



Litunda t/a Desert Runner Services Company Limited v Waita (Civil Miscellaneous Application E151 of 2024) [2025] KEHC 15342 (KLR) (24 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15342 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL MISCELLANEOUS APPLICATION E151 OF 2024
TM MATHEKA, J
OCTOBER 24, 2025**

BETWEEN

SILVIA ALIVITSA LITUNDA T/A DESERT RUNNER SERVICES COMPANY LIMITED PLAINTIFF

AND

SHADRACK KIIO WAITA RESPONDENT

RULING

1. Before me is the Notice of Motion dated 28/11/2024 brought under Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 1 & 3 of the Civil Procedure Rules, Sections, 3A, 79 G, of the Civil Procedure Act, Article 159 (2) (a) & (d) of the Constitution. The applicant seeks the orders; -
 - i. Spent
 - ii. That this application be certified urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.
 - iii. Spent
 - iv. That this honourable court be pleased to grant a stay of execution of the judgement and/or decree issued by Honourable Geno L Okwengu Senior Resident Magistrate, in Kilungu CMCC No. E117 of 2023 dated and delivered on 28th August, 2024 pending the hearing and determination of the intended appeal.
 - v. That this honourable court allows the applicants' security to the court be in the form of Bank Guarantee from the Family Bank.
 - vi. Spent
 - vii. That the costs of this application abide the outcome of the appeal.



2. The application is supported by the grounds on its face and the affidavit sworn by Silvia Alivitsa Litunda: the main grounds are:
 - i. That judgement herein was entered on 28th August, 2024 and the 30 days within which an appeal is to be filed have since lapsed.
 - ii. That the main reason for lodging this appeal out of time is that the judgement was delivered in the absence of both parties and the applicant came to learn of it when the time for lodging the appeal has lapsed.
 - iii. That the applicant received copy of the judgement from their advocates on record after the delivery of the same and immediately proceed to review it with a view of making their informed and final decision on the available options
 - iv. That further the delay in complying with the delay in filling the record of appeal was occasioned by the structural management at direct line assurance followed by the court issuing orders dated 5th June, 2024 freezing the accounts of the insurance and later on 10/09/2024 there was Vandalism of the ICT servers and taking away of the companies cheques and other important documents.
 - v. That on 4th of October, 2024 the management of Direct Line Insurance was disbanded and the court ordered that a new board be constituted within 90 days, further delaying the movement of the money from the accounts.
 - vi. That the applicant thereafter advised their advocates on record that they prefer an appeal owing to, the quantum and liability awarded in favour of the plaintiff as against the defendants thus leading to the judgement award being high.
 - vii. That the application has been brought without unreasonable or undue delay.
3. Annexed to the affidavit is the judgement of the Subordinate Court, the draft memorandum of appeal dated 28/11/2024, and a bank guarantee dated 6/7/2023.
4. The application is opposed by Shadrack Kiio Waita the respondent – through the replying affidavit sworn on the 16/1/2025. He depones
 - i. That the time to file an appeal lapsed on 28th September 2024 whereas a copy of judgement had been uploaded on the case tracking system as early as 28/8/2024 hence there has been inordinate delay in filing the present application.
 - ii. That on 28/8/2024 an order for stay of execution for the period of 30 days was sought and granted by counsel appearing for the defendant/applicant.
 - iii. That the applicants application has remained silent on the date when a copy of the judgement was obtained and/or when the instructions to appeal the judgement were issued notwithstanding the fact that on 28/8/2024 there was counsel a Mr. Muema holding brief for Mr. Ouko counsel for the defendant/applicant herein when judgement in the lower court file was delivered.
 - iv. That the attached bank guarantee in the applicant’s supporting affidavit as security was applied for on or about the 6th July 2023 and the duration for executing the acceptance was 30days therefore the said guarantee having been valid for a period of 12 months has since expired whether the acceptance was made on the 30th day or before and no proof for renewal has been attached whatsoever.



- v. That in any event the applicant herein is not a party to the bank guarantee offered as security and thereafter remains doubtful whether the bank guarantee is for the intent and purpose of the proceedings herein.
 - vi. That the application dated 29/11/2024 fails to meet the threshold for grant of an order of stay orders as per the criteria set out under order 42 rule 6 of the Civil Procedure Rules 2010 and as such ought to be dismissed with costs.
5. In addition, that the applicant's memorandum of appeal raises no triable issues – as the applicant did not give any evidence in the Subordinate Court during the trial; that the application was only registered by the respondent's indication that they were about to execute; that no evidence is availed to show that any application was made for proceedings from the subordinate court.
 6. Parties filed written submissions which I have considered.
 7. The issues for determination are whether the application meets the threshold for leave to file appeal out of time – and if so - whether stay of execution pending appeal ought to issue – and, on what terms.
 8. On the 1st issue – section 79 G – provides for the late filing of appeals – of the appellant satisfies the court that he had good and sufficient reason for not filing the appeal in time.
 9. I have perused the grounds and the affidavit in support of the application. The 1st reason given is that the judgment was delivered in the absence of parties. I have looked at the Judgment and although the Hon trial magistrate indicates that judgment was delivered in open court on 28/8/2024 – it is not indicated as to who was present or whether any parties were present.
 10. It is submitted by respondent that as at the time of filing submissions, they had not been served with a response – however none of this was brought to the attention of the court at the times the matter was mentioned to confirm filing of submissions by parties. Though I do not have the benefit of the proceedings in the subordinate court when the Judgment was delivered the averment by the applicant that there was an advocate present holding brief for Mr. Ouko for the applicant remained unchallenged.
 11. Be that as it may , there is evidence that on 10/9/2024 the offices of the applicants insurer, the were vandalized and therefore the operations were temporary disrupted making it difficult to start the appeal process. This was soon after the delivery of the Judgment in this case.
 12. This issue was not responded to by the respondent, and it stands unchallenged and I would find it a satisfactory explanation in the circumstances of this case for the delay in filing the appeal. Hence the application for leave is granted to file appeal out of time – the memorandum of appeal be filed and served within 3 days hereof.
 13. Does the appellant observe the order of stay of execution pending the hearing and determination of the appeal?
 14. I have perused the lower court judgment – and I am of the view that the applicant has an arguable appeal.
 15. To balance the right of the applicant to appeal and that of the respondent to the fruits of his judgment a conditional order for stay of execution is tenable.
 16. The applicant's security as presented is not acceptable as it appears to have expired.



17. Hence the condition is that the that the applicants pays the respondent the sum of Kshs. 200,000/=, and deposits ½ of the balance of the decretal sum in a joint interest earning account in names of both advocates within 45 days hereof. In default execution to issue.
18. The Record of appeal be filed and served within 30 days hereof
19. The costs of this application to abide the appeal
20. Orders accordingly

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF OCTOBER 2025

.....

MUMBUA T. MATHEKA

JUDGE

Court Assistant - Chrispol

Counsel for Applicant: Ouko

Counsel for Respondent; Nzilani

