

Republic of Kenya

in the High Court of Kenya at Makueni

HCCA Number E 047 of 2024

Sammy Kituku Kinyili ..... Appellant

versus

Elizabeth Ndulu Kasili (suing as the administrators of the estate  
of the late Daniel Kasili Soi (deceased) .....1<sup>st</sup>

Respondent

Adventure Technology Company Limited.....2<sup>nd</sup>

Respondent

Michael Kimeu Mulwa .....3<sup>rd</sup>

Respondent

Ruling

Before me is the notice of motion dated 12<sup>th</sup> August 2024 brought under article 159 the Constitution, section 1A,1B,3A of the civil procedure act ,order 42 rule 6 order 51 rule 1of the Civil procedure rules.

It seeks in the earlier an order of stay of execution of the ruling/ order of the magistrate's court delivered on the 18<sup>th</sup>

March 2024 in civil suit 91 of 2011 and all consequential orders in favor of the first respondent pending the hearing and determination of the appeal,

That there be an enlargement of time and the memorandum of appeal dated 25<sup>th</sup> March 2024 be deemed to be properly filed

The grounds for the application are on the face of the application mainly that the applicant is aggrieved by the ruling of the 18<sup>th</sup> of March 2024, has an arguable appeal as outlined on the grounds on the memorandum of appeal and if stay is not granted the appeal will be rendered nugatory.

It is supported by the affidavit of the applicant sworn on the same date.

He depones that he is a retired teacher and was lastly attached at Kithyululu Secondary School from the year 2014 to 2017 and he seeks to appeal against the ruling dated 18<sup>th</sup> of March 2024 which he attaches.

In that ruling the applicant had filed a similar application and the learned magistrate stated that he had considered the application and the response and had noted that on the 14<sup>th</sup> of February 2023 The applicant had filed a notice of motion

seeking to set aside proceedings and the ex parte judgment entered on 24<sup>th</sup> of June 2015 but that application was heard and determined and was allowed on the condition that the judgment was set aside and the defendant would pay throw away costs of Kenya shillings 50,000. That by their time the matter came for pretrial on the 9<sup>th</sup> of October 2023 the applicant had not paid the throw away costs of 50,000 the stay orders lapsed and the judgment was reinstated. The application dated 19<sup>th</sup> of October 2023 was brought to review or vary the orders reinstating the judgment. The trial court was of the view that the applicant having failed to pay the throw away costs of 50,000 he was in breach of the court order, the application was found as lacking merit and was dismissed on the 18<sup>th</sup> of March 2024.

The application is opposed through the replying affidavit

Elizabeth Ndulu Kasili. She deponed the accident herein occurred on the 8<sup>th</sup> of September 2010 and the applicant was properly served with STEA the 27<sup>th</sup> of February 2013 which he personally signed and acknowledged in her presence for he is a person known to her and she is the one who took the process server to serve him; the judgment in the primary suit was

delivered on 24<sup>th</sup> of June 2015 but he refused to pay and on 4<sup>th</sup> of February 2023 auctioneers proclaimed him for non-payment of the decretal sum of 1,787, 300 ;that the applicant filed an application on 14<sup>th</sup> February 2023 seeking stay of execution and setting aside of the judgment; the court delivered its ruling on 31<sup>st</sup> July 2023 allowing the application on condition that he paid thrown our way costs of 50,000, and to file and serve his defense in 30 days.

That the ruling was made in the presence of both advocates and she and the applicant were present.

That the applicant did not comply with the conditions set by the court and the judgment was reinstated and the respondent was allowed to proceed with execution.

That the Applicant changed advocates and filed another notice of motion on 23<sup>rd</sup> October 2023 seeking to set aside the orders of 31<sup>st</sup> July 2023, the application was again dismissed.

That no appeal has been filed against the orders of 31<sup>st</sup> July 2023 .

That the memorandum of appeal does not raise any substantial issue on the ruling of 18<sup>th</sup> March 2023; the application has been

brought after an unreasonable delay of four months since the 18<sup>th</sup> March 2024 ;that the ruling was posted on the portal on the 18<sup>th</sup> of March 2023; That the applicant paid for it on the 5<sup>th</sup> of April 2024 but only moved when the when there was a proclamation for him to pay the decretal sum; that the same be dismissed.

The applicant filed the supplementary affidavit and the point that the delay of four months was neither inordinate nor intentional but it was occasioned by the delay in accessing the court ruling which required the assistance of the executive officer of the court as none has been uploaded to date that the applicant is not in any financial position to deposit the decretal sum as a precondition for the order of stay

The applicant has filed written submissions and sets out the issue for determination as to whether he has satisfied the conditions for stay over execution pending appeal.

On substantial loss he submits that he's a retired teacher Sikh and elderly citizen of limited means and the ruling by the lower court allowing the first respondent to commence execution would causeway irreversible hardship and deny him the

constitutional right of appeal That he would suffer irreparable and disproportionate loss.

He relies on Kenya Shell Limited versus Benjamin Karuga Kigibu and another.

On delay he submits that a certified copy of the ruling was only available on the 12<sup>th</sup> of August 2024 and that the follow up saw him attend the registry physically where the Registry informed him that the file was still in chambers until the executive officer intervened; That he is willing to comply with any conditions or terms including provision of security as may be directed by the court though the application is primarily grounded on preserving the right of appeal citing section 95 of the civil procedure act and order 50 rule 6 of the civil procedure rules he urges the court to allow his request for enlargement of time; That the failure to file the memorandum of appeal was due to systemic failure of the E filing system during a period of national transition to digital court infrastructure

I did not see any submissions by the respondent.

I have carefully considered the application before me and the issue for determination is whether the applicant has satisfied

the court that he has complied with the provisions of order 42 rule 6.

I have looked at the CTS for Makindu Law Courts MCCC 91 of 2011 and I have confirmed that no ruling was uploaded on the 18<sup>th</sup> of March 2025. I have also seen the letters by counsel for the applicant dated 25<sup>th</sup> April 2025 seeking the certified copy of the ruling; on the issue of delay , it is evident that the system supports the applicant's version of events.

On substantial loss the applicant has stated that he is a retired teacher a fact not disputed, who is sickly would suffer loss if execution takes place. However, on the other hand the respondent does not demonstrate that she would be able to refund the money if paid.

On security, the applicant has indicated that he is willing to deposit any reasonable security that the court may direct except the deposit of the entire decretal sum.

The respondent's position is that the applicant is only doing this to delay the payment of what is rightfully due to her.

On delay, it is the onus on the applicant to explain the same to the satisfaction of the court He has explained that it was due to

the delay in receiving the certified ruling and the system not being in transition. These are reasonable grounds. . I am satisfied that the delay was not intended but was caused by circumstances as explained by the applicant.

On substantial loss , the applicant has explained how the execution would affect him before the appeal is heard.

The other issues raised in the matter are issues to be determined during the appeal.

I therefor allow the application on the following conditions:

There be stay of execution pending the hearing of the appeal on condition that the applicant deposits 25% of the decretal sum in court within 45 days hereof as security for the performance of the decree.in default the stay will lapse

The memorandum of appeal be filed and serve within 7days hereof in default the leave will expire.

The Record of appeal be filed within 45 days hereof.

A date de assigned foe mention before the DR for compliance on the Record of Appeal

Costs to abide the outcome of the appeal.

Dated, signed and delivered via CTS on the 22<sup>nd</sup> December  
2025

Mumbua T Matheka

Judge

CA Chrispol