



REPUBLIC OF KENYA



KENYA LAW

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Thethere v VO (Minor Suing through Her Mother and Next Friend LAK) (Miscellaneous Application E249 of 2025) [2025] KEHC 19144 (KLR) (18 December 2025) (Ruling)

Neutral citation: [2025] KEHC 19144 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E249 OF 2025**

RC RUTTO, J

DECEMBER 18, 2025

BETWEEN

JAMES NGUGI THETHERE APPELLANT

AND

VO (MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND LAK) RESPONDENT

RULING

1. The applicant filed a Notice of Motion dated 12th August 2025 under order 42 Rule 6, order 51 rule 1 of the Civil Procedure Rules, and sections 1A and 3A of the *Civil Procedure Act* seeking;
 - a. Spent
 - b. Spent
 - c. An interim order of stay of execution of the judgment and/or decree entered on 17th June 2025 in Machakos SCCC E1373 of 2024 pending hearing and determination of the applicant's appeal
 - d. Leave to furnish security in form of a bank guarantee from a reputable Bank pending the full hearing and determination of the Appeal.
2. This application was supported by grounds on the face of the application and supporting affidavit sworn by the applicant. The applicant averred that; that the 30 days stay of execution granted by the trial court had lapsed; that the appeal is meritorious with high probability of success; the appeal will be rendered nugatory if the orders sought are not granted; unless stay is granted, the appeal will be rendered nugatory as the respondent may proceed to sell the applicant's attached motor vehicle; that the respondent is of unknown means of income and may not be in a position to refund and that he is willing to furnish security in form of a bank guarantee for the due performance of the decree.



3. Upon being served with, the applicant's application the respondent filed a Notice of Motion dated 18th August 2025, under, sections 3A and 79G of the [Civil Procedure Act](#), order 42 rule 6 and order 51 rule 1 of the Civil Procedure Rules seeking the following reliefs:
 1. ... Spent;
 2. ... Spent;
 3. That the application dated 12th August 2025 be struck out with costs.
4. The respondent's application was supported by the facts set in the body of the Motion together with the supporting affidavit of the J. Mbugua Mburu, the respondent's counsel, sworn on 18th August 2025. The respondent contended that the applicant fraudulently misrepresented the date of judgment, claiming it was delivered on 17th June 2025 when it was delivered on 17th March 2025. That the memorandum of appeal filed outside the 30 days period under section 79G of the [Civil Procedure Act](#). They contended that no leave to file the appeal out of time was sought and the interim reliefs were obtained by deliberately misrepresenting and concealing material facts.
5. The respondent also filed a replying affidavit sworn by Linet Akinyi Kungu reiterating that the applicant's application dated 12th August 2025 was incompetent, an abuse of the court process and that the memorandum of appeal dated 12th August 2025 was filed out of time and contrary to section 79G of the [Civil Procedure Act](#). Thus, she urged that the application be dismissed.
6. As directed by the court, the application was canvassed by way of submission. The respondent filed submissions dated 28th October 2025. The applicant did not file submissions.
7. The respondent submitted that its application dated 18th August 2025 should be allowed as it remained unopposed since the applicant did not file any response. Further that the applicant failed to comply with the provisions of section 79G of the [Civil Procedure Act](#) requiring an appeal to be lodged within 30 days of delivery of judgment and that they have not sought a prayer to extend time.
8. In urging the court to dismiss the applicants application the respondent relied on the case of Michael Wambua Musau vs Jecinta Waeni & Other (HCCA E009 of 2025) unreported and the case of Nicholas Kiptoo Arap Salat vs IEBC (2014)eKLR.

Analysis and Determination

9. From the above pleadings and submissions, the following issues arise for determination namely; whether the applicant's notice of motion dated 12th August 2025 should be to strike out and secondly whether the applicant has satisfied the conditions for to grant orders for stay of execution of the judgment and/or decree entered on 17th June 2025 in Machakos E1373 of 2024 pending appeal.
10. On the first issue the respondent argued that the applicant misrepresented the judgment date and filed the memorandum of appeal outside the statutory period without leave, rendering the application incompetent.
11. In support of its assertions, the respondent produced as evidence the court's case tracking system extract, a copy of the judgment and decree all showing that judgment was delivered on 17th February 2025, not 17th June 2025 as alleged by the applicant. The applicant did not respond to these assertions, leaving them unchallenged.
12. However, this court notes that the respondent did not provide documentary proof of when the memorandum of appeal was lodged, nor an appeal cause number to confirm its filing. Without such



evidence, the competence of the appeal cannot be conclusively determined at this stage. Further, the validity of the appeal is a matter for the appellate court to determine. This court, sitting on a miscellaneous application, cannot conclusively pronounce on whether the appeal is defective and or fatally defective. Accordingly, the respondent's application dated 18th August 2025 seeking to strike out the applicant's motion is dismissed.

13. On the second issue the applicant seeks stay of execution under Order 42 Rule of the Civil Procedure Rules which requires demonstration of; an arguable appeal with high chances of success; that the appeal will be rendered nugatory if stay is not granted; provision of security for due performance of the decree.
14. The applicant annexed a memorandum of appeal dated 12th August 2025, which references a judgment allegedly delivered on 17th June 2025. Yet, the record clearly shows that judgment was delivered on 17th February 2025.
15. This discrepancy is material. It casts doubt on whether the applicant has properly challenged the correct judgment. A stay of execution cannot issue in respect of a judgment that was never delivered on the date cited.
16. While the applicant expressed willingness to furnish security, the foundation of the application is defective. The court cannot grant stay orders anchored on misrepresented facts. In light of the foregoing;
 - a. The respondent's application dated 18th August 2025 is dismissed.
 - b. The applicant's Notice of Motion dated 12th August 2025 seeking stay of execution is likewise dismissed for want of merit.
 - c. Each of the party shall bear its costs

It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 18TH DAY OF DECEMBER, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant

