REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION NO. E157 OF 2024

ANDREW SIMIYU ………………………………………………… 1ST APPLICANT

MANG'ALA SECONDARY SCHOOL …………………….. 2ND APPLICANT

VERSUS

FRANKLINE SWAKA SHIKAMI ……………………………… RESPONDENT

RULING

1. By a Notice of Motion dated 22/10/2025, the Applicant sought the following orders: -

   1. *SPENT*
   2. *THAT* the Honourable Court be pleased to grant leave to Mukuna Eshuchi & Associates to come on record for the Applicants post judgment.
   3. *SPENT*

COPY

4. THAT the Honourable Court be pleased to extend the time within which to file and serve the Memorandum of Appeal.

5. THAT there be a stay of execution of the Judgment delivered on 10th September in Kakamega MCCC No. 96 of 2019, Frankline Swaka Shikami v. Andrew Simiyu & Mang'ala Secondary School, together with the resultant decree and all consequential orders pending the hearing and determination of the intended Appeal.

6. THAT the Applicants be granted leave to file and lodge the Memorandum and Record of Appeal out of time.

7. THAT prayers 1, 2 and 3 above be issued ex parte and in the interim pending hearing and determination of this application.

8. THAT costs of this Application abide the outcome of the Appeal."

2. The application is supported by an affidavit sworn by Christabel Wanyama, the School Principal, who avers that their previous Advocate never notified them of the impugned Judgement and that they only came to learn of

its existence when Auctioneers visited the School in October 2024 and served them with a Proclamation Notice. She deponed that, had their previous Advocate updated them immediately upon delivery of the Judgement, the Applicants would have filed an appeal, as they were aggrieved by the Judgement.

3. The Applicant's Principal further deposed that the intended appeal raises triable and arguable issues and that if the orders sought are not granted, the Respondent would proceed to execute. It is her position that since the execution comprises school property, execution would cripple the school's operations and violate the learners' right to education.

4. In response, the Respondent filed an affidavit dated 6/11/2025 in which he deponed that the Applicant was aware of the existence of the impugned Judgement as his Advocate on record was in communication with the Applicant, with the most recent communication being on 23rd September 2025. For the reason that the Judgement was delivered more than one and a half years ago, the Respondent depones that the Applicant has not tendered a reasonable cause as to why it took too long to file an

appeal. The Respondent further asserted that the Advocate on record for the Applicant is a public institution and is always defended by the Office of the Attorney General.

5. The application was canvassed through written submissions, which the court has duly considered.

Analysis and Determination

6. Based on the application and the parties' submissions, there are two issues for determination:-

    (a) Whether the firm of Mukuna Eshuchi & Associates, should be granted leave to come on record post judgement.

    (b) Whether the application for stay of execution has merit.

7. The first issue that the court needs to deal with is whether the firm of Mukuna Eshuchi & Associates should be allowed to come on record for the Applicant post judgement. This should be determined "*before the court can go into the merits of the first application*".

8. The Respondent contends that the 2nd Applicant, being a government institution, should be represented by the Attorney General and that there is no consent between

COPY

the current law firm and the Attorney General's office allowing them to come on record.

9. Under Order 9 Rule 9 of the Civil Procedure Rules, an Advocate intending to come on record on behalf of a party after judgement has been delivered has to obtain the leave of the court upon an application with notice to the parties, or upon a consent being filed between the outgoing Advocate and the proposed incoming Advocate or the party.

10. The intention of the Order 9 Rule 9 was to safeguard the costs of an Advocate in the event a client decides to change Advocates post judgement. All that is necessary is for the new Advocate to file and serve an application for leave to come on record, or to file a consent order.

11. Regarding the submissions that only the Attorney General is mandated to act for the Applicant, as the 2nd Applicant is a public school, Article 156 (4) provides:-

    "The Attorney-General—

    (a) is the principal legal adviser to the Government;

    (b) shall represent the national government in court or in any other legal proceedings to which the

COPY

national government is a party, other than criminal proceedings; and

(c)shall perform any other functions conferred on the office by an Act of Parliament or by the President.”

12. Additionally, Section 25 (1) and (2) of the Office of the Attorney General Act provides:-

“(1) There shall be such officers and other members of staff of the Office as the Attorney-General considers necessary for the proper and efficient discharge of the functions of the Office.

(2) The Attorney-General may procure the services of such other persons as may be reasonably necessary for the purposes of assisting the Attorney-General in the performance of the functions of the Attorney-General.”

13. Consequently, I find that there is no law that expressly proscribes the appointment of a private law firm to act on behalf of the Attorney General or for an entity such as a public Secondary School, which is normally sued through its Board of Management and which Board has the

mandate to manage the school as an agent of the National Government. The Board of Management, by virtue of Section 53 of the Basic Education Act, therefore, has the power to appoint an Advocate to defend its interests.

14. In determining whether to grant an Applicant leave to file an appeal out of time based on Section 199 of the Civil Procedure Act, which requires an applicant to show "good and sufficient cause", the court needs to consider four factors:-

    (a) The length of the delay.

    (b) The reasons for the delay.

    (c) The chances of the appeal succeeding.

    (d) The degree of prejudice to the Respondent if the application is allowed. See **Thuita Mwangi v. Kenya Airways Limited [2002] KECA 100 (KLR).**

15. In the present case, Judgement was delivered on 10/9/2024 which is more than a year ago. The Applicant attributes the delay in filing the appeal to the failure by its Advocate then on record and to the subsequent bureaucracies attendant to the administration of a public institution.

16. The 2nd Applicant's claim that its Advocate, then on record, failed them can be deduced from the fact that the Applicants have retained the services of a new law firm. However, the question is whether the delay of one (1) year has been adequately explained.

17. Despite the Respondent averring that the Applicant school was aware of the Judgement and decree and maintaining that the Advocate on record was in communication with the Applicants as recently as 22/9/2025, the Respondent did not tender any evidence to disprove the Applicant's claim. In the premises, the court is left to rely on the Applicants' averment that it first became aware of the Judgement and Decree in October 2025 when it was served with the Proclamation Notice by the Auctioneers. There is nothing on the record to suggest that the Applicant was aware of the Judgement and Decree earlier than October 2025. In the absence of awareness of a judgment and decree, the Applicant could not take any step towards filing an appeal.

18. The court finds that the Applicants' right of appeal was impeded by its Counsel then on record, who failed to communicate to them timeously. In **Philip Chemwolo &**

Another v. Augustine Kubede [1986] KLR 495, the Court of Appeal stated that whereas blunders would be made and will continue to be made by Advocates, the duty of the court is to correct them where necessary to ensure justice is done. This is a scenario in which the Counsel assigned by the Government to defend a public institution failed to discharge his duty. The mistakes of the said Counsel who failed to notify the Applicants of the hearing, progress or outcome of the case, should not be visited upon the Applicants.

19. For the above reason, I do find that the delay, albeit excessive, was adequately explained, is not inordinate and is not attributable to the Applicants' indolence or deliberate inaction.

20. Regarding the chances of appeal succeeding, a cursory look at the judgement and the grounds of appeal shows that the appeal has a reasonable chance of succeeding at the very least on the issue of quantum. The appeal is therefore arguable.

21. With respect to the question whether the Respondent will suffer prejudice, it is noted that the decree being appealed against is a money decree. It has been severally held by

COPY

the courts that no prejudice is so great that it cannot be compensated by costs should the appeal fail – See **Factory Guards Ltd v. Abel Vundi Kitungi [2014] KEHC 879 (KLR)** and **Richard Ngetich & Another v. Francis Vozena Kidiga [2014] KEHC 74 (KLR)**. Any prejudice likely to be suffered by the Respondent in this case would be adequately compensated by costs and interest.

22. Having said that, the other issue for the court to consider is whether the Applicants have satisfied the conditions for grant of stay of execution.

23. The principles governing grant of stay of execution as laid down in Order 42 Rule 6 (2) of the Civil Procedure Rules are:-

    (a) The applicant must demonstrate that substantial loss may result unless the order is made.

    (b) The application must be made without unreasonable delay.

    (c) The applicant must provide such security as the court may order.

COPY

24. Substantial loss was explained in the case of **James Wangalwa & Another v. Agnes Nalika Cheseto [2012] KEHC 1094 (KLR)** where the court held:-

"…Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

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, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867,* and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the

Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

> ***"…the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."***

25. As submitted by the Applicants, the 2nd Applicant, being a public institution, stands to suffer substantial loss in the event execution were to proceed. Execution would result in the attachment of school property, which would disrupt learning and damage the school's reputation. The disruption of studies for young learners, the loss of reputation for a public school, and the irreparable nature of these losses are not quantifiable. In **Tropical Commodities Suppliers Ltd & others v. International Credit Bank Ltd (in liquidation) [2004] EA 331**, the court held that "***substantial loss is a qualitative concept referring to any loss of real worth or value***."

COPY

26. Certainly, the loss of reputation and disruption of learners would render the appeal nugatory as the said loss cannot be restored in the event of a successful appeal.

27. The court has already established that the application was filed promptly upon the Applicants being made aware of the existence of the judgement through service of proclamation. The Applicants have also demonstrated that they have an arguable appeal.

28. Regarding security, the 2nd Applicant's Principal did not offer security but deponed that the Applicant is ready to comply with any terms or conditions issued by the court.

29. In respect to the prayer for stay of execution, the Applicants have met the conditions, but even if they had not, this court is guided by the holding in **John Gachanja Mundia v. Francis Mwuriira Alias Francis Muthika & Another [2016] KEHC 7140 (KLR)** where the court pronounced itself thus:-

"There is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of

COPY

substantive justice in the Constitution as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief."

30. Taking into account the entire circumstances of this case, the court is of the view that substantive justice can only be done if the application is allowed. I find that the application has merit. It is therefore allowed and the following orders made:-

    (a) The firm of Mukuna Esuchi & Associates are granted leave to come on record.

    (b) The Applicants are granted leave to file appeal out of time which appeal should be filed within 30 days.

    (c) Pending the hearing and determination of the intended appeal, there shall be stay of execution subject to the 2nd Applicant depositing half the decretal sum being Kshs. 100,000/= in court within 30 days, and in default, the Respondent shall be at liberty to execute for the entire decretal sum.

    (d) The Respondent shall have the costs of this application assessed at Ksh. 15,000/=.

31. Those are the orders of the court.

COPY

Dated, signed and delivered at Kakamega, this 19th day of February 2026.

A. C. BETT
JUDGE

In the presence of:

Mr Ngania holding brief for Mr Okumu for the Applicants

No appearance for the Respondent

Court Assistant: Polycap

COPY