

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
MISC. CIVIL APPLICATION NO. E105 OF 2025

-versus-

CHIPOSI TAFADZWA ESNATH.....
APPLICANT

-versus-

HEZRON MWENDA RINGERA.....
RESPONDENT

RULING

Background:

1. Before Court for determination is an application by way of a Notice of Motion dated 4th July 2025. The genesis of the matter is a road traffic accident that allegedly occurred on 4th March 2022 along Limuru Road involving the Respondent's motorcycle registration number KMFV 664X [hereinafter referred to as '**the motor cycle**'] and a motor vehicle registration number KCC 268R [hereinafter referred to as '**the motor vehicle**'] which was insured by *Chiposi Tafadzwa Esnath*, the Applicant herein.
2. Following the accident, the Respondent instituted *Nairobi [Milimani] CMCC Civil Suit No. E795 of 2023*, [hereinafter referred to as '**the suit**'] against the Applicant and the registered owner of the motor vehicle, seeking damages for injuries sustained. The trial Court, in its judgment, found the Defendants 100% liable and awarded the Respondent, then the Plaintiff, a total sum of Kshs. 3,755,505/-, comprising general damages, special damages, loss of income and future medical expenses.
3. Aggrieved by the quantum of damages, the Applicant filed the instant application.

The Application:

4. The application is supported by the Affidavit of *Regina Ileri* deposed to on a similar date and sought for the following orders: -
 1. Spent.
 2. *THAT there be a stay of execution of the Judgment and Decree in NAIROBI CMCC NO. E795 OF 2023, HEZRON MWENDA RINGERA -VS- CHIPOSI TAFADZWA ESNATH AND THOMAS EDWARD WAMUKOWA SAKAH pending the hearing inter-partes and determination of this Application.*
 3. *THAT the Applicant be granted leave to file an appeal out of time against the Judgement of Hon. Becky Cheloti Mulemia delivered on 16th May 2025, in NAIROBI CMCC NO. E795 OF 2023, HEZRON MWENDA RINGERA -VS- CHIPOSI TAFADZWA ESNATH AND THOMAS EDWARD WAMUKOWA SAKAH.*
 4. *THAT the costs of this Application be provided for.*
5. In the supporting affidavit, *Regina Ileri*, a Claims Specialist at Heritage Insurance Company Limited, deposed that the insurer instructed *Mbai Waweru Advocates* to defend the suit on behalf of its insured and that judgment was delivered on 16th May 2025. She averred that their Advocates only notified them of the judgment on 2nd July 2025, as it had been delayed in uploading to the CTS. Consequently, the instructions to appeal were given on 4th July 2025, after the statutory period had lapsed on 16th June 2025.
6. It was her case that the delay was inadvertent and not intentional, caused solely by the unavailability of the judgment. Further, she deposed that the insurer was ready to abide by any conditions imposed by the Court, including security, and argued that the Applicant would be permanently prevented from challenging the quantum if the orders were not granted.

The Submissions

7. Through written submission dated 21st October 2025, the Applicant submitted that the conditions for stay of execution under *Order 42 Rule 6(2)* of the *Civil Procedure Rules* had been met. On the issue of substantial loss, reference was made to the case of *National Industrial Credit Bank Ltd -vs- Aquinas Francis Wasike & another* [2006] eKLR, to front the argument that once reasonable fear of inability to repay is expressed, the burden shifts to the Respondent to prove their resources. The Applicant submitted that it had no knowledge of the Respondent's assets and feared that if the decretal sum of over Kshs. 3.7 million was paid out, it would be impossible to recover should the appeal succeed. The case of *G.N. Muema PA Mt View Maternity & Nursing Home -vs- Miriam Maalim Bishar & another* [2018] eKLR was also cited to assert the position that the hardship of instituting recovery proceedings constituted substantial loss.
8. Regarding delay, the Applicant submitted that although the application was filed 19 days after the appeal period expired, the delay was occasioned by the late availability of the judgment on the CTS, a period, that was not unreasonable. On security, the Applicant proposed to deposit Kshs. 3,000,000/- in a joint interest-earning account. To that end, it referred to the case of *Focin Motorcycle Co. Limited -vs- Ann Wambui Wangui & another* [2018] eKLR to assert that it was a demonstration of their good faith.
9. Finally, on the extension of time, the Applicant relied on the case of *Emmanuel Ngade Nyoka -vs- Kitheka Mutisya Ngata* [2016] KECA 393 (KLR), to urge the Court to consider the reason for delay and the chances of the appeal succeeding if appeal is granted and the degree of prejudice to the Respondent if the Application is granted.

The Respondent's case:

10. *Hezron Mwenda Ringera* opposed the application through his Replying Affidavit sworn on 25th July 2025 and a Further Affidavit sworn on 30th July 2025. He deposed that the application was brought in bad faith, noting that the Applicant had initially expressed intentions of a settlement. He contended that the

Applicant failed to show good cause for the delay and that the intended appeal had no chance of success.

11. In his Further Affidavit, the Respondent averred that during the oral delivery in virtual Court, the trial magistrate awarded Kshs. 7,100,000/- for diminished earning capacity, but this figure was omitted in the final typed judgment, which instead stated that the prayer had failed. He disclosed that he had filed an application for review to correct this error. Consequently, he argued that if stay were granted, the Applicant should be compelled to deposit the entire decretal sum inclusive of the disputed Kshs. 7.1 million as security. He further insisted that no security had been furnished yet, which is a mandatory requirement for stay.

The Submissions

12. The Respondent urged his case further through written submission dated 27th October 2025. It was his case that the Applicant failed to meet the tripartite test for stay of execution. On substantial loss, he relied on the case of *Khaki & 28 others -vs- Juma & 5 others* [2025] KEELC 333 (KLR) and *China City Construction Company Limited -vs- Karisa* [2024] KEHC 3323 (KLR), and stated that mere allegations that a Respondent may not be able to refund the money are insufficient without specific evidence. He emphasized that execution is a lawful process and speculative fears do not constitute substantial loss.
13. Regarding security, the Respondent cited authority in the case of *Ndung'u & Another -vs- Safaricom PLC & another* [2025] KEHC 2984 (KLR) and the one in *Arun C. Sharma -vs- Ashana Raikundalia* [2014] eKLR, to argue that security is a pre-condition to guarantee the due performance of the decree. It was his position that the Applicant's refusal to furnish the full decretal sum plus the disputed review amount demonstrated a lack of good faith.
14. On the issue of delay, the Applicant termed the excuse of not receiving instructions as purely the Applicant's fault. He concluded that the successful party should not be denied the fruits of their judgment. To fortify that position he referred to

the case of *Machira t/a Machira & Co Advocates -vs- East African Standard* [2002] KEHC 1167 (KLR).

Analysis:

15. Arising from the application and the parties' submissions, the following issues emerge for determination: -
- i. *Whether the Applicant should be granted leave to file the appeal out of time.*
 - ii. *Depending on (i) above, whether the Applicant has satisfied the conditions for a stay of execution pending appeal.*
16. The Court will now deal with the above issues in *seriatim*.

[a] Whether the Applicant should be granted leave to file the appeal out of time:

17. The power to extend time under Section 79G of the *Civil Procedure Act* is discretionary. In ***Nick Salat -vs- Independent Electoral and Boundaries Commission & 7 others***, the Supreme Court observed as follows: -

..... Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.

18. In determining whether to extend time, the Court must balance the length of delay, the reason for the delay, the arguability of the appeal and the prejudice to the Respondent. In the said decision of ***Nick Salat -vs- IEBC & Others***, the Supreme Court referred to the case of ***Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi*** - Civil Application No. Nai. 255 of 1997 (unreported), where the Court expressed itself thus: -

.... It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension

of time are: first, **the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.**" (emphasis added).

19. The Court notes that the judgment was delivered on 16th May 2025. The statutory period of 30 days for filing an appeal expired on or about 15th June 2025. The instant application was filed on 4th July 2025, representing a delay of approximately 19 days. The Applicant explained that this delay was occasioned by the unavailability of the typed judgment on the Judiciary's Case Tracking System until 2nd July 2025, an assertion substantiated by the email correspondence annexed to the Supporting Affidavit. A delay of 19 days, attributable to administrative challenges in accessing the judgment, is not inordinate. This Court has also appreciated the contents of the draft Memorandum of Appeal in which the Applicant challenges the award of general damages, which is an arguable point of law and fact. The appeal is, hence, arguable and as such, the Respondent stands not to suffer prejudice if an opportunity is accorded to the parties to ventilate their cases on appeal especially in a case like the instant one. Accordingly, this Court finds sufficient cause to grant leave to file the appeal out of time.

[b] Whether the Applicant has satisfied the conditions for a stay of execution pending appeal:

20. The grant of a stay of execution is governed by *Order 42 Rule 6(2)* of the *Civil Procedure Rules*. The provision settles three conditions to be satisfied in considering the grant of the order. The conditions are that substantial loss may result to the Applicant if the order is not made, the application has been made without unreasonable delay and the availability of security for the due performance of such decree or order as may ultimately be binding on the Applicant.

21. The Court will now discuss the foregoing requirements in turn.

i. Substantial Loss:

22. The Applicant is acting through the insurer of the motor vehicle, whereas the Respondent is an individual decree-holder. The Applicant argued that if the sum of Kshs. 3,755,505/- is paid out, recovery would be impossible should the appeal succeed since the liquidity of the Respondent remains unknown.
23. In **James Wangalwa & another -vs- Agnes Naliaka Cheseto** Misc Application No. 42 of 2011 [2012] eKLR, the Court discussed substantial loss as follows: -

.... No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. 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 -vs-. Chesoni [2002] 1KLR 867, and also in the case of Mukuma -vs-. 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.

24. In instances where an Applicant raises doubt as to the possibility of the Respondent repaying the sums if paid, the burden shifts to the Respondent to demonstrate ability to repay in the event the Applicant eventually succeeds in the matter. In this case, the Respondent did not rebut the Applicant's claim that he has no means to make a refund in the event the appeal was successful. This Court, therefore, finds that the Applicant has demonstrated that he will suffer substantial loss if the order is not granted.

ii. Delay:

25. Having found that the delay in filing the appeal was excusable due to the unavailability of the judgment, it follows that this condition is hereby satisfied.

iii. Security:

26. Provision of security for due performance of the decree is a legal requirement. The Applicant proposed depositing Kshs. 3,000,000/=. The Respondent, however, demanded the deposit of the full decretal sum being Kshs. 7.1 million subject to a pending review application.

27. Execution can only proceed on the basis of the decree as it currently exists. The current judgment on record explicitly states in paragraph 16(g) as follows

"The prayer for diminished earning capacity fails".

28. Therefore, this Court cannot order security for a sum (Kshs. 7.1 million) that has not yet been awarded, regardless of the pending review. This Court finds that the offer of Kshs. 3,000,000/- as security is reasonable in the circumstances.

Disposition:

29. In the end, this Court finds merit in the application and the following orders hereby issue: -

[a] Leave be and is hereby granted to the Applicant to lodge an appeal against the judgment in *Nairobi CMCC Civil Suit No. E795 of 2023.*

[b] The Applicant shall file and serve a Memorandum of Appeal in a substantive appeal file within 14 days of this order.

[c] There be a stay of execution of the Judgment and Decree in *Nairobi CMCC Civil Suit No.*

E795 of 2023 pending the hearing and determination of the intended appeal.

- [d] The grant of stay in the stay order in (c) above is conditional upon the Applicant depositing the sum of Kshs. 3,000,000/- in Court within 30 days of this order. For clarity, the deposit shall be in the substantive appeal file.**
- [e] In the event of non-compliance with Order (d) above, the order for stay of execution shall automatically lapse and the Notice of Motion dated 4th July 2025 shall stand dismissed with costs assessed at Kshs. 30,000/= and the Respondent shall be at liberty to levy execution of the decree.**
- [f] The Applicant shall bear the costs of this application assessed at Kshs. 30,000/= payable within 30 days of this order and in default execution to issue.**
- [g] This file is hereby marked as CLOSED.**

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 27th day of February, 2026.

**A. C. MRIMA
JUDGE**

Ruling virtually delivered in the presence of:

Ms. Alosa, Learned Counsel for the Applicant.

Ms. Swaka for Mr. Kirimi, Learned Counsel for the Respondent.

Michael/Amina - Court Assistants.