

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
MISC APPLICATION NO. E184 OF 2025

ASALI ORGANICS LIMITED - **1ST APPLICANT**
SARAH SINTAMEI NKAITOLE - **2ND APPLICANT**
VS
NAB A BURGER LIMITED - **RESPONDENT**

RULING

(In respect of Applicant's application dated 27/6/25)

1. The application before the court is dated 27/6/25, filed by the Applicants herein seeking orders of stay of the Ruling delivered in **BPRT No E416 of 2024 - Nab A Burger Limited Vs Asali Organics Limited & Anor** on 19/2/25 pending the hearing and determination of the intended appeal. The second prayer sought leave to the Applicants to file an appeal out of time.
2. The application is based on the grounds annexed thereto and the supporting affidavit of Sarah **Sintamei Nkaitole**, sworn on the same date. Briefly, she deposes that the Applicants are dissatisfied with the decision of the Tribunal delivered on 19/6/25, in which the Applicants were condemned to pay the sum of Kshs 4,271,500/-
3. Based on the loss adjuster's report dated 31/10/24 regarding the fire incident, no evidence has been presented to demonstrate that the Applicants caused the fire. She states that the dispute between the parties concerned the locking of the premises, and that the issues were addressed in their replying affidavit, though the Tribunal disregarded that evidence.
4. She states that having been aggrieved by the said decision, they filed an appeal in **HCCA E090 of 2025 - Sarah Sintamei Nakitole & Anor Vs Nab A Burger Limited**, where the High Court found that it had no

jurisdiction to hear and determine the matter and eventually struck out the application and the appeal, hence the filing of the appeal in this court.

5. It was her case that unless the orders are issued, they stand to suffer substantial loss when they are compelled to pay the sum of Kshs 4,271,500/- in a case that the Tribunal never heard them. That their appeal stands a chance of success, and if execution is allowed to ensue, the substratum of the appeal shall be rendered nugatory.
6. The Respondent opposes the application vide the Replying affidavit of **William Maluki Ngumbau**, sworn on 15/9/25. The deponent states that the application has been brought late in the day, after about six [6] months, and that it is intended to frustrate the Respondent's enjoyment of the fruits of the judgment granted by the Tribunal vide the decision of 19/2/25.
7. Further, that the Tribunal rightly disallowed the application for review dated 5/11/24 as there was no discovery of new evidence and or error on the face of the record. Similarly, the Tribunal's decision of 19/2/25 was sound as it considered the replying affidavit by the Applicants herein and found that they had not demonstrated why they should be granted review orders even if the said replying affidavit was to be taken into consideration.
8. In summary, the Respondent contends that the Applicants have not demonstrated any substantial loss they are likely to face, and they have not provided an explanation for the delay in filing the application. Therefore, it urged the court to dismiss the application.
9. It was further stated that the Applicants have failed to pay the sums ordered by the court within 60 days from the date of the ruling or at all and have continued to deny the Respondent access to the premises and the investments therein have since been damaged and distressed for rent illegally while the suit is still pending.
10. Parties have filed written submissions, which I have read and considered.

Analysis and Determination

11. There are two issues for determination in the application.
 - a. Whether the Applicants are entitled to leave to file an appeal out of time
 - b. Whether the stay of execution of the orders of the Tribunal issued on 19/2/25 should be allowed.
 - c. Costs of the application.

Leave to file an appeal out of time

12. Section 79G of the Civil Procedure Act (CPA) which provide as follows; -

79G. Time for filing appeals from subordinate Courts

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. It is trite that extension of time to file an appeal out of time is a discretionary relief which like all discretionary remedies must be granted by the Court on sound legal basis and not on caprice or whims. This is the import of the provisions of Section 95 Civil Procedure Act which empowers the Court to enlarge such time as follows; -

95. Enlargement of time

“Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

14. The Supreme Court laid down the principles to be considered in an application for extension of time in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** as follows;

“1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court

3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

5. Whether there will be any prejudice to be suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.” **See also Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi [1999] 2 EA 231.**

15. In addition, the Supreme Court in the case of **Nyamboki v Gathuru (Application 6 of 2019) [2019] KESC 44 (KLR)** held as follows in determining an application seeking such extension;

“....., the Court has to consider whether the explanation given for any delay is reasonable and credible; whether there also exist extenuating circumstances to enable the Court exercise its unfettered jurisdiction; and that the delay, in any event, should not be so inordinate as to leave no doubt, that an Applicant has been slothful, and filed such an application as an after-thought.”

16. In this case, the tribunal's ruling was delivered on 19/2/25, and in accordance with the provisions of Section 79B of the CPA cited above, the Applicants should have lodged the appeal by 19/3/25. The Applicants explained that they initially approached the wrong forum, being the High Court Commercial Division, and were only redirected to this court after the said appeal was struck out due to jurisdictional issues. Although the Applicants have not disclosed when the appeal was filed in the High Court, the court considers that the Applicants have demonstrated their intention and seriousness to be heard on appeal. I therefore hold that the Applicants have explained the delay in filing the appeal, and this court exercises discretion in their favour to enable them to be heard on the merit.

Stay of execution of the orders of the Tribunal issued on 19/2/25

17. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 rule 6 of the Civil Procedure Rules. An Applicant for an order of stay of execution of a decree or an order pending appeal is obligated under Order 42 rule 6(2), to satisfy the following conditions, namely:

- a. That substantial loss may result to the Applicant unless the order is granted.
- b. That the application has been made without unreasonable delay, and
- c. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given.

18. These principles were enunciated in **Butt vs Rent Restriction Tribunal [1979]** the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
 - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
 - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.
19. The purpose of an order for a stay of execution is to protect the foundation of the appeal during its pendency, ensuring it does not become meaningless. The Court must balance the interests of the Applicant, who wishes to preserve the status quo while the appeal is ongoing and if the appeal is successful. The Court should consider not only the Applicant's interests but also, in fairness, the interests of the Respondent, who would be deprived of the benefits of their Judgment.
20. In this application, the court finds that the Applicants have not demonstrated the significant loss they are likely to suffer, given that the orders are related to a monetary decree. They did not show that the Respondent would be unable to refund the award if the tribunal's decision is overturned on appeal.
21. Regarding the issue of delay, the court notes that the Applicants have provided very limited evidence. For example, they should have indicated

when the High Court dismissed the appeal and the timeframe within which they sought this court's order for a stay of execution. As it stands, the court cannot determine whether the application before it is inordinate or not.

22. Regarding the issue of security for the proper performance of the court that may ultimately bind the Applicants, the court notes that the Applicant has offered to deposit the entire amount of Kshs 4,271,500/- in court as security for costs.
23. Notwithstanding this, and solely to serve the ends of justice, the Court is guided by the principle that it must balance the interests of the Applicant, who is seeking to maintain the status quo pending the hearing of the Appeal, should the Appeal be successful, and the right of the Respondent to enjoy the fruits of its judgment. It finds that this is a case in which the court can exercise its unfettered discretion to allow the appeal so that the parties may be heard on the merits.
24. In conclusion, the court finds no prejudice that will be visited upon the Respondent if the instant application is allowed on terms.
25. **Final orders for disposal**
 - a. Leave to file an out-of-time appeal is hereby granted. The Applicant is directed to lodge their appeal within 15 days from today; otherwise, the leave granted herein shall lapse automatically.
 - b. There shall be a stay of execution of the Tribunal's ruling issued on 19/2/25, pending the hearing and determination of the intended appeal, subject to the deposit of the decretal amount as security for the proper execution of the court's orders.
 - c. The Applicants are hereby ordered to deposit the decretal amount of **Kshs 4,271,500/-** in court as security for the proper performance of the court's orders, which may be binding on them, within 15 days; failure to do so will result in the orders issued herein lapsing automatically.
 - d. Costs of the application shall be in favour of the Respondent.

26. Orders accordingly

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF
DECEMBER 2025 VIA MICROSOFT TEAMS.**

**J. G. KEMEI
JUDGE**

Delivered Online in the presence of:

1. Ms Lamoi for the Applicants/Appellants
2. Mr Mwirigi HB for Mr Nyangena for the Respondent
3. CA – Ms Yvette Njoroge