

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELCA NO. E119 OF 2025

PHYLLIS WANGWE - **APPELLANT**
VS
KIBICHU NDOTHUA HENRY - **1ST RESPONDENT**
EMBAKASI RANCHING COMPANY LIMITED - **2ND**
RESPONDENT

RULING

(In respect of the Appellant's application dated 15/7/2025)

1. What is coming up for determination is the Appellant's application dated 15/7/2025. The application is expressed to be anchored on the provisions of Section 79G of the Civil Procedure Act, Order 42 Rule 6(1) and Order 51 Rule 1 of the Civil Procedure Rules. Substantively, the Appellant prays for orders that;
 - a. The Applicant be and is hereby granted leave to appeal out of time against the Judgment of Hon. Becky Cheloti Mulemia delivered on 6/6/2025 in MCCC No. 358 of 2011.
 - b. The execution of the Judgment and/or decree and subsequent proceedings in MCCC No. 358 of 2011 be stayed pending hearing and determination of the main appeal.
2. The application is premised on the grounds on the face of it and further supported by the Appellant's Affidavit of even date. The Appellant avers that the matter was fixed for hearing before the trial court on diverse dates. That hearing was closed before the trial court on 28/4/2025, and parties were directed to file their respective submissions. The 1st Respondent, who was the Plaintiff in the Lower Court, was directed to file and serve his written submissions within 14 days. The Appellant herein was also granted 14 days to file and serve her submissions after receipt

of the Plaintiff/1st Respondent's submissions. The matter was then slated for Judgment on 6/6/2025.

3. The Appellant asserts that the 1st Respondent served her Advocates with his submissions on 28/5/2025, well after the time granted to him had expired. Her Advocates then wrote to the Executive Officer on 3/6/2025 requesting for additional time to file her submissions due to the delay caused by the 1st Respondent in serving them. She states that her Counsel also requested a deferment of the Judgment to allow her more time to comply.
4. The Appellant states that 6/6/2025 was gazetted as a public holiday, and therefore she expected the court to issue a Judgment Notice on the e-filing portal. She claims that, although no Judgment Notice was posted, her Advocate only learnt on 8/7/2025 that the Court had delivered the Judgment on 6/6/2025, despite the day being gazetted as a public holiday. She argues that it was irregular for the judgment to be delivered on a day that was gazetted as a public holiday and when courts were not sitting. She further faulted the court for failing to extend time for her to file submissions, considering that the delay was caused by the 1st Respondent.
5. The Appellant states that, being aggrieved by the Judgment delivered on 6/6/2025 by the trial court, she wishes to lodge an appeal against it. She contends that she has an arguable appeal with a high chance of success, as evidenced by the attached Draft Memorandum of Appeal. She urges the court to grant the orders sought.
6. The 1st Respondent did not file any response to the application despite being duly served. Although Counsel for the 1st Respondent sought leave on 2/10/2025 to file a response within 14 days, which was granted, none had been filed by the time the court was writing this Ruling. The application is therefore unopposed.

The written submissions

7. The 1st Respondent having indicated their intention of filing a response to the application, the court directed the parties to file submissions upon the expiry of the deadline after the 1st Respondent's response. As the 1st Respondent did not comply, the Appellant filed her submissions on 5/12/2025, which the court has duly considered in its analysis and determination.

Analysis and determination

8. I have considered the application and the submissions filed in support thereof. The issues for determination which arise therefrom are: -
 - a. Whether leave should be granted to appeal out of time.
 - b. Whether an order for stay of execution can issue against the Judgment delivered on 6/6/2025 in MCCC No. 358 of 2011.
 - c. Whether there are any proceedings to be stayed in MCCC No. 358 of 2011.

Whether leave can be granted to appeal out of time

9. Section 79G of the Civil Procedure Act provides that appeals originating from the subordinate court should be filed within thirty (30) days from the date of the decree or order appealed against. Section 95 of the said Act gives the court discretion to extend the time as it deems fit even if the time originally fixed has expired.
10. Order 50 Rule 6 of the Civil Procedure Rules empowers the court to extend time upon sufficient cause being demonstrated. On that ground alone, it is my finding that there was inordinate delay in filing the instant application for leave.
11. In an application for leave to appeal out of time, an Applicant must satisfy the court that it had good and sufficient cause for not filing the appeal in time. The Supreme Court of Kenya in the case of **County Executive of Kisumu vs County Government of Kisumu & Others [2017] eKLR** while relying on its decision in the case of **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others Application No. 16 of 2014 [2014] eKLR** the apex court stated as follows:

“the under-lying principles that a Court should consider in exercise of such

discretion:

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 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.”

12. Further, the Court of Appeal in **Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited [2020] eKLR** outlined the guiding principles in such cases inter alia:

“(viii) The law does not set out any minimum or maximum period of delay. All it

states is that any delay should be satisfactorily explained. A plausible and

satisfactory explanation for delay is the key that unlocks the Court’s flow of

discretionary power with the only caveat being that there has to be valid and

clear reason upon which discretion can be favourably exercised.

(ix) Failure to attach a draft memorandum of appeal is not fatal to an application

under rule 4 of the Rules of the Court so long as there is demonstration

through other processes relied upon by such an applicant that the intended

appeal is arguable.

(x) An arguable appeal is not one that must necessarily succeed but is one which

ought to be argued fully before court;

(xi) The right to a hearing is not only constitutionally entrenched, it is also the

cornerstone of the rule of law.”

13. The Supreme Court of Kenya in the case of **Nick Salat -vs- Independent Electoral and Boundaries Commission & 7 Others (Application 16 of 2014) [2014] KESC 12 (KLR)** state that;

“... it is incumbent on the Applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default.”

14. Having laid out the principles guiding the process for extension of time, a brief recount of the facts shall suffice. The judgment sought to be appealed against was to be delivered on 6/6/2025, which turned out to be a public holiday. The Applicant avers that they expected that the court would issue a Judgment Notice on the e-filing Portal. She avers that whereas no Judgment Notice was posted, her Advocate only learnt on 8/7/2025 that the Court had been delivered on 6/6/2025.

15. I have perused the record, in deed there was no Judgment Notice issued. The Applicant was evidently not aware of the Judgment date. The date slated for Judgment having been gazette as public holiday, it was imperative for the court to issue a Judgment Notice. This Court,

therefore, finds and hold that the delay in lodging the application was satisfactorily explained by the Applicant.

16. The Application herein was filed on 15/7/2025. A delay of about Nine (9) days after the alleged delivery of Judgment. The reason for delay having been satisfactorily explained, the court finds the delay herein is not inordinate.
17. As regards the chances of the appeal succeeding if the application is granted, a cursory perusal of the Draft Memorandum of Appeal exhibited by the Applicant, it is evident that appeal raises arguable issues. I therefore exercise my discretion and grant the Applicant leave to file her appeal out of time. I see no prejudice that will result to the 1st Respondent if the Applicant is granted leave to file its appeal out of time and letting it have its day in court.

Whether an order for stay of execution can issue against the Judgment

delivered on 6/6/2025 in MCCC No. 358 of 2011.

18. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. The Court of Appeal in the case of **Butt -vs- Rent Restriction Tribunal {1982} KLR 417** gave guidance on how a court should exercise the said discretion and held that:
 - “1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. 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 that appeal Court reverse the Judge’s discretion.
 3. 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.

4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. 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 for costs as ordered will cause the order for stay of execution to lapse.”

19. The principles upon which stay of execution pending appeal can be allowed are now well settled from the authorities from this court and from the superior courts. Generally, stay of execution is provided for under Order 42 Rule 6(2) of the Civil Procedure Rules.

20. As for the applicants having to suffer substantial loss, in the case of **Kenya Shell Limited -vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)KAR 1018** the Court of Appeal pronounced itself to the effect that:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

21. The applicants have a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Appellants to their Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. **{See the case of Absalom Dora -v- Turbo Transporters (2013) (eKLR)}.I**

22. In the case of **Geoffery Muriungi & another v John Rukunga M'imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR** and which wisdom I am persuaded with; -

“...the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”

23. For substantial loss, it is not disputed that the Appellant is in occupation of the suit property. Clearly, the Applicant stands to suffer substantial loss if the stay is not granted considering that she is likely to be evicted before the determination of the Appeal. In any event, the application is not opposed.

24. On the second condition, the Applicant cannot be punished for the delay, if any, as the Judgment was delivered on a public holiday.

25. As for the last condition on provision of security, grant of security of costs remains a discretionary order. I exercise my discretion and issue no orders as to security of costs.

Whether there are any proceedings to be stayed in MCCC No. 358 of 2011.

26. A decision on whether or not to grant stay of proceedings is discretionary and this Court has powers to stay proceedings pending an Appeal. This jurisdiction is derived from Order 42 rule 6 (1) of the Civil Procedure Rules.

27. Judgment having been entered in the trial court, there are no pending proceedings post-judgment capable of being stayed. The prayer for stay of proceedings is therefore misplaced.

28. Based on foregoing, I shall allow the said application on the following terms;

- a. The Applicant be and is hereby granted leave to appeal out of time against the Judgment of Hon. Becky Cheloti Mulemia delivered on 6/6/2025 in MCCC No. 358 of 2011.
- b. There be a stay of execution of the Judgment and/or decree issued in MCCC No. 358 of 2011 pending hearing and determination of the appeal to be filed.
- c. The Appellant/Applicant shall lodge her Appeal against the Judgment of Hon. Becky Cheloti Mulemia delivered on 6/6/2025 in MCCC No. 358 of 2011 within 30 days from this date.
- d. That upon filing of the Memorandum of Appeal in (c) above, the Applicant shall prepare, file and serve his record of appeal within 45 days.
- e. There shall be no orders as to costs.

29. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF DECEMBER 2025 VIA MICROSOFT TEAMS.

**J G KEMEI
JUDGE**

Delivered online in the presence of;

1. Mr Kaburu h/b for Gachoka for the Appellant/Applicant

2. Ms Kanini h/b for Charagu for the Respondent
3. C/A - Ms. Yvette Njoroge

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