

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**HCCA NO. E181 OF 2023**

**MALOBA MASABA JONATHAN LIVINGSTONE T/A MIAMA  
GENERAL MERCHANTS .....  
APPELLANT/RESPONDENT**

**VERSUS**

**FAMILY BANK LIMITED .....  
RESPONDENT/APPLICANT**

**RULING**

1. The respondent/Applicant, Family Bank Limited, filed the Notice of Motion dated 16th September 2025 filed under sections 1A, 1B, 3A and 79G of the Civil Procedure Act, Order 42 and Order 50 Rule 6 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law.

By the said application, the Respondent/Applicant seeks the following substantive orders:

- I. That this Honourable Court be pleased to grant leave to the Respondent/Applicant to file a Memorandum of Cross-Appeal out of time against the judgment delivered on 1st November 2023 in Kakamega CMCC No. 60 of 2017;
- II. That the Memorandum of Cross-Appeal dated 15th September 2025 be deemed as duly filed upon payment of

the requisite court fees; and

III. That the costs of the application be provided for.

2. The application is supported by affidavits sworn on behalf of the Respondent/Applicant and is opposed by the Appellant/Respondent, who filed a replying affidavit together with written submissions and authorities.

### **The Respondent /Applicant's Case**

3. The Respondent/Applicant avers that it was aggrieved by substantial portions of the judgment delivered on 1st November 2023 in Kakamega CMCC No. 60 of 2017, particularly the findings declaring the repossession of Motor Vehicle Registration No. KCF 198K Mitsubishi Canter illegal, null and void, and the consequential injunctive orders restraining the Applicant from dealing with the said motor vehicle.

4. The Applicant states that upon delivery of the judgment, it instructed its advocates on record, Mukele Moni & Company Advocates, to lodge a cross-appeal. It contends that the advocate who had personal conduct of the matter, Ms. Linda Machuma, represented that the cross-appeal had been filed within time. The said advocate later left the firm, and upon internal review of files, it

was discovered that the cross-appeal had not been filed.

5. The Applicant asserts that the failure to file the cross-appeal within time was not deliberate but arose from an honest mistake of counsel, which should not be vested upon an innocent litigant. It relies on the principles enunciated **in Philip Chemwolo & Another v Augustine Kubede, Belinda Murai v Amos Wainaina, and Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others**, urging the Court to determine the matter on its merits.

6. The Applicant further submits that the intended cross-appeal is arguable, raising substantial questions of law on the interpretation of the Movable Property Security Rights Act, 2017, the rights of secured creditors, and the propriety of the trial court's injunctive orders.

### **The Respondent/Appellant's Case**

7. The Appellant/Respondent opposes the application, arguing that it is incompetent, misconceived, and an abuse of the court process.

8. The respondent submitted that a cross-appeal is in substance an appeal and must comply with section 79G of the Civil Procedure Act. The delay of nearly three years is described as inordinate and

unexplained.

9. The Appellant contends that the explanation regarding Ms. Linda Machuma is unsubstantiated, noting that she did not participate in the trial proceedings and that the matter was consistently handled by other advocates who attended court regularly without raising any concern about a missing cross-appeal.

10. The respondent relied in the case of **Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR**, to argue that inaction and indolence do not constitute sufficient cause.

### **Issues for Determination**

11. The Court identifies the following issues for determination:

1. Whether the Applicant has demonstrated good and sufficient cause for extension of time under section 79G of the Civil Procedure Act;
2. Whether the delay is inordinate and inexcusable;
3. Whether the intended cross-appeal is arguable; and
4. Whether granting the application will occasion prejudice to the Appellant/Respondent.

### **Analysis and Determination**

**i. Whether the Applicant has demonstrated good and sufficient cause for extension of time**

12. Section 79G of the Civil Procedure Act grants this Court discretion to extend time where good and sufficient cause is shown. The Applicant attributes the delay to a mistake of counsel.

13. The Court reiterates that while mistakes of counsel are regrettable, they should not invariably be vested upon litigants, as held **in Philip Chemwolo & Another v Augustine Kubede**. There is no evidence that the Applicant deliberately failed to file the cross-appeal or acted in bad faith. The explanation, though not ideal, is plausible. The Court is satisfied that sufficient cause has been demonstrated.

**ii. Whether the delay is inordinate and inexcusable**

14. The delay herein is lengthy. However, the length of delay must be considered together with the explanation given. The Court is persuaded that the delay, though regrettable, has been explained and is not so unreasonable as to defeat the exercise of discretion, guided by the principles in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others** where the court of appeal held that a delay should not be so inordinate or unexplained as to prejudice the other

party or undermine the integrity of the process. Where a party gives a plausible, honest and sufficient explanation, the court should lean towards substantive justice rather than technicality, in line with Article 159(2)(d) of the Constitution.

**iii. Whether the intended cross-appeal is arguable**

15. An arguable appeal is not one that must succeed but one that raises bona fide issues for consideration. The intended cross-appeal raises serious questions on secured lending and statutory interpretation. The Court finds that it is arguable.

**iv. Whether granting the application will occasion prejudice**

16. The Appellant has not demonstrated specific prejudice that cannot be compensated by costs. Conversely, denying the application would permanently shut out the Applicant from the appellate process. The balance of justice favours allowing the application.

**Conclusion**

17. The Court finds that the Respondent/Applicant has met the threshold for extension of time under section 79G of the Civil Procedure Act.

## **Orders**

18. Accordingly, the Court makes the following orders:

1. The Notice of Motion dated 16th September 2025 is allowed;
2. The Respondent/Applicant is granted leave to file and serve its Memorandum of Cross-Appeal out of time within seven (7) days from the date hereof;
3. The Appellant/Respondent shall be at liberty to file supplementary submissions within fourteen (14) days of service; and
4. Costs of the application shall abide the outcome of the appeal.
5. Right of Appeal 40 days Explained.
6. Mention 25<sup>th</sup> March 2026, for further directions.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 20<sup>TH</sup> DAY OF JANUARY, 2026.**

**S. N MBUNGI**

**JUDGE**

**In the presence of:-**

**CA: Ang'onga**

Ms. Karanja holding brief for Ms. MACHARIA.

The Respondent present online.

Mr. Nyikuri for the Appellant present online.

Mr. Masaba Livingstone present online.

