

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT VOI

MISC. CIVIL APPLICATION NO. E045 OF 2025

EASTCON MULTIPLES LTD.....

APPELLANT

=VERSUS=

ERIC MUTISO MUSAU AND BEATRICE NJUMI

NJATHI.....RESPONDENTS

RULING

1. The application coming for consideration in this Ruling is the one dated 9th September 2025 brought under Order 51 Rules 1 and 3 of the Civil Procedure Rules, Sections 1A, 1B, 3A, 63 (e), 79G and 95 of the Civil Procedure Act and all other enabling provisions of the Law seeking the following orders:-

(i) THAT this application be certified urgent and be heard ex-parte on account of its urgency.

(ii) THAT pending the hearing and determination of this application, this Honourable Court be pleased to grant an order for stay of execution of the judgement/decree of Voi CMCC No. E023 of 2023 - Eric Mutiso Musau vs Eastcon Multiples Ltd.

(iii) THAT pending the hearing and determination of this application, this Honourable Court be pleased to issue a temporary order restraining Regent Auctioneers or their agents from attaching the assets of the Applicant and if already attached a temporary order restraining Regent Auctioneers from advertising the for sale, selling or in any other manner alienating the assets in execution of the judgement/decreed/warrants of attachment/sale issued in Voi CMCC No. E023 of 2023 - Eric Mutiso Musau vs Eastcon Multiples Ltd.

(iv) THAT this Honourable Court be pleased to enlarge time and grant leave to the Applicant to file an appeal out of time against the judgment delivered by Hon. C. Kithinji - PM on the 16th October 2024 in Voi CMCC No. E023 of 2023 - Eric Mutiso Musau vs Eastcon Multiples Ltd.

2. The application is supported by the affidavit of **DAVID KARIUKI** a Director of the Applicant in which he deposed as follows:-

(i) THAT I am a Director of the Applicant herein and therefore competent and authorized to swear this affidavit on her behalf.

- (ii) THAT the Respondents, who is the Plaintiff/Judgment Debtors in Voi CMCC No. E023 of 2023 - Eric Mutiso Musau and Beatrice Njumi Njathi vs. Eastcon Multiples Ltd has commenced execution proceedings of the judgement/decree issued in the suit pursuant to which on 4th September 2025, Regent Auctioneers proclaimed the Applicant's motor vehicles and other assets and unless application is considered the Applicant is apprehensive that the proclaimed motor vehicles and assets will be attached on 11th September 2025 when the seven days notice lapses.**
- (iii) THAT the Applicant was represented in Voi CMCC No. E023 of 2023 by the Kimondo Gachoka & Company Advocates and later Kairu & McCourt Advocates all appointed by our insurers, Directline Assurance Co. Limited and no update on the outcome of the judgement was made to the Applicant who learnt of the same when the execution proceedings were commenced. Indeed, when I visited the offices of our insurers on 5th September 2025 we were unable to be provided with any information on the judgement/decree.**

- (iv) THAT we have appointed our current Advocates who has accessed a copy of the Judgement and Decree issued by the trial Court in Voi CMCC No. E023 of 2023 and read the same.**
- (v) THAT the Applicant being aggrieved by the Judgement and intends to lodge an appeal but the statutory period of thirty (30) days within which to appeal has already lapsed and leave of this Honourable Court is required before the Appeal can be filed.**
- (vi) THAT the Applicant has an arguable appeal for determination by this Honourable Court particularly on the trial Court's analysis and determination of the issue of liability for the material accident which was apportioned at 100% which was against the weight of evidence on the party to blame for the accident and on the award of general damages which were excessive in the circumstances of the case.**
- (vii) THAT unless the reliefs sought in the application are granted, the entire object of the application and the intended appeal will be rendered nugatory and the Applicant subjected to substantial loss if the already commenced execution process is completed as the**

decretal/warrants sum of Kshs. 4,455,638.94 are substantial and are unlikely to be recovered from the Decree holders at the conclusion of the appeal proceedings.

(viii) THAT the Applicant is willing to comply with the conditions that this Honourable Court may consider to impose in granting the reliefs sought in this application.

(ix) THAT this Honourable Court has the power and discretion to issue the reliefs sought by the Applicant in the interests of justice and to preserve the object of the application and the intended appeal.

3. The Respondent opposed the application and filed a Replying Affidavit in which he stated that the delay has not been explained and further that the application has no merit.
4. The parties filed written submissions as follows; The Applicant, Eastcon Multiples Ltd, seeks the court's discretion to be granted leave to file an appeal out of time against a judgment delivered on 16th October 2024.
5. The delay in filing the appeal within the statutory thirty-day period is attributed to a breakdown in communication from the legal counsel initially appointed by the Applicant's insurers.

6. The Applicant contends it was unaware of the judgment's outcome until execution proceedings commenced in September 2025, after which it acted promptly by filing the present application.
7. The Applicant argue in their submissions that the delay is neither inordinate nor deliberate, but rather an excusable error stemming from the failure of its former advocates to provide updates.
8. Relying on established legal principles, the Applicant emphasizes that courts should not penalize a litigant for the inadvertence of their counsel, provided the interests of justice so dictate.
9. It is further submitted that the intended appeal, as outlined in a draft Memorandum of Appeal, raises arguable issues concerning both liability and the assessment of damages, and is therefore not frivolous.
10. The Applicant asserts that the balance of convenience favors granting the extension, as the prejudice of being denied an appeal would cause irreparable harm to its business.
11. In contrast, the Respondents would face minimal inconvenience, especially considering that the Applicant's insurers have already initiated steps in the lower court to settle the decretal sum by instalments.
12. The Applicant expresses willingness to comply with any conditions the court may impose.

13. In conclusion, the Applicant invokes the constitutional right of access to justice and a fair hearing, urging the court to exercise its discretionary power in a manner that aligns with the overriding objective of just, expeditious, and proportionate resolution of disputes.
14. The Respondents opposed the application for extension of time to appeal and for stay of execution, urging the court to dismiss it.
15. They argue that the judgment was delivered on 16th October 2024, nearly a year ago, and the Applicant was statutorily required to appeal within 30 days under Section 79G of the Civil Procedure Act but failed to do so.
16. They emphasize that procedural rules are crucial for the administration of justice and must be complied with.
17. The Respondents contend that the court's discretion to extend time must be exercised judicially, guided by established principles: the length and reason for the delay, the appeal's chances of success, and the prejudice to the Respondent.
18. They submit the application fails on these grounds. Specifically, the inordinate delay of almost a year is not satisfactorily explained.

19. The Applicant's blame on its former advocates is insufficient, as a litigant has a duty to follow up on their case and cannot simply disclaim an advocate's mistakes.
20. The Respondents cited several authorities holding that such indolence and carelessness should be visited upon the client.
21. Furthermore, the Respondents argue the application is an ill-intentioned afterthought, filed only to circumvent the lawful execution process that had already commenced with the attachment of the Applicant's assets.
22. They assert it is an abuse of court process.
23. Regarding stay of execution, the Respondents submit that even if extension were granted, stay should be denied.
24. The Applicant has not demonstrated any substantial loss, as the discharge of a financial decree does not constitute such loss.
25. The application was also made with unreasonable delay. Additionally, the Applicant has not offered any security for the due performance of the decree, which is a mandatory requirement.
26. Granting stay would unfairly prejudice the Respondents, who are entitled to enjoy the fruits of their judgment, and would further prolong litigation that has already reached execution.
27. In conclusion, the Respondents pray for the dismissal of the application with costs.

28. The issues for determination in the application dated 9th September 2025, are as follows;

- (i) Whether the Applicant should be granted leave to file an appeal out of time against the judgment delivered on 16th October 2024.**
- (ii) Whether an order for stay of execution of the decree pending appeal should be granted.**

29. The court's power to extend time for filing an appeal under Section 79G of the Civil Procedure Act is a discretionary one, to be exercised judiciously and upon terms that are just.

30. The primary objective is to serve the ends of justice, not to punish a litigant for the failings of their advocate, provided there is a reasonable explanation.

31. The court's discretion is unfettered and should be based on the facts of each case, considering the length of the delay, the reason for it, and the prejudice to the parties.

32. In the present matter, the delay from 16th October 2024 to 9th September 2025 is indeed inordinate.

33. However, the reason for this delay is central. The Applicant, through its director, has sworn that it was represented by advocates appointed by its insurer, and that no update on the judgment was provided.

34. It learnt of the adverse judgment only when execution proceedings commenced.
35. This explanation, though raising questions about the Applicant's internal follow-up mechanisms, directly attributes the lapse to the advocates on record.
36. The legal principle that a litigant should not be penalized for the mistakes of their counsel, where the litigant is not personally culpable, is deeply entrenched in our jurisprudence.
37. The Court of Appeal in Phillip Chemwolo & another v Augustine Kubende [1982-88] 1 KAR 103 at p. 104 emphasized this, stating:
"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel. Blunders will continue to be made... and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on its merits."
38. While the Respondents correctly argue that procedural rules are vital and that litigants have a duty to be diligent, the constitutional imperative of access to justice and the right to a fair hearing, including the right to appeal, must be the overarching consideration.
39. Denying the Applicant a hearing on the merits of its arguable appeal which challenges both liability and quantum based on the

negligence of its previous counsel, would be a draconian measure.

40. The prejudice to the Applicant in losing the opportunity to appeal is far greater than the prejudice to the Respondents, which can be ameliorated by appropriate conditions.

41. The balance of convenience tilts in favour of allowing the appeal to be heard, provided the Respondents' rightful position as decree-holders is secured.

42. On the second issue for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules, the Applicant must satisfy three conditions: demonstrate substantial loss, file the application without unreasonable delay, and provide security.

43. The application for stay was filed promptly after the Applicant became aware of the judgment through the proclamation.

44. The decretal sum is substantial, exceeding Kshs. 4.4 million. The Applicant's apprehension that this sum may not be recoverable from the Respondents should the appeal succeed constitutes a legitimate concern for substantial loss.

45. The mere fact that execution would render the appeal nugatory is not enough; the Applicant must show specific loss.

46. However, in circumstances where a large monetary decree is to be executed against a party who is actively challenging it, the risk is evident.

47. To hold otherwise would be to ignore commercial reality. The interests of justice demand that the status quo be preserved to prevent an irreversible situation.

48. Therefore, in the exercise of this court's discretion to do substantive justice, and guided by the overriding objective under Sections 1A and 1B of the Civil Procedure Act, I am persuaded to allow the application on the following terms;

- (i) THAT the Applicant is granted leave to file and serve its Appeal out of time. The Memorandum of Appeal shall be filed and served within fourteen (14) days from the date of this Ruling.**
- (ii) THAT there shall be a stay of execution of the judgment/decreed in Voi CMCC No. E023 of 2023, and all related attachment and sale processes by Regent Auctioneers, pending the hearing and determination of the intended appeal.**
- (iii) THAT the Applicant shall, within forty (40) days from the date of this Ruling, deposit Kshs 3,000,000 out of the decretal sum of Kshs. 4,455,638.94 into a joint interest-earning account in the names of the Advocates for the parties herein.**
- (iv) THAT in default of compliance with condition (ii) above, the stay of execution orders shall**

automatically lapse and be of no effect, and the Respondents shall be at liberty to proceed with execution.

49. The costs of this application shall be in the cause of the intended appeal.

Dated, signed and delivered this 3rd day of December 2025 in open court at Voi High Court.

**ASENATH ONGERI
JUDGE**

In the presence of:-

Court Assistant: Mabishi/Millicent

.....**for the Appellant**

.....**for the Respondents**