



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT MILIMANI**  
**ELCA NO. E027 OF 2025**

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**KIRAGU MAINA** -  
**APPELLANT/RESPONDENT**

**VS**

**RIARA DOWNS MANAGEMENT**  
**PUBLIC LIMITED COMPANY** -  
**RESPONDENT/APPLICANT**

**RULING**

**(In respect of Applicant's application dated 15/4/2025)**

1. What is forthcoming for determination is the Applicant's application dated 15/04/2025, which is expressed to be brought under the provisions of Sections 1A, 1B, 3A, 79G, and 95 of the Civil Procedure Act, as well as Order 42 Rule 6 of the Civil Procedure Rules. The Applicant substantively prays for the following orders;
  - a. That this Honourable Court be pleased to stay the execution of Judgment delivered by the Honourable Pamela Achieng' CM on 23/1/2025 in **Milimani ELC No. 311 of 2023 Kiragu Maina -vs- Riara Downs Management Public Limited Company** and the resultant Decree pending the hearing and determination of the Appeal and the intended Cross- appeal.
  - b. That this Honourable Court be pleased to extend time within which to file and serve the Respondent's Cross-appeal against part of the Judgment delivered in **Milimani ELC No. 311 of 2023 Kiragu**

**Maina -vs- Riara Downs Management Public Limited Company**  
and the draft Memorandum of Appeal be deemed as duly filed.

- c. That costs of the application do abide by the outcome of the Appeal and intended Cross-appeal.
2. The application is based on the grounds on the face of it and supported by the Affidavit of Kuiyaki Gacanja, the Applicant's Director, dated 15/4/2025. The deponent states that the lower court delivered its judgment on 23/1/2025, in which the appellant's claim was partially granted on the following terms: The plaintiff was awarded Kshs. 253,640/=, with the claim for Kshs. 730,000/=, along with costs of the suit and interest from the date of filing. The appellant, being dissatisfied with this decision, filed the appeal and submitted the Record of Appeal dated 12/3/2025.
3. He asserts that the Applicant is equally aggrieved by part of the said Judgment and intends to lodge a Cross-appeal. Unfortunately, the cross-appeal was not filed within the required timeframe. He states that the delay was not intentional, but resulted from the administrative and consultative processes involved in obtaining instructions from the respective apartment owners. He affirms that directions for the current Appeal are yet to be issued, so that the appeal can be conveniently considered alongside the cross-appeal without causing prejudice to the Appellant. He claims that the cross-appeal presents arguable issues with a reasonable chance of success.
4. The Applicant contends that the decretal sum ordered to be paid is substantial and its execution will prejudice homeowners since the Applicant is not for profit but for the benefit and maintenance of the common areas and utilities within the premises. The Applicant asserts that the Appellant has since obtained orders to freeze two bank accounts held by the Respondent, thus impairing the Applicant's operations such as the payment of salaries and utilities, including electricity and water.

Consequently, this causes hardship to the parties, including the Appellant, hence the prayer for a stay of execution.

5. The deponent avows that the Appellant will not suffer any prejudice, as the Applicant is prepared to provide security for costs in a joint interest-earning account between the parties' advocates. The deponent states that this court has the authority to extend the time for filing the intended Cross-Appeal, as failure to do so would cause the Applicant irreparable harm. He contends that the intended cross Appeal has a strong likelihood of success, as demonstrated by the attached Draft Memorandum of Appeal. He also affirms that the Applicant is willing and prepared to comply with any orders the Court may issue as a condition for granting a stay. He urged the court to grant the orders sought.

#### **The Appellant's Replying Affidavit**

6. The Appellant strongly opposes the application through his Replying Affidavit sworn on 30/4/2025. The Appellant argues that the Respondent does not merit the equitable orders being sought, as the application is based on falsehoods. While the Applicant claims that the delay was due to the process of obtaining instructions from 68 apartment owners, the Appellant maintains that the Respondent has a WhatsApp Group for the owners where estate-related matters are typically discussed. He emphasized that the Applicant's Chairman only notified the Apartment owners of the matter and the current appeal on 23/1/2025, nearly two months after the judgment was delivered.
7. The Appellant asserts that during the intervening period, the parties, through their Advocates, exchanged correspondence regarding the settlement of the decretal sum. He states that the Respondent failed to settle the decretal amount, which compelled him to initiate garnishee proceedings against two banks where the Applicant maintains accounts. Following the issuance of the orders, the Applicant's accounts were frozen. He thus contends that the proposed cross-appeal is an afterthought and that the stay orders sought are aimed at frustrating the

execution of the decree. He further alleges that the Respondent approached the court with unclean hands and therefore does not deserve the equitable remedy of an extension of time as requested.

8. On a without prejudice basis, the Appellant argues that no significant loss will be caused to the Respondent if the enforcement of the decretal sum is permitted to proceed. That the Respondent's Chairman stated in the WhatsApp Group that the garnishee order nisi affected only the decretal sum, not the total amount held in the account, and therefore the claim that the Respondent's operations have been compromised is unfounded. He maintains that, in any event, he is a man of means and can therefore refund the decretal sum if the Cross-appeal succeeds.
9. The deponent further states that the intended cross appeal is not arguable because it seeks to introduce new facts not raised before the trial court. For instance, he argues that the Respondent did not contend that the tanks above the apartment blocks were privately owned. He claims that the Respondent never asserted that it only owned the tanks above the guard house and those adjacent to the pool area, as now stated in the Memorandum of Appeal. Based on the foregoing, the Appellant asserts that the application constitutes an abuse of court process, is unlawful, and should be dismissed with costs.

### **The written submissions**

10. On 30/6/2025, the court directed that the application be canvassed through written submissions. Parties were instructed to submit their written arguments within 14 days. The Applicant here complied and submitted its submissions dated 10/9/2025. However, as of 24/10/2025, the Appellant had not yet filed his submissions.
11. The court has read and considered the Applicant's submission.

### **Analysis and Determination**

12. The Court has read and considered the Application, the Affidavits and the annexures thereto as well as the submissions. The issues that commend themselves for determination are;

- a. Whether leave should be granted to appeal out of time.
- b. Whether the prayer for stay of execution pending hearing and determination of the Appeal and Intended cross-appeal is merited.
- c. Who should bear the costs of the application.

**Whether leave should be granted to appeal out of time**

13. Section 79G of the Civil Procedure Act states that appeals from the subordinate court must be lodged within thirty (30) days of the decree or order being challenged. The same section also mandates the court to extend this period if sufficient cause for the delay is demonstrated.
14. In an application for leave to appeal out of time, an applicant must satisfy the court that there was good and sufficient cause for not filing the appeal in time. The Supreme Court of Kenya, in the case of **County Executive of Kisumu v County Government of Kisumu & Others [2017] eKLR**, while relying on its decision in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others Application No. 16 of 2014 [2014] eKLR**, stated as follows:

“the under-lying principles that a Court should consider in exercise of such discretion:

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 a 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 Respondents if the extension is granted;

6. Whether the application has been brought without undue delay;  
and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
15. Further, the Court of Appeal in **Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited [2020] eKLR** outlined the guiding principles in such cases inter alia:
- “(viii) 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 power with the only caveat being that there has to be valid and clear reason upon which discretion can be favourably exercised.
- (ix) Failure to attach a draft memorandum of appeal is not fatal to an application  
under rule 4 of the Rules of the Court so long as there is demonstration through  
other processes relied upon by such an applicant that the intended appeal is  
arguable.
- (x) An arguable appeal is not one that must necessarily succeed but is one which  
ought to be argued fully before court;
- (xi) The right to a hearing is not only constitutionally entrenched, it is also the  
cornerstone of the rule of law.”
16. It has been submitted that the delay in this case was due to the administrative and consultative process of obtaining instructions from the respective apartment owners. Although the Appellant argues that the Applicant has a WhatsApp Group for the owners where estate-related matters are typically discussed, and that members were only notified of

the matter and the instant appeal on 23/1/2025—almost two months after the Judgment was delivered—the Appellant has not provided evidence of when the 68 owners actually issued instructions to file the cross appeal. The Judgment was delivered on 23/1/2025, and the application in question was dated and filed on 15/4/2025. The delay of approximately fifty-three (53) days is, in my view, not excessive and has been reasonably explained. When measuring delay, each case must be assessed based on its specific circumstances, as even a delay of 1 or 3 days might be considered excessive, while a delay of a year might not. In **Almas Hauliers Ltd v Abdulnasir Abukar Hassan [2017] eKLR**, a delay of 4 months was found not excessive.

17. Regarding the likelihood of the appeal succeeding if the application is granted, the applicant asserts that there are strong chances of success. The applicant maintains that the intended cross-appeal, as outlined in the Draft Memorandum of Appeal annexed to the Supporting Affidavit, demonstrates that there are issues worth determining. Among these, it argues, are whether the trial court correctly assessed the management company's responsibility over common utilities versus privately owned tanks and whether the apportioned liability was legally justified.
18. I have perused the Draft Memorandum of Appeal; I am convinced that the Applicant has an arguable appeal. It was held in the case of **Kenya Commercial Bank Limited Vs. Nicholas Ombija [2009] eKLR** that an "arguable" appeal must not necessarily succeed, but one which ought to be argued fully before the Court.
19. I also see no prejudice that will result to the Appellant if the Applicant is granted leave to file its cross- appeal out of time and letting it have its day in court.

**Whether the prayer for stay of execution pending hearing and determination of the Appeal and Intended cross-appeal is merited**

20. It is trite that no appeal can operate as a stay; therefore, an application for a stay must be made to the court by the party seeking it. The principles on which a stay of execution pending appeal may be granted are now well established from the authorities of this court and other superior courts. Generally, a stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules, which states as follows:

(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, an 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 of 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 undue 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."

21. In considering an application for stay of execution, I am guided by the case of **Butt -vs- Rent Restriction Tribunal (1982) KLR 417** where the Court of Appeal set the following guidelines:

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

22. The grant of an order of stay of execution is a discretionary one. In the case of **RWW -vs- EKW (2019) eKLR** the Court held that: -

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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 the 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 damages.”

23. The Court is therefore called upon to balance the rights of the successful party so as not to hinder the enjoyment his fruits of judgment, and those of the Appellant, who has a right of appeal and whose appeal may succeed and be rendered nugatory if a stay of execution is not granted.

24. The purpose of the stay of execution is to uphold the foundation of the case. The Court will now decide whether the Applicant has met the conditions necessary for the orders sought to be granted.

25. Under the first condition of demonstrating that significant loss may occur unless an order of stay is issued, the Applicant must not only state that he is likely to suffer significant loss but also prove that he will suffer such loss if stay orders are not granted.

26. Substantial loss was clearly explained in the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR: -**

"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."

27. The Applicant contends that the decretal sum ordered to be paid is substantial and its enforcement will prejudice homeowners, as the Applicant is not for profit but for the benefit and maintenance of the shared areas and utilities within the premises. The Applicant states that the Appellant has since obtained orders to freeze two bank accounts held by the Respondent, thereby impairing the Applicant's operations, such as paying salaries and utilities like electricity and water. That this has caused hardship for the parties, including the Appellant.

28. It is clear that the homeowners, including the Appellant, will suffer irreparable harm if the orders requested are not granted. Utility bills such as electricity and water for the common areas are unlikely to be paid. The hardship of maintaining the common areas, including salary payments, is imminent.
29. The issue of substantial loss was defined in the case of **Kenya Shell Limited -vs- Benjamin Karuga Kibiru & Another [1986] eKLR**, where it is held as follows:
- “Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondents should be kept out of their money”.
30. In this case, the court has found that the Applicant has provided sufficient evidence that it is likely to suffer substantial loss if the application is not granted. It is the irreparable damage that must be prevented.
31. Regarding whether the application was made without unreasonable delay, the Court has already found that the delay in filing the application was not excessive. The reasons for the delay were adequately explained.
32. On the third condition of Security of costs, the purpose of security was explained in the case of **Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR** the court stated: -
- “The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may

ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

33. As already demonstrated in **James Wangalwa & Another -vs- Agnes Naliaka Cheseto (supra)** the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive.
34. In the instant case, the Applicant avers that it is ready and willing to offer security for costs in a joint interest earning account between the parties Advocates. The Court must consider the overriding objective and balance the parties' interests, including the issue of security to be offered.
35. The law recognizes that when an applicant intends to exercise their undisputed right to appeal and, ultimately, succeeds, they should not face a situation where they cannot recover their money. Similarly, the respondent who has a decree in their favour should not find it difficult or impossible to enforce the decree if the applicant's appeal is unsuccessful. This principle forms the core of the requirement for security.
36. This Court, in dispensing justice, is of the considered opinion that the Applicant faces a disadvantage should stay orders be declined before hearing and determination of the intended cross-appeal. As this is a monetary decree, the Court exercises its discretion and directs that the Applicant deposit the sum of Kshs. 253,640/- into the Advocates' joint interest-earning account.
37. Based on the foregoing, I shall allow the said application on the following terms;
  - a. There is a stay of the execution of the Judgment delivered by the Honourable P. Achieng' on 23/1/2025 in **Milimani ELC No. 311 of 2023 Kiragu Maina -vs- Riara Downs Management Public Limited Company** and the resulting Decree pending the hearing and determination of the Appeal and the intended Cross-appeal.

- b.** The Applicant herein is granted leave to lodge its Cross- Appeal against the Judgment delivered by the Honourable P. Achieng' on 23/1/2025 in **Milimani ELC No. 311 of 2023 Kiragu Maina -vs- Riara Downs Management Public Limited Company** within 7 days hereof.
- c.** The applicant be and is hereby ordered to deposit the sum of Kshs. 253,640/= into the parties advocates' joint interest-earning account within the next **14** days from the date of this ruling.
- d.** That upon filing of the Memorandum of Appeal in (b) above, the Applicant shall prepare, file and serve its record of appeal within **14** days.
- e.** In default of b, c and d above the orders shall lapse automatically.
- f.** he Costs of the application shall be in favour of the Respondent /applicant

38. It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2025 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**  
**JUDGE**

**Delivered Online in the presence of:**

1. Mr Mwangi for the Appellant
2. Ms Mathangari for the Respondent /Applicant
3. CA- Ms Vvette Njoroge

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