



Purma Holding Ltd v Nyakagwa t/a Fortunes Auctioneers (Miscellaneous Civil Application E093 of 2025) [2026] KEHC 685 (KLR) (28 January 2026) (Ruling)

Neutral citation: [2026] KEHC 685 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CIVIL APPLICATION E093 OF 2025**

**TA ODERA, J
JANUARY 28, 2026**

BETWEEN

PURMA HOLDING LTD PLAINTIFF

AND

**JIMMY OMWENGA NYAKAGWA T/A FORTUNES
AUCTIONEERS DEFENDANT**

RULING

Background

1. Before this Court for determination is the Applicant's Notice of Motion brought pursuant to the provisions of the Auctioneers Rules, 1996, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules, and Articles 50 and 159 of the Constitution of Kenya.

The Applicant seeks the following substantive orders:

1. Spent
 2. A stay of execution of the decision of the Taxing Master delivered on 5th November 2024, and all consequential orders, pending the hearing and determination of the intended reference.
 3. Extension of time to lodge a reference against the decision of the Taxing Master delivered on 5th November 2024.
 4. That the draft reference dated 11th June 2025 be deemed as duly filed upon payment of the requisite court fees.
 5. Costs of the application to abide the outcome of the reference.
2. The application is supported by the affidavit of Ruth Kinyanjui, the Applicant's office administrator, sworn on 17th June 2025, together with the grounds set out on the face of the application.



Applicant's Case

3. The Applicant depones that on 9th June 2025, agents from Foresight Auctioneers visited its premises and proclaimed its goods pursuant to warrants issued in execution of the Taxing Master's decision. It is contended that similar warrants had earlier been issued by Fortune Auctioneers in April 2023 but were subsequently set aside after the Court found that no auctioneering services had been rendered.
4. The Applicant argues that the Respondent failed to demonstrate that he held a valid auctioneering licence permitting him to operate within Nairobi County in 2022, and despite this omission, the trial court condemned the Applicant to pay Kshs. 725,266 for services allegedly not rendered.
5. Following the proclamation, the Applicant's insurers instructed counsel to lodge an appeal. However, the appeal was not filed in time due to inadvertence occasioned by the departure of the advocate who was in conduct of the matter, who failed to hand over pending matters and misfiled the record.
6. The Applicant submitted that the delay was neither deliberate and that the intended appeal is arguable, and that unless stay is granted, the Applicant risks suffering substantial loss through attachment and unjust enrichment of the Respondent.

Respondent's Case

7. The Respondent opposed the application through a replying affidavit sworn on 30th June 2025 and written submissions dated 23rd July 2025.

The Respondent contends that:

8. The taxation proceedings were properly conducted, Applicant has failed to annex the impugned ruling, no affidavit has been sworn by counsel to substantiate allegations of mistake, the delay of over seven months is inordinate and unexplained, board resolution authorising the institution of proceedings has been filed, the Applicant has not demonstrated substantial loss nor offered security and that ranting stay would unjustly deprive the Respondent of the fruits of a lawful decision. The Respondent urged the Court to dismiss the application with costs.

Issues for Determination

9. Having considered the application supporting and replying affidavits, submissions and authorities relied upon, the 1 find that the issues for determination are:
 - a) Whether the Court should extend time for filing a reference against the decision of the Taxing Master delivered on 5th November 2024.
 - c) Whether security for due performance should be ordered.
 - b) Whether a stay of execution should issue pending the determination of the reference.

Analysis And Determination

Issue (a): Extension of Time

10. Section 95 of the *Civil Procedure Act* grants the Court discretionary power to enlarge time where sufficient cause is shown, even where the prescribed period has lapsed.



11. The principles guiding extension of time were succinctly set out by the Supreme Court in *Nicholas Kiptoo Korir Arap Salat v IEBC & 7 Others* [2014] eKLR, including the need for a plausible explanation for delay, absence of undue delay, and consideration of prejudice.
12. In the present case, the impugned ruling was delivered on 5th November 2024, while the present application was filed on 16th June 2025. On the face of it, the delay was for about 7 months. However, the Court notes that the Applicant said it only became aware that no appeal had been lodged upon proclamation of its goods on 9th June 2025, and moved the Court within seven days thereafter.
13. The explanation given is that the delay arose from inadvertence caused by the departure of counsel has been consistently recognised by courts as a factor that may, in appropriate circumstances, be excused, provided there is no evidence of bad faith or intention to overreach. The Court is persuaded by the reasoning in *Philip Chemwolo & Another v Augustine Kubende* [1986] KLR, that blunders of counsel should not necessarily be visited upon a litigant. The law does not define inordinate delay. It is my considered view that 7 months delay is not inordinate considering the reasons advanced for the same.
14. Further, the intended reference raises arguable issues, including whether the Respondent held a valid licence within the relevant jurisdiction and whether services were rendered so as to justify taxation.
15. Article 159 of *the constitution* enjoins courts to exercise their discretion without undue technicalities of procedure. And Section 95 of the *Civil Procedure Act* gives courts discretion to enlarge time. This is proper case for exercising the said discretion. I allow the pray for extension of time.

Issue (b): Stay of Execution

16. The principles governing stay of execution are set out under Order 42 Rule 6(2) of the Civil Procedure Rules. The said rule provides that Applicant must demonstrate:
 1. Substantial loss;
 2. That the application was made without unreasonable delay; and
 3. Willingness to provide security.
17. On substantial loss, the Applicant's goods have already been proclaimed, and execution is imminent. In the case of *Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto* that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.”
18. The purpose of stay of execution pending appeal is to preserve the subject matter and ensure that the reference is not rendered nugatory has been met, while balancing the Respondent's right to the fruits of judgment. The taxed sum of Kshs. 725,266 /= which is substantial. The respondent has not stated whether it has capacity to refund the decretal sum incase the appeal succeeds. Attachment of the Applicant's property before the determination of an arguable reference would occasion substantial loss.
19. On the issue of delay, this has already been dealt with hereinabove.



20. On security, this is important for due performance of the decree at the end of the day and to safeguard respondents from frivolous litigants. Applicant has expressed willingness to abide by any security conditions imposed by the Court. It has not offered a specific proposal on mode of security. The respondent took issue with this. However, the issue of mode of security is at the discretion of the court. In the case of Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd [2019] eKLR, the court observed:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... This the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine.” I have taken into account all the necessary factors and in order to safeguard the interests of both parties, the Court finds it just to order that the applicant deposits ½ of decretal sum in a joint interest earning account to be opened in the joint names of both forms of advocates on record within 30 days from today.

Disposition

21. In the upshot, I proceed to make the following orders:
1. Leave is hereby granted to the Applicant to file a reference out of time against the decision of the Taxing Master delivered on 5th November 2024.
 2. The intended reference be filed within seven (7) days from today.
 3. Stay of execution of the decision of the Taxing Master delivered on 5th November 2024, and all consequential orders, is hereby granted pending the hearing and determination of the reference.
 4. The Applicant shall, within fourteen (30) days, deposit the ½ taxed sum in a joint interest-earning account in the names of both firms of advocates representing the parties herein counsel for the parties herein and in case of default, the stay orders shall automatically lapse.
 5. I award Costs of the application in the sum of Kshs 20,000/= to the respondent. The same be paid within 30 days from today.
 6. The applicant to bear the auctioneers fees assessed at Kshs Auctioneers fees in the sum of Kshs 10,000/= within 30 days from today.



It is so ordered.

**DELIVERED VIRTUALLY VIA TEAMS PLATFORM ON THIS 28TH DAY OF JANUARY 2026
IN THE PRESENCE OF:**

T.A ODERA

JUDGE

28. 1.26

Parties Absent

Court Assistant - Kipchirchir

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