

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEALLATE DIVISION**  
**MISCELLANEOUS CIVIL APPLICATION NO. E298 OF 2025**

**HARRISON MUTUKU MUSEU & ANOTHER .....**

**APPLICANTS**

**VERSUS**

**MARTHA WANJERI NGUGI & ANOTHER .....**

**RESPONDENTS**

**RULING**

1. This ruling is in respect to the application dated 27<sup>th</sup> October 2025 in which the Applicants seeks leave and extension of time to lodge an appeal out of time against the judgment delivered on 26 January 2024 in Milimani CMCC No. E6456 of 2022. The Applicant also seeks stay of execution of the said judgment and decree pending the hearing and determination of the intended appeal.
2. The application is supported by an affidavit sworn by one **Moses Barasa** and is opposed by the Respondent's replying affidavit dated 20<sup>th</sup> November 2025. The application was canvassed by way of written submissions that was filed by both parties.

**Applicants' Case**

3. The Applicants contend that although their insurer issued instructions to lodge an appeal through a letter dated 22<sup>th</sup>

February 2024, the advocate then handling the matter left the firm without filing the appeal or properly handing over the file. The omission was allegedly discovered during an internal review in July 2025, prompting the filing of the present application.

4. They submit that the delay was inadvertent, arose from circumstances beyond their control, and has been sufficiently explained. They further argue that the intended appeal is arguable, particularly on the assessment of damages where they fault the trial court for adopting a multiplicand of Kshs. 25,000 without strict proof of income and for failing to apply the statutory minimum wage.
5. On stay of execution, the Applicants submit that the decretal sum of Kshs. 2,170,385/= is substantial and that execution would occasion substantial loss and render the appeal nugatory. They express willingness to deposit the decretal amount in a joint interest-earning escrow account as security.

### **Respondents' Case**

6. The Respondents oppose the application, arguing that the delay of one year and ten months is inordinate, unexplained, and inexcusable. They contend that the Applicants and their insurer were fully aware of the judgment throughout 2024 and 2025, remained represented by the same firm, and actively participated in related proceedings.

7. They submit that litigants have a duty to follow up their cases and cannot simply blame counsel for their own indolence. They further state that even after allegedly discovering the omission in July 2025, the Applicants waited an additional three months before filing the present application.
8. On the merits of the application, the Respondents argue that the intended appeal is not arguable as the evidence on the deceased's income was clear, uncontroverted, and subjected to cross-examination at trial. They submit that reopening factual findings on appeal amounts to an afterthought.
9. Regarding stay of execution, the Respondents argue that the Applicants have failed to demonstrate substantial loss, have not furnished security, and that granting stay would unjustly deny them the fruits of their judgment, thereby occasioning serious prejudice.

### **Issues for Determination**

10. Having considered the pleadings and submissions, the Court identifies the following issues for determination: -
  - a) Whether the Applicants have demonstrated good and sufficient cause to warrant extension of time to file an appeal out of time.**
  - b) Whether the intended appeal is arguable.**
  - c) Whether the Applicants have satisfied the requirements for stay of execution pending appeal.**

### **Analysis and Determination**

## **Leave and Extension of Time**

11. Section 79G of the Civil Procedure Act provides that an appeal may be admitted out of time if the appellant satisfies the Court that he has good and sufficient cause for not filing the appeal in time.
12. The guiding principles were restated by the Supreme Court in ***County Executive of Kisumu vs. County Government of Kisumu & 8 Others* [2017] eKLR**, where the Court held that extension of time is not a right of a party but is an equitable remedy that is only available to a deserving party at the discretion of the Court. The court added that the delay should be explained to the satisfaction of the Court.
13. Similarly, in ***Leo Sila Mutiso vs. Rose Hellen Wangari* [1999] 2 EA 231**, the Court of Appeal stated that in exercising the discretion to extend time, the court must consider the length of the delay, the reason for the delay, the chances of the appeal succeeding, and the degree of prejudice to the respondent.
14. In the present case, I note that the judgment was delivered on 26<sup>th</sup> January 2024, while the application was filed on 27 October 2025, a delay of approximately one year and ten months. The explanation advanced is that the advocate who handled the matter left the firm without filing the appeal or handing over the file.
15. This Court notes that the Applicants remained represented by the same law firm throughout the period and actively participated in related proceedings. No evidence has been

placed before the Court identifying the advocate who allegedly left, the steps taken to follow up on the appeal, or any correspondence demonstrating diligence.

16. In ***Habo Agencies Ltd vs. Wilfred Odhiambo Musingo [2015] eKLR***, the Court held that it is not enough for a party in litigation to simply blame the advocate on record as parties have a responsibility to follow up their cases even when they are represented by counsel.
17. I further note that even after the alleged discovery of the omission in July 2025, the Applicants waited a further three months before filing the application. This delay remains unexplained.
18. Having regard to the totality of the circumstances of this case, I am not satisfied that the Applicants have demonstrated good and sufficient cause for the inordinate delay.

### **Whether the Intended Appeal is Arguable**

19. It is trite that an arguable appeal need not succeed but must raise bona fide issues deserving judicial consideration.
20. The Respondents submitted that evidence of the deceased's income was adduced at trial and remained uncontroverted. The Applicants did not challenge that evidence through cross-examination or by adducing contrary evidence. In ***Savings and Loan Ltd vs. Susan Wanjiru Muritu HCCC No. 397 of 2002***, the Court observed that a party who failed to challenge evidence at

trial cannot seek to reopen the matter on appeal as an afterthought.

21. This Court is persuaded that the intended appeal largely seeks to reopen factual findings conclusively determined at the trial and does not disclose arguable points of law.

### **Stay of Execution Pending Appeal**

22. The principles governing stay of execution are set out under Order 42 Rule 6 of the Civil Procedure Rules. Under the said provision, an applicant must demonstrate that he will suffer substantial loss if the stay is not granted, that the application has been made without undue delay and that he is ready to provide security for the due performance of the decree.
23. In ***Kenya Shell Ltd vs. Kibiru* [1986] KLR 410**, Platt, JA stated that substantial loss is the cornerstone of both jurisdictions for granting a stay and that without evidence of substantial loss, it is difficult to see why the respondent should be kept out of his money.
24. Similarly, in ***Samvir Trustee Ltd vs. Guardian Bank Ltd* [1997] eKLR**, the Court held that it is not enough to merely put forward assertions of substantial loss and that there must be empirical or documentary evidence to support such contention.”
25. In the present case, the Applicants merely assert that the decretal sum is substantial. No evidence has been tendered to demonstrate inability to recover the sum if paid. I find that even though the Applicant has offered to provide

security, the application cannot be said to have been brought timeously in view of the inordinate delay.

26. The Court is persuaded that the Respondents, as successful litigants, stand to suffer greater prejudice if stay is granted.

### **Conclusion**

27. For the reasons that I have stated in this ruling, I find that the instant application is not merited and I therefore dismiss it with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF FEBRUARY 2026.**

**HON W. A. OKWANY**  
**JUDGE**

**In the presence of**  
**Miss E sese for Applicant**  
**Ms Nyanchera for Respondent**  
**Abdirzak - Court Assistant**