

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**MISCELLANEOUS APPLICATION NO. E009 OF 2025**

**(CORAM: HON. CHARLES M. KARIUKI – J)**

**STEPHANIE UMMA SMITH. ....1<sup>ST</sup> DEFENDANT/APPLICANT**

**VERSUS**

**JOHN WAWERU KIGERA.....PLAINTIFF/RESPONDENT**

**ABDULGANI TRADING CO. LTD. ....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JUDGMENT**

**10/03/2026**

**INTRODUCTION**

- 1) Before Court is a Notice of Motion dated 17th February 2025 filed by the 1st Defendant/Applicant, Stephanie Umma Smith, brought under Order 21 Rule 1, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 4 of the Civil Procedure Rules, as well as Sections 3, 3A and 79G of the Civil Procedure Act.
- 2) The Applicant seeks several substantive orders, namely: stay of execution of the judgment and decree delivered on 31st October 2024 in Narok CMCC No. 166 of 2018 pending the hearing and determination of the application inter partes; stay of execution pending the hearing and determination of the intended appeal; enlargement of time to lodge an appeal against the said judgment; and that costs of the application be in the cause.

- 3) The application is premised on the grounds that judgment, which had initially been scheduled for delivery on 24th October 2024, was instead delivered on 31st October 2024 without prior notice to the Applicant or her advocates. It is contended that the firm previously on record for the Applicant was not served with a Notice of Entry of Judgment and that the Applicant only became aware of the delivery of judgment upon perusal of the Court's Case Tracking System (CTS). By that time, the statutory period for lodging an appeal had lapsed.
- 4) The Applicant avers that she is dissatisfied with the judgment and intends to challenge the same on appeal, contending that the intended appeal raises serious and weighty legal issues with high chances of success. She maintains that the appeal is arguable and not frivolous. It is further asserted that unless stay is granted and time enlarged, the intended appeal will be rendered nugatory, and the Applicant will suffer substantial and irreparable loss.
- 5) The Applicant states that she has applied for certified copies of typed proceedings and that the delay in filing the appeal was neither deliberate nor inordinate but was occasioned by lack of notice of the delivery of judgment. She expresses willingness to abide by any terms or conditions that the Court may impose, including provision of security, and urges the Court to exercise its discretion in the interests of justice and fairness, contending that no prejudice will be occasioned to the Respondents if the orders sought are granted.
- 6) The application is supported by the affidavit of Daniel Khaemba, sworn on 17th February 2025, and the annexures thereto.

### **The Supporting Affidavit**

- 7) The application is supported by the affidavit of Daniel Khaemba, sworn on 17th February 2025. The deponent describes himself as a legal officer of the Applicant's insurer and states that he is competent to swear the affidavit on behalf of the 1st Defendant/Applicant, Stephanie Umma Smith.
- 8) He deposes that judgment in Narok CMCC No. 166 of 2018 had initially been scheduled for delivery on 24th October 2024, but was not delivered on that date as the court did not sit. He avers that the judgment was subsequently delivered on 31st October 2024 without prior notice to the Applicant or her advocates. According to the deponent, the firm of Nyachiro Nyagaka & Company Advocates, then on record for the Applicant, was not served with a Notice of Entry of Judgment, and only became aware of the delivery of judgment upon later checking the Court's Case Tracking System (CTS).
- 9) The deponent states that upon learning of the judgment, the Applicant became aggrieved and instructed her advocates to lodge an appeal to the High Court. He annexes a draft Memorandum of Appeal (marked DK1) and explains that by the time instructions were issued, the statutory period for filing the appeal had already lapsed, hence the need for enlargement of time.
- 10) It is further deposed that in the absence of a stay order, the Plaintiff/Respondent, John Waweru Kigera, may proceed with execution, which would occasion the Applicant irreparable loss and render the intended appeal nugatory. The deponent states that he has been advised by counsel that the intended appeal has overwhelming chances of success.
- 11) He adds that the Applicant has since applied for certified copies of the proceedings, is willing to abide by any conditions that the Court may impose, and

has brought the application in good faith and without undue delay. Finally, he asserts that the Respondent will not suffer prejudice if the orders sought are granted.

### **The Replying Affidavit**

- 12) The application is opposed through a replying affidavit sworn by Julia Kariuki, learned counsel for the Plaintiff/Respondent, John Waweru Kigera. She deposes that she is duly seized of the matter and competent to swear the affidavit on behalf of the Respondent in opposition to the Notice of Motion dated 17th February 2025.
- 13) Counsel states that she has read and understood the application seeking leave to file an appeal out of time and stay of execution of the judgment delivered in Narok CMCC No. 166 of 2018, and contends that the application lacks merit and is intended to frustrate the Respondent from enjoying the fruits of his judgment.
- 14) She deposes that the Applicant has not offered any sufficient or reasonable explanation for the delay of nearly four months in filing the appeal. According to her, the claim that the Applicant only became aware of the delivery of judgment at a later date is untrue. She avers that the Applicant was notified of the delivery of judgment as early as 29th November 2024 through a letter dated 19th November 2024, which was sent via email, and annexes copies of the email correspondence marked JK.1. She further states that a reminder demanding settlement of the decretal sum was sent on 19th December 2024 (annexure JK.2). It is her deposition that these communications were sent to the Applicant's official email address, which is the same email used by the Applicant to serve the present application (annexure JK.3).

15) The deponent further avers that throughout the proceedings in the lower court, the Applicant persistently delayed the matter by seeking numerous adjournments on what she terms frivolous grounds. She annexes court attendance sheets (JK.4) and a Case Tracking System (CTS) printout (JK.5) to demonstrate that the suit, filed in July 2018, took over six years to conclude, largely due to the Applicant's conduct.

16) She contends that the delay in filing the appeal is inordinate and that litigation must come to an end. In her view, granting leave to appeal out of time would undermine the principle of finality in litigation. She further deposes that the intended appeal has no chances of success, stating that the trial court reasonably apportioned liability at 80:20 despite the Applicant not calling any witnesses, and that the award of general damages was modest and commensurate with the injuries suffered.

17) Counsel also avers that the Applicant has not demonstrated diligence in pursuing the intended appeal, alleging that no steps have been taken to institute the appeal and that there has been no demonstrated willingness to provide security for due performance of the decree.

18) In the alternative, she prays that should the Court be inclined to grant any relief, it should order that half of the decretal sum be released to the Respondent, and the balance be deposited in court as security.

**Directions of the court**

19) The application was canvassed by way of written submissions.

**The applicant's submissions.**

- 20) The 1st Defendant/Applicant, Stephanie Umma Smith, filed written submissions in support of the Notice of Motion dated 17th February 2025 seeking, inter alia, stay of execution of the judgment delivered on 31st October 2024, enlargement of time to lodge an appeal, and stay pending the hearing and determination of the intended appeal.
- 21) Counsel identified three issues for determination: whether time to file an appeal should be enlarged; whether the Applicant has satisfied the conditions for grant of stay of execution pending appeal; and whether the intended appeal raises arguable triable issues.
- 22) On enlargement of time, it was submitted that although the 2nd Defendant had earlier filed Narok High Court Civil Appeal No. E035 of 2024, challenging the lower court's judgment, the said appeal was never served upon the Applicant. The Applicant subsequently sought and obtained leave to file an appeal out of time and lodged Civil Appeal No. E011 of 2025. Counsel contended that the delay was not inordinate and was sufficiently explained. It was further argued that, in the interests of justice and in view of the already pending appeals, the Court ought to exercise its discretion in favour of enlargement of time to enable the dispute to be determined on appeal.
- 23) On the prayer for stay of execution, the Applicant relied on Order 42 Rule 6(2) of the Civil Procedure Rules and submitted that the statutory conditions had been satisfied. It was argued that the Applicant stands to suffer substantial loss if execution proceeds, as he is a small-scale businessman who depends on income from transportation for his livelihood and that of his family. Counsel maintained that the application was brought without unreasonable delay and that the

Applicant is willing to abide by any conditions as to security that the Court may impose.

24) In support of the principles governing stay of execution, reliance was placed on **RWW v EKW [2019] eKLR**, where the Court held that the purpose of stay is to preserve the subject matter so that the rights of an appellant are safeguarded pending appeal. Further reliance was placed on **Nicholas Stephen Okaka v Alfred Waga Wesonga [2022] eKLR**, in urging the Court to allow the application where the conditions under Order 42 Rule 6(2) have been met.

25) On whether the intended appeal raises arguable issues, counsel submitted that the appeal challenges, inter alia, the quantum awarded by the trial court and raises issues deserving consideration by the appellate court. It was contended that unless stay is granted, the appeal may be rendered nugatory.

26) The Applicant further invoked the decisions in **Gitahi & Another Vs. Waruonongo [1981] KLR 621** and **Absalom Dova vs. Tarbo Transporters [2013] eKLR**, particularly the latter, where the Court emphasized that the discretionary remedy of stay of execution is intended to balance the competing rights of an appellant and a decree-holder, ensuring that neither party is unduly prejudiced and that the appeal is not rendered nugatory while at the same time safeguarding the fruits of judgment.

27) In conclusion, the Applicant submitted that the application is meritorious, that no prejudice will be occasioned to the Respondents—who themselves have a pending appeal—and urged the Court to grant the orders sought, including stay of execution and enlargement of time, with costs in the cause.

### **The Respondent's Submissions**

- 28) The Plaintiff/Respondent, John Waweru Kigera, filed written submissions opposing the Notice of Motion dated 17th February 2025 by the 1st Defendant/Applicant, Stephanie Umma Smith, which seeks enlargement of time to file an appeal and stay of execution of the judgment delivered on 31st October 2024 in Narok CMCC No. 166 of 2018.
- 29) The Respondent relies on the Replying Affidavit and annexures JK.1–JK.5 to demonstrate that the Applicant had knowledge of the judgment and has engaged in a pattern of delay. It is submitted that the Respondent was awarded Kshs. 1,520,544/= (after 20% contribution) plus costs and interest for serious injuries, including a fracture of the right acetabulum, and has awaited the fruits of judgment for over six years.
- 30) Two issues were framed for determination: whether the Applicant has satisfied the conditions for grant of a stay under Order 42 Rule 6(2) of the Civil Procedure Rules, and whether sufficient cause has been shown to warrant enlargement of time to appeal.
- 31) On stay of execution, counsel submitted that Order 42 Rule 6(2) sets out three cumulative requirements: proof of substantial loss, filing without unreasonable delay, and provision of security. It was argued that the Applicant has not demonstrated substantial loss, but merely made general assertions of irreparable harm without evidence that the Respondent would be unable to refund the decretal sum if the appeal succeeds. Reliance was placed on *Kenya Shell Ltd v Benjamin Karuga Kibiru*, where the Court of Appeal emphasized that substantial loss is the cornerstone of the jurisdiction to grant stay and must be specifically proved.

- 32) On delay, it was submitted that judgment was delivered on 31st October 2024, and the present motion was filed on 17th February 2025, nearly four months later. The Applicant neither sought proceedings nor filed a notice of appeal within time. Citing *RWW v EKW*, the Respondent argued that delay must be satisfactorily explained, failing which stay ought to be declined.
- 33) As to security, counsel contended that the Applicant has not offered any security for due performance of the decree as required under Order 42 Rule 6(2)(b), which omission is fatal to the application.
- 34) The Respondent further submitted that the Applicant's conduct disentitles her to the Court's discretion, pointing to alleged repeated adjournments and obstructive behaviour. Reliance was placed on *Butt v Rent Restriction Tribunal*, for the proposition that the Court's discretion to grant stay is exercised judiciously and in favour of a party who approaches the Court with clean hands.
- 35) On enlargement of time, the Respondent invoked the principles set out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*, namely that extension of time is discretionary, and an applicant must demonstrate a satisfactory explanation for delay, that the delay is not inordinate, and that the intended appeal is arguable.
- 36) It was submitted that the Applicant's claim of late knowledge of the judgment is untrue, as correspondence annexed (JK.1 and JK.2) shows that judgment was communicated as early as 29th November 2024. The delay of close to three months thereafter was said to be unexplained and inordinate. Reliance was placed on *Bi-Mach Engineers Ltd v James Kahoro Mwangi*, where the Court declined to enlarge time in the absence of a satisfactory explanation for delay.

37) Finally, the Respondent contended that the intended appeal is not arguable, as the trial court apportioned liability at 80:20 and awarded damages consistent with comparable precedents, having provided a reasoned analysis of the injuries and quantum. It was argued that no specific error of law or fact has been identified to justify the extension of time.

38) In conclusion, the Respondent submitted that the Applicant has failed to satisfy the requirements for stay of execution and enlargement of time, and urged the Court to dismiss the Notice of Motion dated 17th February 2025 with costs and allow execution to proceed.

#### **Issues for Determination**

39) Having considered the Notice of Motion dated 17th February 2025, the affidavits on record, and the rival submissions, the following issues arise for determination:

- i. Whether the Applicant has established sufficient cause to warrant enlargement of time to file an appeal under Section 79G of the Civil Procedure Act.
- ii. Whether the Applicant has satisfied the conditions for grant of stay of execution pending appeal under Order 42 Rule 6(2) of the Civil Procedure Rules.

#### **ANALYSIS AND DETERMINATION**

##### **1. Whether Time to File an Appeal Should Be Enlarged**

40) The power of this Court to enlarge time for filing an appeal from a subordinate court is donated by Section 79G of the Civil Procedure Act, which provides that an appeal shall be filed within thirty (30) days from the date of the decree or order, provided that the Court may admit an appeal out of time if the appellant

satisfies the Court that he or she had “good and sufficient cause” for not filing the appeal in time.

41) The principles governing extension of time are now settled. The Supreme Court in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others[2014] eKLR** held that extension of time is not a right of a party but an equitable remedy available at the discretion of the Court. The Court outlined the guiding principles, inter alia:

42) Extension of time is discretionary and must be exercised judiciously;

43) The applicant bears the burden of laying a basis for the extension.

44) The Court must consider the length of delay, the reason for the delay, the degree of prejudice to the respondent, and whether the intended appeal is arguable.

45) Similarly, in **Leo Sila Mutiso v Rose Hellen Wangari Mwangi(1999 eKLR)**, the Court of Appeal held that the Court’s discretion is guided by the length of delay, the reason for the delay, the chances of the appeal succeeding, and the degree of prejudice to the respondent.

46) In the present case, judgment was delivered on 31st October 2024. The present application was filed on 17th February 2025, approximately three and a half months later. The Applicant contends that the delay was occasioned by the lack of notice of delivery of judgment. The Respondent, however, annexed email correspondence indicating that notice of delivery was communicated as early as 29th November 2024.

47) Even assuming notice was received on 29th November 2024, there remains a delay of close to three months before the filing of the present application. The Applicant has not demonstrated steps taken within that period to file a

memorandum of appeal or to promptly seek enlargement of time. The explanation tendered is therefore not entirely satisfactory.

48) The Court must also consider prejudice. The Respondent obtained judgment after protracted litigation spanning over six years. The principle that litigation must come to an end is an important consideration. Nevertheless, the right of appeal is a statutory right and should not be lightly curtailed where a plausible explanation is given.

49) On the arguability of the appeal, the draft memorandum challenges, inter alia, the quantum of damages awarded. An appeal on quantum is not per se frivolous, as assessment of damages is a discretionary exercise open to appellate interference where it is shown that the trial court applied wrong principles or made an inordinately high or low award. (See **Butt v Khan**).

50) Balancing these considerations, and bearing in mind that extension of time is an equitable remedy, the Court finds that although the delay is not insignificant, it is not so inordinate as to be incapable of being cured by an award of costs. The interests of justice tilt in favour of allowing the Applicant an opportunity to ventilate her grievance on appeal, subject to appropriate conditions.

51) Accordingly, the Court is inclined to enlarge the time for filing the appeal, on terms.

## **2. Whether the Applicant Has Satisfied the Conditions for Stay of Execution**

52) The principles governing stay of execution pending appeal are codified under Order 42 Rule 6(2) of the Civil Procedure Rules. The applicant must demonstrate:

53) Substantial loss may result unless stay is granted.

54) The application has been made without unreasonable delay;

55) Such security as the Court orders for the due performance of the decree has been given.

56) These conditions are conjunctive.

**(a) Substantial Loss**

57) The cornerstone of the jurisdiction is proof of substantial loss. In **Kenya Shell Ltd v Benjamin Karuga Kibiru[1986] eKLR** , the Court of Appeal held that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

58) The Applicant asserts that execution would occasion irreparable loss and render the appeal nugatory. However, this is a money decree. The general principle is that payment of a decretal sum does not constitute substantial loss unless it is shown that the respondent would be unable to refund the same if the appeal succeeds.

59) In **National Industrial Credit Bank Ltd v Aquinas Francis Wasike(2006 eKLR)**, the Court of Appeal held that once an applicant expresses a reasonable fear that the respondent may not be able to refund the decretal sum, the evidential burden shifts to the respondent to show financial ability.

60) In the present case, the Applicant has not placed before the Court cogent material demonstrating that the Respondent lacks the means to refund the decretal sum. The allegation of substantial loss remains largely speculative.

**(b) Delay**

61) The application was filed approximately three and a half months after judgment. While the Court has considered this delay in the context of enlargement of time, it

remains a relevant factor for stay. The delay is not trivial, but neither is it extreme. It is, however, inadequately explained.

**(c) Security**

62) Provision of security is mandatory. In **Absalom Dova v Tarbo Transporters (2013 eKLR)**, the Court emphasized that the purpose of stay is to balance the rights of the appellant and the decree-holder. Security ensures that the decree-holder is not prejudiced.

63) The Applicant has expressed willingness to abide by any conditions as to security, but has not made a concrete proposal. In the circumstances, and to balance the competing rights, it is appropriate to impose terms.

**Conclusion**

64) On enlargement of time, the Court finds that although the explanation for delay is not wholly satisfactory, the delay is not so inordinate as to bar the Applicant from exercising her statutory right of appeal. Time to file the appeal is therefore enlarged, subject to the appeal being filed and served within fourteen (14) days.

65) On stay of execution, the Applicant has not strictly demonstrated substantial loss. However, in order to preserve the substratum of the intended appeal and to balance the competing rights of the parties, the Court will grant a conditional stay on terms.

66) Accordingly:

- a) Leave to file an appeal out of time is granted. The Memorandum of Appeal shall be filed and served within fourteen (14) days from the date hereof.
- b) There shall be a stay of execution of the judgment and decree in Narok CMCC No. 166 of 2018 pending appeal on condition that the Applicant deposits the entire decretal sum in an interest-earning joint account in the names of counsel for the parties within thirty (30) days, failing which the stay shall lapse automatically.
- c) Costs of the application shall abide by the outcome of the appeal.

67) It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 10TH DAY OF MARCH 2026**

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**CHARLES KARIUKI**

**JUDGE**