REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

HCCCMISC APPLICATION NO. E035 OF 2025

MILKA AKOTH ODONGO ..... APPLICANT

VERSUS

ELLY OIRO KAMADI ..... RESPONDENT

RULING

Before this court is an application dated 12th June, 2025 brought under Sections 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya ; Order 42 Rule 6(1) & (2), Order 51 Rule 1 of the Civil Procedure Rules, 2021 seeking that the Court grants a temporary stay of execution against the judgment entered on 31st October 2023 in Migori CMCCC No. E086 of 2021, and all consequential orders arising therefrom pending the hearing and determination of the application inter-partes.

That the court be pleased to grant leave to the Applicant to appeal out of time in respect to the ruling delivered on 01/04/2025 in Migori CMCCC No. E086 of 2021

That the court be pleased to grant an order of stay of execution of the judgment and/ or decree delivered on or about 31/01/2023 and all consequential orders arising therefrom pending hearing and determination of the intended appeal.

The Applicant also sought for costs of the application.

The application was based on the grounds on its face and the Supporting affidavit of the Applicant sworn on 25th January 2026.

The Applicant averred that her insurers conducted investigations and established that the claim by the Respondent was fraudulent as the Abstract from Migori Police Station and similarly medical documents

such as the Discharge Summary were a forgery as they had been disowned by their alleged authors. That Dr. Momanyi Peter Morebu also disowned the Medical Report that he was alleged to have authored and which report formed the basis upon which the claim herein was allowed.

The Applicant averred that the claim by the Respondent was fraudulent as it was non-existent and his former Advocate was misled to negotiate and compromise on liability and as such, she was not afforded fair hearing.

That when she filed an application dated 25th January 2024 seeking to set aside the judgment and admit the matter for fresh hearing the trial Magistrate dismissed the application and upheld the judgment.

The Applicant averred that there was a delay in transmitting the appeal instructions by the Defendant to the Advocates on record as she was still consulting and deliberating on her next cause of action.

The Applicant averred that she stands to suffer substantial loss and damage if orders sought are not granted and she will be prejudiced as the judgment obtained by Respondent was out of fraud and misrepresentation of facts both in pleadings and documents filed.

The Applicant contended that the application was made timeously and the Respondent will not be prejudiced in any way beyond the ambit of costs if orders sought are granted.

The application was opposed by the Replying affidavit of the Respondent sworn on 17th September 2025 in which he averred as follows:

THAT the Applicant had failed to demonstrate that there is an arguable appeal that raises triable issues with a high chance of success to enable the court grant the orders sought.

THAT the ruling that the Applicant is seeking to appeal against was delivered way back on 1st April, 2025 and the Applicant is before the Honourable Court almost 6 months later seeking leave to appeal out of time.

THAT the Applicant has not given a good reason or sufficient cause for the delay in filing the Appeal within the time provided for in Section 79G of the Civil Procedure Act.

THAT the Application is an afterthought, an abuse and misuse of the judicial process.

THAT he shall suffer great prejudice if an extension of filing of the intended Appeal is granted.

THAT the Applicant is very much aware of Section 79G of the civil procedure Act which is very clear on filing of appeals from the subordinate courts.

THAT the Appeal is mischievous, contemptuous and an abuse of and misuse of the judicial process.

THAT the annexed draft memorandum of Appeal is fatally defective, incompetent and a nullity ab initio and the grounds therein are not arguable

THAT the stay of execution is only granted if court is satisfied that the Applicant has demonstrated that the appeal or intended appeal is arguable and unless the court grants stay or injunction, the appeal or intended appeal would be rendered nugatory if successful.

THAT the Applicant has not demonstrated that the Appeal or intended Appeal is arguable and therefore the instant Application lacks merit.

THAT the Application itself does not portray any merit for it to be allowed and heard.

THAT the Application is meant to solely just frustrate him from enjoylng the fruits of the fair judgement that was reached by the Honourable Court.

THAT he will be greatly prejudiced if the orders sought herein are granted.

THAT the Applicant's application as drawn and filed unprocedurally and substantially lacks merit and hence has no/ zero chances of success, which fact is well within the Applicant's knowledge.

THAT the Application herein is malicious and has no basis except that the Applicant only wants to deny justice that was out rightly and on merit awarded to me.

THAT should the court allow the application, then same should be on condidon that he is paid half the decretal amount with the other half being deposited in a joint interest earning account in the names of the advocates for the parties herein.

THAT he will be prejudiced greatly if the orders sought herein are granted and the same will contravene the provisions of Article 159 (2) (6) of the constitution that provides that justice shall not be delayed and allowing this application will contravene the express provisions of the constitution.

The court was urged to exercise discretion and dismiss the instant application with costs.

The application was canvassed by written submissions of the parties.

The Applicant in her submissions dated 13th October 2025 submitted that she was relying on the grounds in the application dated 12th June, 2025 and her Supporting Affidavit and reiterated the averment therein.

It was submitted that the principles upon which the Applicant's application ought to be weighed against are;

Whether there was inordinate delay on the part of the Applicant

The Applicant submitted that the ruling on the application dated 25/01/2024 to set aside the consent judgment on the basis of fraud was delivered on the 01st April 2025 and the Applicant had a duration of 14 days to appeal it. That the Applicant took time to exhaustively deliberate and consult on her next cause of action in regards to the ruling. That by the time she had resorted to lodge an appeal against the said ruling, the period to lodge an appeal had lapsed. That she instructed her advocates on record the firm of ADVOCATES LLP who moved with speed and filed this application on the 12th June, 2025 seeking leave to file the appeal out of time. She submitted that the application was made exactly 42 days after the expiry of the time stipulated to lodge the Appeal.

On whether there was inordinate delay on the part of the Applicant the authority of Mwangi s. Kimenyi vs Artonev Genera & Another [20141 KEHC4220 (KLR) was cited where Hon Justice F Gikonyo in explaining inordinate delay under paragraph 14 stated that;

> **"inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable"**

It was submitted that in this case the delay was excusable as the Applicant was still consulting on her next cause of action whether to satisfy the consent judgment or appeal the ruling. When she had resorted to appeal the ruling, the stipulated duration to lodge an appeal had lapsed. That the Applicant was only late in filing the Appeal by 42 days, a period which is not long to be deemed inordinate.

The Applicant also relied on the authority of AGIP (KENYA) LIMITED v HIGHLANDS TYRES LIMITED [2001/ KLR 630 where the court found out a period of 8 months did not amount to inordinate delay and urged the Court to find that the Applicant's delay in filing the Appeal on time is excusable and that it isn't inordinate as she moved with speed to this court via the instant application.

On whether the intended Appeal is arguable with a higher chance of success, the Applicant submitted that the annexed draft Memorandum of Appeal contains 6 grounds of appeal with her major grounds of contestation being that the trial magistrate failed to find that the consent in the lower court file were recorded on the basis of

misrepresentation and fraud. That the only way that this intended appeal can be heard and determined on merit is by this court allowing the Applicant's prayer to file her appeal out of time.

That by granting leave to appeal out of time the court will be protecting the Applicant's constitutional right of access to justice as provided for under Article 48 of the Constitution of Kenya 2010. Reliance was also placed on the ruling in the case of Paul Wanjohi Mathenge v Duncan Gichane Mathenge [20131 eKLR where Otieno Odek, J.A allowed the Applicant's application to file his intended Appeal out of time despite not attaching his draft Memorandum of Appeal and stated in paragraph 16 that:

“I find that the demands of justice will be better met by allowing the application so as to allow the parties to ventilate their respective positions on merit. "

On whether the Respondent will suffer prejudice it was submitted that if the court issues a stay of execution of the Judgment/ Decree pending the hearing and determination of the Application seeking leave to file the appeal out of time the Respondent will not suffer prejudice. The court was urged to exercise its power under the overriding objective principle and allow for the just, expeditious, proportionate and affordable resolution of this matter by exercising its discretion to stay execution of the said judgment.

It was further submitted that the mistake is curable under Article 159 (2)(d) of the Constitution of Kenya 2010 regardless of any short comings by the Applicant, this court is obliged by the Rules of Natural Justice, and in particular, by Article 50 of the Constitution of Kenya, 2010 to hear and determine each case on its merit and that no litigant

should be driven from the seat of justice without being heard. The holding in the case of MARTHA WANGAR/ KARUA —VS- IEBCNyeri Civil Appeal No.l of2017 was cited where the Court of Appeal held as follows:

> **"The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be."**

The Applicant urged the court to allow the application as prayed and should not be bound by technicalities of procedure but instead be guided by the quest for justice as prescribed under Article 159(2) (d) of the Constitution of Kenya 2010 and the cherished cannons of natural law.

The Respondent in submissions dated 26th September 2025 submitted that he shall be relying on his Replying Affidavit filed herewith together with the instant submissions.

The Respondent's counsel identified issues for determination in the subject application as follows:

Whether stay of execution should be granted?

Whether the Applicant should be granted leave to appeal?

On whether stay of execution should be granted the Respondent submitted that the Applicant had not adduced any evidence whatsoever on how it will suffer substantial loss in the event stay is not granted and of how it will suffer irreparable loss in the event that stay is not granted.

It was submitted that it was not enough for the Applicant to argue that she is bound to suffer substantial loss in the event stay is not granted. That the Applicant is to demonstrate the nature of the loss and how it is to suffer damages, if any.

The Respondent cited the authority in the case of KENYA SHELL LTD VERSUS KIBIRU [19861 KLR 410 where Platt, Ag. JA at pages 416 expressed himself as follows;

> "**Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money"**. (emphasis supplied)

Moreover, the Respondent further submitted that the Applicant should show the damage it would suffer if the order for stay is not granted since granting stay would be denying a successful litigant of the fruits of his judgment. That the Applicant has not given to the Court sufficient cause to enable it to exercise its discretion in granting the order of stay.

The Respondent also submitted that the Court has a duty to balance the rights of both parties. It follows therefore that it is the discretion of the court to determine the whether it should grant a stay of execution or not. The Respondent argued that on the basis of his submissions, supported well with the authority cited, it is clear that the Applicant's instant Application is clearly devoid of merit the same should therefore be dismissed with costs to the Respondent.

On whether the Applicant should be granted leave to Appeal out of time, the Respondent submitted that the court's discretion to grant leave to appeal out of time is guided by Section 79G of the Civil Procedure Act, which provides:

> "Every Appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order."

The Respondent drew the court's attention to the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 Others (2014) eKLR, where the Supreme Court laid down the principles that guide courts when considering applications for leave to appeal out of time as hereunder;

a) The length of delay
b) The reason for the delay
c) The degree of prejudice to the respondent
d) The prospects of the Appeal succeeding and
e) The Public interest in the matter.

It was the Respondent's contention that the onus is on the Applicant to satisfy the Court that it should grant leave to appeal the decision of the trial court. The Respondent submitted that the instant Application is an abuse of the Court process since the judgement that the Applicant seeks to stay was delivered way back on 31st January, 2023 approximately two and a half years ago. That the delay on the part of

the Applicant is inordinate and the Applicant has not provided enough evidence as to why he is seeking stay two and half years later.

That the first issue for the Court's determination is whether the Applicant herein has established an arguable Appeal. An arguable Appeal is usually one that raises bonafide issue for determination.

That in granting leave to appeal out of time, the court considers whether the appeal is arguable and whether there is a compelling reason to grant leave. The Respondent argued that the Applicant herein had not provided a compelling reason and the application seeking leave to appeal is not as a matter of right but a discretion of the court, which must be exercised judiciously.

It was the Respondent’s submissions that the intended Memorandum of Appeal and the intended appeal does not raise pertinent issues warranting the leave to appeal. The court was invited to find that the appeal cannot be said to be arguable.

It was further submitted that the Applicant had not established a prima facie case and had not demonstrated the prejudice to be suffered in the event that the leave to appeal out of time is not granted. That the Applicant had not stated the Bonafide issues that he is to raise in the appeal as issues for determination.

Reliance was placed on the case of Re Estate of Bare Adan Mohamed (Deceased) (Civil Appeal E013 of 2023) [20241 KEHC 3416 (KLR) (15 March 2024) (Ruling) where the court quoted the case of Sila Mutiso v Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997 (unreported) where the Court stated:

> “**The principles upon which the court should exercise discretion and grant leave to appeal out of time are now settled thus; the court should take intoaccount the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted.”**

Moreover, the Respondent submitted that he will suffer prejudice in the event the application herein is granted as the Applicant had not given sufficient cause to enable the court exercise its discretion in granting the leave.

The Respondent also contended that the Court has a duty to balance the rights of both parties. On the basis of the submissions, supported with the authorities cited, the Respondent submitted that it was clear that the Applicant's application was devoid of merit and the same should therefore be dismissed with costs to the Respondent.

ANALYSIS AND DETERMINATION

Having considered the application, the supporting affidavit, the Replying Affidavit in opposition to the application and rival submissions the issues arising for determination are:

1. Whether leave to appeal out of time should be granted.
2. Whether a stay of execution pending appeal is merited.

Section 79G of the ***Civil Procedure Act*** provides that:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree

> ***or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:***
>
> ***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.***

In the case of Mbukoni Services Limited and Nother Vs Mutinda Reuben Nzili & 3 Others H. C at Machakos Misc. App N0 E077 of 2021 Odunga J (as he then was) held:

"**It is clear therefore that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion…… must be fixed principles and not private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so…"**

Further, in **Leo Sila Mutiso vs. Helen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231** the Court of Appeal set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant

In the case of **Thuita Mwangi vs. Kenya Airways Ltd [2003] eKLR,** the Court explained that:

> **"The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered."**

The Supreme Court in the case of **Nicholas Kiptoo Arap Salat v IEBC & 7 Others (2014)** also set out the guiding principles for grant of leave to appeal out of time as follows:

a) Length of delay
b) Reason for delay
c) Chances of the appeal succeeding / arguability
d) Degree of prejudice to the respondent
e) Public interest

The ruling which the Applicant seeks to appeal against was delivered on 1st April 2025**.** The Applicant therefore had the right to appeal within 30 days from the date of ruling which would have been 1st May 2025. The application for leave to appeal out of time was filed on 12th June 2025. This was approximately 42 days outside the 30-day limit.

In consideration that the Kenyan courts have excused longer periods of delay than the instant one the delay is herein is not inordinate**.**

In the case of Agip (K) Ltd v Highlands Tyres Ltd –the court excused a delay of 8 months which was much longer save that an explanation existed to the satisfaction of the court.

The Applicant explained that the delay was as a result of consultations on the next course of action and delay by the insurer in giving instructions.

Although these reasons are not compelling standing alone, courts have taken a liberal approach where delay is short and capable of being cured by costs.

In **Mbukoni Services Limited** (supra) it was held that:

“The broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline.

3. **Where it is not shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, casesought as far as possible be determined on their merits rather than on technicalities of procedure. In this case, I did not hear the Respondents contend that if the application is allowed they will suffer such prejudice that cannot be compensated by an award of costs. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See Waljee’s (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.”**

The explanation given by the Applicant though weak is acceptable, given the short duration.

Whether the intended appeal is arguable **t**he draft memorandum raises key grounds to the effect that the trial court erred by failing to interrogate serious allegations of fraud and forgery in the police abstract and medical documents and that the consent and judgment may have been procured through misrepresentation. Fraud is a weighty issue in law. Even one bona fide ground suffices for arguability. The intended appeal is therefore arguable**,** and the merits of the same can only be appreciated wholly upon the intended appeal being mounted.

The Respondent cited prejudice from delayed enjoyment of judgment.

However, it did not come out clearly that the alleged prejudice could not be compensated by costs. Anticipated prejudice can easily be balanced with award of costs. Allegations of fraud tilt the balance towards allowing ventilation of the appeal. This court finds that prejudice is manageable and cannot be used to deny the Applicant the right of appeal. It is therefore in the interest of justice and public interest that the application for leave to appeal out of time be granted. The Applicant is therefore granted leave to file appeal out of time. Let the Memorandum of Appeal be filed and served within 14 days from the date hereof. In consideration that the appeal is yet to be filed this court is of the view that the application for stay of execution should be made and ventilated in the appeal once filed.

Costs of this application shall abide the outcome of the intended appeal.

Ruling herein to apply in HCCMISC E034 of 2025 Milka Akoth Odongo versus Makarios Karivizwa Aruda

DELIVERED, DATED and **SIGNED** at **MIGORI** this **12th** day of **February, 2026.**

A. ONGINJO
JUDGE