

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
MISCELLANEOUS APPLICATION NO E162 OF 2024

**THE THIRD ENGINEERING BUREAU OF CHINA
CITY CONSTRUCTION COMPANY LIMITED1ST APPLICANT
VICTORIA ENGINEERING COMPANY LIMITED.....2ND
APPLICANT**

VERSUS

RICHARD TAURRA MALINGI
RESPONDENT

RULING

1. In an application dated 17.10.24, the Applicants seek leave to appeal out of time, the judgment delivered on 26.2.24 in Kilifi MCCC No. E076 of 2023. They also seek stay of execution of the said judgment pending the hearing and determination of the Application.
2. The grounds upon which the Application is premised are that being dissatisfied with the judgment, the Applicants erroneously filed Mombasa Civil Appeal No. E059 of 2024. Their memorandum of appeal dated 26.2.24 was duly served upon the Respondent’s advocates. The matter was mentioned on 17.10.24 when the Court directed that the same be withdrawn and filed in the right court, namely Malindi High Court as Kilifi Law Courts from which the appeal emanated is within this Court’s territorial jurisdiction.
3. The Applicants further state that they complied with the conditional stay orders granted by the lower court by depositing the decretal sum in a joint interest earning account of the parties’ respective counsel. The Applicants assert that the Respondent will not suffer prejudice if the orders sought are granted. Further that their appeal has high chances of success and urged that the Application be allowed.
4. In his replying affidavit sworn on 28.10.24, the Respondent averred that the prayers for stay are *res judicata*, having first been granted on 26.2.24 and then again in a ruling of 28.6.24. Further that the supporting affidavit was sworn by counsel in violation of Rule 9 of the Advocates Practice Rules. Additionally, that the Application is defective for want of grounds upon which it is premised and lack of a penal notice. It is the Respondent’s contention that the court directed the appeal be withdrawn based on a preliminary objection filed by the Respondent in May 2024, pointing out defects in the appeal.
5. The Respondent contended that the filing of the appeal in Mombasa was an exercise in forum shopping; that he continues to be prejudiced by the delay in this matter as he has been denied

the fruits of his judgment; that the appeal has minimal chances of success as it is on quantum which is a discretionary decision; that the reason given for the delay is not sufficient. The Respondent urged that the Application be dismissed with costs.

6. The statutory period for filing an appeal in this Court from a subordinate Court is 30 days. This is stipulated in Section 79G of the Civil Procedure Act which provides:

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.

7. The *proviso* to Section 79G of the Act allows a party who gets caught up and is unable to file an appeal within the stipulated period, to seek extension of time. Such party must however satisfy the Court that there is good and sufficient reason for not filing the appeal on time.
8. An order for extension of the time to file an appeal is discretionary. Such discretion must however be exercised judicially. The factors to be considered in an application such as the one before Court were set out by the Court of Appeal in **Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR** as follows:

For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable.

9. **The judgment in respect of which the Applicants seek to appeal was delivered on 26.2.24 while the present Application is dated 17.10.24, a delay of over 10 months. What this Court must determine is whether the explanation given by the Applicants for the delay is plausible.**
10. The reason proffered for the delay are that the Applicants had first filed the Appeal in the High Court at Mombasa but that on 17.10.24 the Court directed that the same be withdrawn and filed Malindi High Court. The Respondent however contends that the filing of the appeal in Mombasa was an exercise in forum shopping and that the withdrawal was based on his preliminary objection filed in May 2024, pointing out defects in the appeal.

11. The law makes provision for the High Court in which appeals from subordinate courts within a given region ought to be filed. Rule 20(1) Part IV of the High Court (Organisation and Administration) (General) Rules thereunder provides:

Subject to the Practice Directions issued by the Chief Justice, the filing of appeals, bail applications and references from subordinate courts, tribunals and other bodies or authorities within regions designated under the Schedule shall be made to the respective High Court Station Registry with corresponding supervisory jurisdiction according to the established judicial administrative regions set out in the Schedule.

12. The Schedule to the Rules lists the High Court and the respective Magistrate's court areas of supervision in respect of each county and High Court Station. For Kilifi County, the High Court station is Malindi High Court which supervises the Magistrates courts in Malindi, Kilifi, Kaloleni and Mariakani.
13. The judgment in respect of which the orders herein are sought emanates from Kilifi Law Courts which falls under the supervisory jurisdiction of the High Court at Malindi. It is not clear to the Court why, in view of the foregoing provisions, the Applicants chose to file their appeal in the High Court at Mombasa. Their claim that it was an oversight is not persuasive. Additionally, having been served with the Respondent's notice of preliminary objection in May 2024 in that appeal, the Applicants only moved to this Court 5 months later in October 2024, with the present Application. No reason for this delay was proffered. Further, I am of the view that given the delay and the reason therefor, the Respondent will suffer prejudice if the orders sought are granted.
14. In the end, I find that the Applicant has not placed before the Court sufficient material to persuade the Court to exercise discretion in its favour. In the premises, the prayer for leave to appeal out of time is declined. Having been so declined, it follows that the prayer for stay of execution of the judgment must also fail.
15. I accordingly dismiss the Application dated 17.10.24 with costs to the Respondent.

DATED, SIGNED and DELIVERED in MALINDI this 14th day of November 2025

M. THANDE
JUDGE