

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL APPEAL NO. E031 OF 2024

ISMAEL CHEBURET.....1ST
APPELLANT/APPLICANT

RELI MOTORS LIMITEDE2ND
APPELLANT/APPLICANT

- V E R S U S -

GLADYS CHEPKURUI.....1ST
RESPONDENT

GLASER SECURITY COMPANY LIMITED2ND
RESPONDENT

FAMILY BANK LIMITED.....3RD
RESPONDENT

JUDGMENT

1. The Application dated 24th July, 2004 is made by the two Applicants against the three Respondents seeking Orders for leave to file an appeal out of time against the decision of the Principal Magistrate at Kericho in CMCC No.336 of 2018 and that there be a stay of execution of the Judgment pending hearing and determination of the intended appeal.
2. **Section 79 G** of the **Civil Procedure Act** provides for filing of appeals within a period of thirty (30) days from the date of a Judgment/decree, but an appeal may be admitted out of

time if the applicant/appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time. Where any period is fixed or granted by the Court for the doing of any act prescribed by the Civil Procedure Act, the Court may in its discretion enlarge such period even though the period originally fixed or granted may have expired (see, **Section 95** of the **Civil Procedure Act.**)

3. This application is two pronged. Therefore, the first issue for determination would be whether the Applicants have provided good and satisfactory grounds for exercise of this Court's discretion in their favour in granting them the leave to file the intended appeal out of time and that the memorandum of appeal annexed to the supporting affidavits dated 24th July, 2024 be deemed as having been filed upon payment of the requisite Court Fees.

4. The success or otherwise of this first issue would inform the determination of the second issue which would be whether the Applicants have provided sufficient grounds for grant of an order of stay of execution pending the hearing and

determination of the appeal in terms of **Order 42 Rule 6 of the Civil Procedure Rules.**

5. As regards the first issue, the main ground proffered by the applicants is that the delay in filing the appeal was occasioned by delivery of the Judgment without notice to the parties as directed, hence the Applicants were unaware of the date of the delivery of Judgment on 20th September, 2023 and only became aware of the same on 22nd July, 2024 long past the prescribed period for filing an appeal.
6. This ground is buttressed by the averments of the Applicants' Counsel, **Mr. Kiptoon** contained in the supporting affidavit dated 24th July, 2024. Although the Application alludes to a supporting affidavit of the first applicant, **Ismael Cheburet**, the same is not in this record. The date of delivery of the impugned Judgment as alluded to in the applicant's submission is at variance with that alluded to in the supporting affidavit.
7. Whereas the submissions alludes to the 12th October, 2022 as the date of delivery of the Judgment, the supporting affidavit allude to 20th September, 2023. All the Respondents opposed the application in its totality. The

parameters for extension of time to file an appeal were clearly set down in the case of **Leo Sila Wilson -vs- Rose Hellen Wangari Mwangi - Nbi Civil Appeal No.255 of 1997** in the following terms:-

“It is now well settled that the decision whether or not to extend the time for appealing is accordingly disallowed. It is also well settled that in general, the matter which the Court takes into account is deciding whether to grant an extension of time are: First, the length of the delay; Secondly, the reason for the delay; Thirdly, (possibly) the chances of the appeal succeeding if the application is granted; and finally, the degree of prejudice to the Respondent if the application is granted.”

8. In this case, the length of delay in filing the intended appeal was about ten (10) months. This was inordinate for which the explanation given by the Applicants may as well vindicate them on the basis of the lower Court record which

shows that there was uncertainty as to when the impugned Judgment was delivered.

9. A perusal of the record by this Court reveals that the trial of the case commenced on 3rd August, 2022 and ended on 1st February, 2023, after which the parties were given fourteen (14) days to file submissions and matter be mentioned on 1st March, 2023 on which date it was not mentioned. Instead, on the 24th March, 2023 a further mention date slated for 7th June, 2023 was fixed in the registry.
10. On 7th June, 2023, the matter was mentioned in Court where it was disclosed that the Trial Magistrate had proceeded on transfer to another station before conclusion of the case by way of written submissions. It was therefore ordered that the matter be further mentioned on 5th July, 2023 for submissions and on that day, only the third party (herein third respondent) turned up and confirmed the filing of its submissions. There was no indication as to whether submissions had been filed by the Plaintiffs (herein, first and second respondents) and the three Defendants including the

first and second Defendants (herein, the first and second applicants).

11. Nonetheless, the Court ordered that the matter be referred to the actual trial magistrate for directions on the Judgment of the case. The record does not show that such directions were ever given to the parties or that a mention date for the directions was ever fixed. What is apparent is that a typed copy of the Judgment was filed herein showing that the Judgment was delivered on 12th October, 2022 but was signed on the 20th September, 2023 thereby implying that that was the actual date of delivery of the Judgment.

12. This created an uncertain situation as to the actual date of the delivery of the Judgment. Most importantly, there was no indication that the parties or anyone of them attended Court for the Judgment on whichever date it was effectively delivered. This meant that the parties were not informed of any Judgment date and were therefore unaware of any of the two dates mentioned hereinabove. In the circumstance, this Court must find and hereby finds that the applicant have shown satisfactory reasons for their failure to file the

intended appeal within the prescribed period of time. They are in that regard, deserving of this Court exercise of discretion in their favour. Accordingly, prayer (3) of the application is granted.

13. As regards the second issue for determination i.e. Prayer (2) of the application, **Rule 6 of Order 42** of the **Civil Procedure Rules** is clear that no appeal or second appeal shall operate as a start of execution except in so far as the Court granted from real order but, the Court appealed from May for sufficient cause order, stay of execution of a 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 make such order as may to it seem just.

14. Rule 6 (2) provides for the parameters for stay of execution as follows:-

“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 applicant unless the order is made and that the applicant 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 willfully be binding on him has been given by the applicant.”***

15. The parameters have to be considered against the principles that a successful party is entitled to the fruits of his Judgment. In applying the principles, the Court, as was held by the High court in ***Machira T/As Machira & Co., Advocates -vs- East African Standard - Nbi Civil case No.612 of 1996***, must have its sight firmly fixed on upholding the overriding objectives of the rules of procedure for handling Civil Cases in the Courts which is to do justice in accordance with the law and to prevent abuse of the process of the Court.

16. In this case, considering that the applicants become aware of the Judgement on 22nd July, 2024, long after its

delivery on 12th October, 2022 or 20th September, 2023, and given that the present application was made on 24th July, 2024, it cannot be said that there was any delay in the applicants making this application.

On the question of substantial loss, it was observed by the Court of Appeal in Kenya ***Shell Ltd -vs- Benjamin Keruga Kibiru & Others (1982-85) 1 KAR 108*** that:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented.”

Therefore an applicant must have strong basis upon which the court can make a finding that the applicant would suffer substantial loss as alleged. The applicant should go beyond general assertions of substantial loss in the event a stay order is not granted (***see, Pan African Insurance Co. Ltd -vs- International Air Transport Association H/C App. No.86/2006***

17. In ***Machira t/a Machira & Co., Advocates -vs- Fast African Standard (No.2) (2002) KLR 63***, it was stated by the Court that:-

“In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.”

18. In essence, the inquiry for purpose of stay pending appeal under Order 42 rule 6 of the CPR is not about the merits of the appeal, but rather the loss which will be occasioned by satisfactions of the appeal in the event the appeal succeeds. ***(See, Antoine Ndiaye -vs- African Virtual University Nbi H/C Civil Case No.422 of 2006).***
19. In this case, there is nothing substantial to demonstrate that the applicants will suffer substantial loss should an order of stay not be granted. They have merely asserted that they will suffer substantial loss without stating and showing how that would be so. At most, in their supporting affidavit, they seem to rely on the belief that the intended appeal has high chances of success and therefore, stay of execution order should be issued.

20. In their submissions, the applicants imply that if anything, they stand to suffer financial loss should stay not be granted. Unless the amount is astronomical mere financial loss may not amount to substantial loss. In any event, there was nothing to suggest that the respondents will be incapable of refunding any amount which may be paid out to them in whatever form should the appeal succeed.

21. All in all, with regards to prayer (2) of the application, the applicants have failed to demonstrate that they are deserving of exercise of this Court's discretion in that regard in their favour. Therefore, the prayer is denied.

22. In sum, whereas prayer (3) is hereby allowed, prayer (2) is disallowed and dismissed. The respondents will each have half of the costs of the application.

Ordered accordingly.

**Dated, signed and delivered at Kericho this 26th day
of November, 2025.**

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**J. R. KARANJAH
JUDGE**

In the Presence of:-

C/Assistant – Peter

Mr. Morata holding brief for Mr. Kiptoon for Appellant

Mr. Kipkorir for 1st, 2nd Respondents

Mr. Nyadimo holding brief for Mr. Orende for 3rd Respondent