

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CORAM: R. MWONGO, J.
CIVIL MISCELLANEOUS APPLICATION NO. E005 OF 2025

ABRAHAM MARANGU NCUNGEAPPLICANT

-VERSUS-

GITONGA NJAGI HENREY.....
.....RESPONDENT

RULING

The Application

1. By this notice of motion dated 20th January 2025, which is supported by the grounds set out on its face and the facts deposed in the supporting affidavit thereof, the applicant seeks orders as follows:
 - 1) Spent;
 - 2) That this Honourable Court be pleased to grant leave to extend the time limited for filing of the Appeal herein following the Court's judgement delivered on 20th December 2022;
 - 3) That honourable court be pleased to stay execution of the decree of the magistrate's court pending the hearing and determination of the intended appeal;
 - 4) That the honourable court be pleased to issue any other order and/or direction it deems fit in the circumstances; and
 - 5) Costs.
2. The trial court entered judgment against the applicant in Embu MCCC No. E190 of 2021 through a judgment delivered on 20th December 2022. He was ordered to pay the respondent Kshs.179,987.43/= with interest. His application for stay of execution was dismissed by the trial court on 23rd December 2024. The trial court noted that there was no pending appeal at that point which was over 1 year since the judgment was delivered.
3. Through the present application, the applicant stated that he wishes to challenge the findings of the trial court on the judgment. That the delay in applying for leave

to appeal and stay of execution was not inordinate. He stated that the judgment of the trial court was delivered during the December holidays and the judgment remained unavailable to him to enable him to appeal. That once he received the judgment, he drew his memorandum of appeal with the intention to appeal but he was time-barred. He was apprehensive that if the orders sought are not granted, he will suffer substantial loss and his property will be lost through execution and that the appeal will be rendered nugatory. He offered security in the form of a bank guarantee and stated that the intended appeal has high chances of success.

Replying Affidavit

4. The respondent filed a replying affidavit terming the application an abuse of the court process. He stated that there was no clear reason why the applicant has not paid the decretal amount 2 years and 3 months after the judgment of the trial court was rendered. He stated that the application does not meet the threshold for granting stay of execution under Order 42 Rule 6 of the Civil Procedure Rules. He urged the court to dismiss it.

Further Affidavit

5. The applicant filed a further affidavit dated 04th April 2025 in which he argued the facts of the case before the trial court. Nothing in the said affidavit related to the present application for stay of execution and extension of time to appeal.

Parties' Submissions on the appeal

6. The court directed the parties to file their written submissions. The applicant's submissions were not relevant to the application at hand. The arguments made through his submissions concerned the issues of fact raised before the trial court.
7. The respondent filed his written submissions in which he stated that the time for appeal can only be extended if the court is satisfied that there is sufficient cause to do so. That the applicant was not deserving of the order for stay of execution but the threshold required in law has not been met. He relied on section 79G of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and the case of **Gitau & another v Mwangi [2024] KEELC 5678 (KLR)**.

Issue for determination

8. The issue for determination is whether the application has merit.

Analysis and Determination

9. The applicant is seeking stay of execution of the decree and leave to appeal out of time against the judgment of the court in Embu MCCC No. E190 of 2021. The judgment of the trial court was delivered on 20th December 2022 against the applicant. He filed an application dated 15th November 2024 seeking stay of execution and he stated that he had lodged an appeal that was pending.
10. The trial court determined the application through a ruling delivered on 23rd December 2024 noting that there was no appeal that had been admitted in the High Court against the court's judgment. The trial court also noted that the application for stay had been brought about 2 years after the judgment, thus there was an inordinate delay that could not be excused. That application was dismissed.
11. Stay of execution is provided for under Order 42 Rule 6(2) of the Civil Procedure Rules as follows:

“(2) No order for stay of execution shall be made under subrule (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. [Emphasis added]

12. The grounds for extension of time of appeal are set out in section 79G of the Civil Procedure Act 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.”

13. The reliefs sought may be granted based on the court's discretion and pursuant to the guiding laws. The first factor to consider is whether the application was brought without delay. As at the time of filing this application, it is more than 2

years since the impugned judgment was delivered, and one month after a similar application as dismissed by the trial court on account of delay. The applicant has not made any efforts to pay the decretal amount since judgment was entered against him, neither did he make any efforts to file an appeal on time.

14. His reason for the delay is that the judgment was read during December festivities and he could not obtain a copy until much later. This excuse is not tenable in law because the festivities did not last for over 1-year up to the time he filed a similar application before the trial court. The trial court was correct in determining that there was an unreasonable delay, a finding that this court readily agrees with and would abide by.

15. It is the applicant's assertion that substantial loss will result if the orders sought are not granted. The respondent has a right to execute for the decretal amount because he succeeded in the suit. Since the time of delivery of the trial court's judgment, the applicant faced the risk of execution having lost in that suit. However, he did not seek stay of execution early enough and it seems that he was not keen on filing an appeal either, until 2 years later. In support of his prayer for stay of execution, the applicant has offered security in the form of a bank guarantee.

16. The Court of Appeal in **Omar Shurie v Mirian Rashe Yafar Civil Application No.107 of 2020** stated:

“There is no maximum or minimum period of delay set out under the law. However, a prolonged and inordinate delay is more likely than not, to disentitle the applicant leave. Likewise, the reason or reasons for delay must be plausible.”

In the present case, there is inordinate delay, implausibly explained. This does not enhance the applicant's case.

17. As regards, extension of time to appeal, the issue of unreasonable delay has already been stated herein. Through his affidavit of 20/1/2025, the applicant has offered to provide a bank guarantee to secure the decretal sum. However, the offer has been made too late in the day and there is no evidence of the nature of such guarantee.

Conclusions and Disposition

18. The Court's discretion to grant stay pending appeal under Order 42 Rule 6 CPC is a discretion that must be exercised judiciously. When there has been a delay as substantial as that of the applicant in this case, the Court must exercise its discretion in favour of the judgment creditor who has been kept from enjoying the fruits of his judgment for that period. The rights of the parties must be fairly balanced.

19. Accordingly, I find no basis to overturn the decision of the trial court, which is hereby confirmed. The application is therefore dismissed with costs to the respondent.

20. Orders accordingly.

Delivered, dated and signed at Embu High Court this 5th day of November, 2025.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. Abraham Marangu Present in Court (Applicant)
2. No Representation for M. Ndeke for Respondent
3. Francis Munyao - Court Assistant