



REPUBLIC OF KENYA



KENYA LAW

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**Thuo & another v Diamond Trust Bank (K)Ltd & another;
Mohammed & another (Interested Parties) (Commercial Civil Case
113 of 2016) [2025] KEHC 14931 (KLR) (24 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14931 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL CIVIL CASE 113 OF 2016**

J NGAAH, J

OCTOBER 24, 2025

BETWEEN

PETER THUO 1ST PLAINTIFF

NELLY NGONYO KAMAU 2ND PLAINTIFF

AND

DIAMOND TRUST BANK (K)LTD 1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS 2ND DEFENDANT

AND

MWANAISHA KIRIALE MOHAMMED INTERESTED PARTY

MBARAK HAMISI MBARAK INTERESTED PARTY

RULING

1. There are two applications before court; the first application is dated 17 October 2024 while the second one is dated 12 November 2024. Both applications are by the plaintiffs. The first application is expressed to be brought under sections 3A, 63 (e) of the *Civil Procedure Act*, cap. 21 and Order 22 Rule 22; order 50 rule 6 of the *Civil Procedure Rules*. The application seeks in the main the following orders:

- “ 3. That this honourable court be pleased to extend time for filing a Notice of Appeal.
4. That the Notice of Appeal dated 3.9.2024 be deemed as duly filed.



5. That in the meantime, and in the alternative, the defendants be allowed to liquidate the decretal sum being Party to Party Costs by installments of Kshs. 5,000/- per month.”
2. The application is supported by the affidavit of Peter Thuo Gathuri and he has sworn that he was not aware of the ruling against which they intend to appeal because the plaintiffs were never notified when it was delivered. It is only on 3 September 2024, when the applicant was served with the notice to show cause, that he became aware of the ruling. Accordingly, the notice of appeal could not be filed in time. The applicant has filed a notice of appeal which he wants this Honourable Court to deem as duly filed.
3. According to Gathuri, he is not able to pay the entire decretal sum due from him because he has financial difficulties. He proposes to pay Kshs. 5,000/= per month till payment in full.
4. The application of 12 November 2024 is in the same terms as that of 17 October 2024. To be precise the applicants seek the prayers:
 - “2. That there be a stay of execution pending the hearing and determination of this application.
 3. That this honourable court be pleased to extend time for filing a notice of Appeal.
 4. That the notice of Appeal dated 3.9.2024 be deemed as duly filed.
 5. That in the meantime, and in the alternative, the plaintiffs be allowed to liquidate the decretal sum being Party to Part) Costs by instalments of Kshs. 5,000/ - per month.”

The applicant has also asked for an order on costs.

5. The application is expressed to be brought under sections 3A and 63 of the *Civil Procedure Act*, cap. 21 and order 22 rule 22 of the *Civil Procedure Rules*. It is supported by the affidavit of Nelly Ngonyo Kamau who has largely rehashed the depositions made by Peter Thuo Gathuri in the affidavit in support of the application of the application dated 17 October 2025. She has only added that she is not able to raise the decretal sum as she is not engaged in any income generating activity but that she was aware that the 1st plaintiff has made some proposals on settlement of the decree.
6. There is a replying affidavit by Mbarak Hamisi Mbarak sworn on his own behalf and on behalf of the 1st interested party. According to Mbarak, the plaintiffs are people of means and they are capable of settling the decretal sum. In any case, neither of the applicants has sworn any affidavit of means.
7. It is also deposed that the notice of appeal has been filed irregularly. The question whether the notice of appeal is valid or not is before the Court of Appeal in Civil Appeal No. E101 of 2024; *Mwanaisha Kiriale Mohamed & Mbarak Hamisi Mbarak v Peter Thuo & 4 Others*.
8. It is the interested parties’ position that the application is meant to delay the notice to show cause and, therefore, an abuse of the due process of the court.
9. To the extent that they are seeking similar orders and are based on the same facts except that the depositions verifying these facts have been sworn by different deponents who are, in any event, the plaintiffs and judgment debtors, the two applications are similar. I have not been able to gather why the applicants opted to file the two applications.



10. That notwithstanding, there is a notice of withdrawal dated 10 January 2025 withdrawing the notice of appeal dated 3 February 2024. The withdrawal means that the prayer for the notice to be deemed as duly filed has been overtaken by events.

11. The other prayer is for extension of time to file the notice of appeal. The provision of law relevant to this prayer would be section 7 of the [Appellate Jurisdiction Act](#), cap. 9 which states:

7. Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

12. Thus, extension of time to file the notice of appeal against a decision of this Honourable Court is discretionary. The applicants state that they could not file the appeal within the appropriate time because they were not aware of when the ruling of the court was delivered.

13. Indeed, there is a ruling on record delivered by Magare, J. on 22 July 2024 that clearly shows that none of the parties was present when it was delivered. The ruling was initially set to be delivered on 2 July 2024. The file was placed before the learned judge on 8 July 2024. On that date, there was no appearance for any of the parties. The court deferred the delivery of the ruling to 22 July 2024 and directed that the parties be notified accordingly. There is no evidence on record to demonstrate that the parties were notified of the ruling date as directed by the court.

14. Based on the record, I am satisfied that the applicants may not have been aware of the ruling until they were served with the notice to show cause. In these circumstances, I am inclined to exercise my discretion in favour of the applicants and extend the time to file the notice of appeal.

15. As far as the prayer for stay of execution is concerned, order 42 Rule 6 (1) of the [Civil Procedure Rules](#) states as follows:

6. Stay in case of appeal

(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 order set aside. (Emphasis added).

16. This rule presupposes that an application for stay of execution in the court to which an appeal has been preferred can only be made if the appeal has been filed. Indeed, this Honourable Court, for instance, aside from its supervisory jurisdiction over the magistrate's court, can only entertain matters arising from that court in exercise of its appellate jurisdiction. Thus, in an application of the nature that is now before court, the law is clear that... "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...”

17. Without belabouring the point, this court can only entertain an application for stay of execution pending appeal from the magistrates’ court when the appeal has, in fact, been filed. It is only in the context of the application that has been made within an appeal that this honourable court is seized of jurisdiction to consider the application for stay and make such order or orders as appropriate.
18. It follows that without the appeal, an application for stay of execution of a judgment from the magistrate’s court, is premature. The applicant’s application for stay of execution would fall for this reason. The appeal is yet to be preferred and, without it, this Honourable Court has no jurisdiction to entertain the application for stay on the basis of a pending appeal when it is obvious that none exists.
19. In the final analysis the applicants’ application dated 17 October 2024 is allowed only the extent that the time to file the notice of appeal is extended by fourteen days from the date of this ruling. The rest of prayers in the two applications are declined. Parties will bear their respective costs. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 24 OCTOBER 2025

NGAAH JAIRUS

JUDGE

