

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(COMMERCIAL AND ADMIRALTY DIVISION)

MISC. APPLICATION NO E047 OF 2025

CORRUGATED IRON SHEETS LTD.....APPLICANT

VERSUS

WAJEEHI LIMITED

RESPONDENT

RULING

1. The court below dismissed the applicant's suit in its entirety on **8th May 2025**. Being aggrieved with the said decision, the applicant filed the notice of motion dated **12th June 2024** (sic!) vide which it sought the following orders:
 - a. Spent;
 - b. Spent;
 - c. That the applicant be granted leave to appeal out of time against the whole of the judgment and the decree of the Honourable Emily M Mwamuye, Senior Resident Magistrate (SRM) in **Mombasa Chief Magistrate's Court Civil Case No. E205 of 2023**, pending the hearing and determination of this application interpartes;
 - d. Spent;
 - e. That upon interpartes hearing, there be a stay of execution of the judgment and decree of the honorable Emily M Mwamuye, Senior Resident Magistrate (SRM) in **Mombasa Chief**

Magistrate's Court Civil Case No. E205 of 2023, pending the hearing and determination of the appeal; and

- f. That the costs of the application be in the cause.
2. In the affidavit in support of the application, sworn by **Kirtan Patel** on **18th June 2025**, it was averred that there was a delay on the part of the applicant in giving instructions to the advocates to file an appeal and that by the time it was done, the time within which the appeal could be filed had lapsed. Mr. Patel deposed that they are dissatisfied with the judgment of the court below. In his view, the intended appeal is meritorious, arguable, and has good chances of success.
 3. Mr. Patel prayed that this court be pleased to stay the execution of the judgment pending the hearing and determination of the appeal. He averred that there was a clear and present risk of execution. The deponent stated that the applicant had been served with warrants vide which vacant possession was sought. If the execution proceeded, the appeal would be rendered nugatory, and the applicant would suffer irremediable loss and damages.
 4. The respondent entered appearance through the firm of **Ngige Aluvale Advocates LLP** and filed grounds of opposition dated **23rd October 2025**, in which it was contended that the application was filed after an inordinate delay, as 42 days lapsed between the date of delivery of the impugned judgment and the filing of the instant application. Further, there was no explanation given for the delay, and the application was an afterthought.

5. The matter was canvassed by way of written submissions. I have considered the parties' respective submissions very carefully.
6. The applicant seeks an extension of time within which to file an appeal. To determine whether I should do so, I will first examine a number of authorities.
7. In the case of *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR), it was held that:

“Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; Whether there will be any prejudice suffered by the respondents if the extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
8. Similarly, *Paul Musili Wambua v Attorney General & 2 Others* [2015] eKLR, the Court of Appeal, in considering an application for extension

of time and leave to file the Notice of Appeal out of time, stated the following:

“... it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal, the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are: the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted.”

9. Applying the above decisions to this matter, I note the delay in this case is 12 days. In my view, the delay is not inordinate. The applicant has explained the delay. The reason given is that time lapsed before the director could instruct and advocate to represent the applicant. Although the explanation is not as detailed or as persuasive as one would expect, this Court is inclined to give the applicant the benefit of the doubt, in the interest of justice. From my perusal of the memorandum of appeal, it would appear to me that the appeal is arguable; certainly, it isn't idle. I am not persuaded that the respondent will be prejudiced if the time within which to file an appeal is extended.

10. Having found as above, I must now determine if a stay of execution pending the hearing and determination of the appeal should issue.

11. Under Order 42 Rule 6 of the Civil Procedure Rules and application for a stay pending appeal may be allowed where the following conditions have been met by the applicant:

- a. The appellant will suffer substantial loss unless a stay is granted;
- b. The appeal was filed without undue delay;
- c. Security for the due performance of the decree or order has been given.

12. Stay of execution is intended to preserve the subject matter of the appeal pending determination of the appeal. In the case of **RWW v EKW [2019] KEHC 6523 (KLR)**, it was held that:

“8. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded, and the appeal, if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

13. I have perused the judgment of the trial court. The conclusion that the court below made, which I now reproduce, was that:

“18. Therefore, it is the humble opinion of this court that invoices and LPOs alone do not prove delivery or receipt of the goods. The invoices were not supported by any delivery note or any note to show receipt of the goods stated therein. As such, the plaintiff has failed to prove on a balance of probability the extent to which the defendant herein is liable.

19. As such, the suit dated 21st December 2022 is hereby dismissed.”

14. What the court did, in a nutshell, was to dismiss the suit filed by the appellant. As is apparent, the court made no order capable of being stayed, i.e., a positive order. It is a trite law that negative orders cannot be stayed. There are plethora of decisions of the courts of record that state this position.

15. In the case of ***Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)*** [2015] eKLR, it was held that:

“An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a

positive order – either an order that has not been complied with or has partly been complied with.”

- 16.** There is no positive order in this case. Not even in regard to costs; the court below ordered that the parties bear their own costs. There is therefore nothing to stay.
- 17.** The applicant succeeds in part. I allow the prayer for leave to appeal out of time. The prayer for a stay pending appeal is denied.
- 18.** The orders that therefore commend themselves to me are the following:
- a.** I grant the applicant leave to file an appeal out of time. The appeal is to be filed within 14 days of the date hereof; and
 - b.** I decline to order a stay of execution of the impugned judgment, as there is in fact nothing to stay. Consequently, subsisting orders are hereby discharged.
- 19.** It is so ordered.

Dated and signed in Mombasa, this **4th day of March 2026**. Delivered virtually through **Microsoft TEAMS**.

Gregory Mutai
JUDGE

In the presence of:

Mr. Oyas, holding brief for Mr. Obonyo, for the Applicant;
Ms. Matara, holding brief for Ms. Wanjiru Ngige, for the Respondent;
and
Ms. Bancy – Court Assistant.

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