

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
HIGH COURT MISC. CIVIL APPL NO. E318 OF 2024

AARON MULI MUSYOKA1ST APPLICANT
JOSEPH KITEME MUSYOKA2ND APPLICANT

VERSUS

SUSAN MWIKALI MUTINDA and PAUL MUINDI MUTULI

(Suing on their own behalf and as the administrators of the estate of the late
PETER KELI MUINDI.....RESPONDENTS

RULING

1. This ruling is on the Applicants' application dated 22.10.2024. It is brought under the provisions of Sections IA 1B, 3A and 95 of the Civil Procedure Act and Order 50 Rules 6, and Order 51 of the Civil Procedure Rules, 2010. The application is supported by the affidavit of IA 1B, 3A and 95 of the Civil Procedure Act and Order 50 Rules 6, and Order 51 of the Civil Procedure Rules, 2010 sworn on the even date. The application is premised on the grounds on the face of the application.
2. The Applicant herein prays to Court as follows: -
 - a) Spent.
 - b) THAT leave be granted to the 1st & 2nd Applicants herein to file and serve the Memorandum and Record of Appeal out of time.
 - c) THAT pending the inter partes hearing of this Application this Honourable Court be pleased to stay the execution of the judgment rendered in Kithimani MCCC No. E307 of 2022; Susan Mwikali Mutinda & Anor. -versus- Aaron Muli Musyoka & Anor, delivered on 19th September, 2024 by Honourable Paul Matanda Wechuli.
 - d) THAT pending the hearing and determination of the Appeal this Honourable Court be pleased to stay the execution of the judgment rendered in Kithimani MCCC No. E307 of 2022; Susan Mwikali Mutinda & Anor. -versus- Aaron Muli Musyoka & Anor delivered on 19th September, 2024 by Honourable Paul Matanda Wechuli.
 - e) THAT the costs of and incidental to this Application be provided for.
3. The application is opposed by **Susan Mwikali Mutinda** the 1st Respondent vide her Replying Affidavit sworn on 30.10.2024. The 1st

Respondent avers that Applicants have brought the application in bad faith and with unclean hands, and thus this honourable Court should not exercise its discretion in their favour. That any prejudice to be suffered by the Applicants on the dismissal of this application is wholly and purely their own doing as they were indolent in pursuing their right of appeal.

4. Directions were given for the application to be heard by way of written submissions. Both parties complied. The Applicants' submissions are dated 03.12.2024 filed by the law firm of ROM LAW ADVOCATES, LLP whilst the Respondents' submissions are dated 10.03.2025 filed by the law firm of S.N NGARE & CO. ADVOCATES.

Analysis and determination

5. I have considered the application, the supporting affidavit, the replying affidavit and the rival submissions filed by the Parties' counsel as well as the judicial decisions relied upon. In my view, the issues for determination are as follows:-

a. *Whether the court should exercise its discretion to grant the applicant leave to file their appeal out of time;*

b. *Whether the applicant has met the prerequisite for grant of stay of execution pending appeal;*

a. **Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;**

6. Section 79G of the Civil Procedure Act states: -

“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 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.

7. It is clear from the wording of Section 79G of the Civil Procedure Act that before the court considers extension of time, the applicants must satisfy the court that that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of **Diplack Kenya Limited vs William Muthama Kitonyi [2018] eKLR** that an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

8. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] eKLR** enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;*
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;*
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;*
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;*
- f. Whether the application has been brought without undue delay.*

9. Similarly in the case of **Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR**, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

10. Applying the above principles to the present case, the judgment herein was delivered on 19.09.2024 and the appeal ought to have been filed by 19.10.2024. The Applicant filed the current application together with the annexed Memorandum of Appeal on 22.10.2024. This is about three (3) days outside the time limited for filing an appeal. The Applicant has attributed the delay in filing her appeal to to an internal restructuring process undertaken within the firm, the aforementioned counsel was regrettably relieved of his duties, effectively terminating his involvement in the matter. It was stated that it is the established practice that any

advocate leaving employment at the firm is required to prepare a comprehensive handover report outlining all ongoing matters that they were handling, including the status for each file, for the purpose of reallocation to other advocates at the firm. Out of an oversight, the counsel in conduct of the matter inadvertently failed to include the instant matter in his handover report, an omission that was not picked out immediately by the firm until the 22nd of October, 2024, when the instructing client requested for an update on the progress of the appeal. Upon noting the omission, it came to their attention that the said counsel had failed to act on the instructions given and therefore neglected to file the appeal within the stipulated time. Following this discovery, the matter was allocated to another advocate within the firm and hence the instant application that has been brought before this Honourable Court timeously and without unreasonable delay. The omission in failing to file the appeal was solely due to the inadvertence and oversight of the previous counsel, and NOT due to any fault on the part of the client. It is well established that the mistakes of the advocate should NOT be visited upon the client, who had acted diligently in issuing instructions in a timely manner.

11. It is my position that the Applicants' previous advocate in the law firm on record cannot be faulted at all. The Applicants would have been expected to reach the law firm soon after giving instructions on the appeal and inquire on the progress. It is trite law that Parties have the responsibility to show interest in and to follow up on their cases even when they are represented by counsel.
12. Considering three (3) days delay cannot really be termed as an inordinate delay, however the reasons for the delay have not been satisfactorily explained to the court as required by the law. In my view, the Applicant has not given any plausible reasons for the delay in filing the appeal.
13. I have perused the intended Memorandum of Appeal and the judgment of the trial court and noted that the appeal faults the trial court on its assessment of damages which they claim to be excessively high. As such, the appeal cannot be said to be without merit although at this juncture, I will restrain from delving into the merits of the appeal. It is my view that the Applicants ought to be given a chance to file their appeal out of time and prosecute it on merits.

b. Whether the applicant has met the prerequisite for grant of stay of execution pending appeal;

14. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2)

Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-

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 on 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 orders set aside.

2. 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 1st 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.*

15. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

- 1. Substantial loss may result to him/her unless the order is made;**
- 2. That the application has been made without unreasonable delay; and**
- 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.**

16. 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”

17. The Applicants contend that they are apprehensive that following the judgment of Hon. Paul Matanda Wechuli delivered on 19th September, 2024 in Kithimani MCCC No. E307 of 2022; Susan Mwikali Mutinda & Anor. - versus- Aaron Muli Musyoka & Anor and the order of stay of execution made by the said court having lapsed on 17th October, 2024, the Respondent is likely to proceed with execution of the said judgment against the Applicants. Such extreme and highly prejudicial consequences before the hearing and determination of the Appeal would subvert the ends of justice
18. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The Applicants are required to show the manner in which execution will irreparably affect them or will alter the status quo to their detriment therefore rendering the appeal nugatory. The Applicants have failed to demonstrate substantial loss in my considered view.
19. On whether the application has been made without unreasonable delay. Judgment at the trial court was delivered on 19.09.2024 and the appeal ought to have been filed by 19.10.2024. The Applicants filed the current application together with the annexed Memorandum of Appeal on 22.10.2024. This is about three days outside the time limited for the application. This period is not inordinate and inexcusable, however as already observed herein above the reason for the delay has not been explained to the satisfaction of the court.
20. On the issue of security for 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.

21. Evidently, the issue of security is discretionary and it is upon the court to determine it and set its terms. The trial court entered judgment for Kshs.3,245,510/= for the Respondents as against the Appellants. The Applicants at paragraph 15 of the supporting affidavit are not opposed to depositing half the decretal sum in court as security for the issuance of stay orders pending hearing and determination of the Appeal.
22. It is imperative that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff/claimant to enjoy the fruits of the judgment delivered in his/her favour. In the case of **Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR** the court stated:-
“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”
23. Consequently, I do find that the Applicants are entitled to pursue their appeal on merit. I do allow the application dated 22.10.2024 on the following conditions:-
- 1. Leave is granted to the Applicants to file appeal out of time against the judgment delivered in Kithimani MCCC No. E307 of 2022; Susan Mwikali Mutinda & Anor. -versus- Aaron Muli Musyoka & Anor.**
 - 2. The Applicants to file and serve their Memorandum of Appeal within Seven (7) days hereof and thereafter to compile, file and serve the Record of Appeal within Forty-Five (45) days of this ruling in default, appropriate directions shall be given on matter.**
 - 3. Execution of the Judgment/decreed in Kithimani MCCC No. E307 of 2022 is hereby stayed pending the hearing and determination of the appeal on condition that:**
 - a) The Applicants shall deposit half the decretal amount into court OR into a joint interest earning Bank account**

to be opened in a reputable Bank in the names of the Advocates' Law firms on record within Thirty (30) days hereof in default the Respondents will be at liberty to execute.

b) A Mention date to be fixed to confirm compliance and for further directions.

- 4. The Applicants shall pay to the Respondents the costs of this application assessed at Kshs.15,000/=.**
- 5. This Miscellaneous file will be closed on the next mention date.**

It is hereby so ordered.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 28TH OCTOBER 2025

**NOEL I. ADAGI
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 28TH OCTOBER 2025

In the presence of :-

Ms. Waithiengeni..... for Applicants

Mr. Ndungu..... for Respondent

Milly..... Court Assistant