in favour of the applicant by allowing an enlargement of time to file the appeal.”

27. In order not to deny the applicant that right, the limited time to file appeal is hereby extended by 14 days from today's date within which the applicant is to file and serve the memorandum of appeal and file the Record of Appeal within 30 days upon filing of the memorandum of appeal.

28. Regarding stay of execution pending appeal, the guiding principles are well settled. The same are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:

No order for stay of execution shall be made under sub rule (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.

29. In **RWW v EKW [2019] eKLR**, the court addressed the purpose of a stay of execution order pending appeal as follows;

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the appellant with those of the respondent.”

30. From the law and the above decision, it is clear that the purpose of stay of execution is to preserve the substratum of a case pending the hearing and determination of an appeal. Further, a successful litigant has a right and expectation to enjoy the fruits of the decision rendered in his or her favour by the court, and a respondent who has lost a case also has a right of appeal to ventilate his or her displeasure with the said decision of the court. Furthermore, the grant of stay of execution is discretionary and the court will exercise this discretion on a case by case basis depending on the circumstances of the case. This court has the duty to balance these rights to ensure that justice is served.

31. This court notes that the applicant in the notice of motion makes mention of a Judgment delivered on 27th and 28th February, 2025. However, from the material before court and the memorandum of appeal the only known Judgment is that delivered on 27th February, 2025.
32. The above being the position, I allow the prayer for stay of execution of the judgment delivered on 27th February, 2024 on condition that the applicant deposits in court the entire decretal amount sum less the Ksh 100,000/= already deposited in court.
33. The upshot is that the application dated 11th June 2025 is allowed as set out above at paragraphs 27 and 32 of this ruling.
34. The applicant shall bear the respondent's costs in this application.
35. Orders accordingly.

Delivered, virtually dated and signed this 30th day of October, 2025 in open court at Nakuru.

**H. I. ONG'UDI
JUDGE**