

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC MISC APPLICATION NO. E017 OF 2025

**KERICHO WATER & SANITATION CO. LTD.....
APPLICANT**

VERSUS

**THOMAS KIMAGUT SAMBU.....
.....RESPONDENT**

RULING.

Introduction.

- 1.** This ruling is in respect of the Applicant's Notice of Motion application dated 19th June, 2025. The application is expressed to be brought under **Sections 1A, 1B, 3A, 79G** and **95** of the Civil Procedure Act, **Sections 13, 16A** and **19** of the Environment and Land Court Act and **Order 22 Rule 22, Order 40 Rules 1 & 4, Order 42 Rule 5 & Order 51 Rule 1** of the Civil Procedure Rules.

- 2.** The Applicant seeks the following orders;

a. Spent

b. That this Honourable Court be pleased and hereby grants leave to the Applicant to file an appeal out of time against the Ruling of Hon. Johnstone Munguti (SPM) in Kericho Magistrate Court MC ELC No. E106 of 2023 delivered on 8th May 2025 out of time.

c. Spent

d. Spent

e. That this Honourable Court be pleased and hereby grants stay of execution of the decree in Kericho Magistrate Court MC ELC No. E106 of 2023 pending the hearing and determination of the intended appeal.

f. That costs for this application be in cause.

- 3.** The application is based on the grounds on its face and the supporting affidavit of **Kibii Chepkwony Siele**, the Applicant's Managing Director.

Factual Background.

4. The application under consideration first came up for hearing on 23rd June, 2025 when the Court issued directions that it be served upon the Respondent.
5. On 28th July, 2025 the application came up for hearing when the Court directed that it be canvassed by way of written submissions.
6. It was mentioned severally to confirm filing of submissions and on 3rd December, 2025 it was reserved for ruling.

The Applicant's Contention.

7. The affidavit in support of the application is sworn by **Kibii Chepkwony Siele** the Applicant's Managing Director.
8. He contends that judgement was delivered on 25th July, 2024 in Kericho CM ELC Case No. 106 of 2023 Thomas Kimagut

Sambu vs Kericho Water & Sanitation Company Limited and that the Applicant was ordered to pay the Respondent Kshs. 2,053,139/=.

- 9.** He also contends that the Applicant became aware of the said judgement at the execution stage when a Notice to Show Cause why its Managing Director should not be committed to civil jail was served.
- 10.** He further contends that the Applicant filed an application dated 18th November, 2024 which sought orders to lift the warrants of arrest that had been issued and for the judgement to be set aside in order for it to file a Statement of Defence.
- 11.** It is his contention that on 8th May, 2025, the trial Court dismissed the said application.

- 12.** It is also his contention that upon delivery of the said ruling, Counsel for the Applicant requested for orders of stay of execution for a period of thirty days and for copies of the ruling and proceedings for purposes of filing an appeal.
- 13.** It is further his contention that the Learned Trial Magistrate issued orders of stay of execution and directed that certified copies of the ruling and proceedings be supplied to the Applicant upon payment of the requisite Court fees.
- 14.** He contends that before the thirty days lapsed, the Respondent instructed Indomitable Auctioneers to proceed with the execution proceedings.
- 15.** He also contends that despite the stay orders being in force, the said auctioneers extracted warrants of attachment and sale on 9th May, 2025 and proclaimed nine motor vehicles that belong to the Applicant vide the Proclamation Notice dated 12th May, 2025.

- 16.** He further contends that on 14th May, 2025, the Applicant wrote a letter of the even date and applied for certified copies of the ruling and proceedings.
- 17.** It is his contention that the Applicant's Counsel made the necessary payments and followed up severally but they were repeatedly informed that the proceedings were yet to be typed.
- 18.** It is also his contention that the thirty days orders of stay lapsed on 9th June, 2025 and by then they were yet to be supplied with the proceedings. He goes on to state that the period within which they were to appeal had also lapsed.
- 19.** It is further his contention that the Applicant was unable to file the appeal within the requisite period because the impugned ruling and proceedings were not supplied to it despite writing letters and following up numerous times.

- 20.** He contends that the Applicant was only supplied with a handwritten copy of the ruling on 16th June, 2025.
- 21.** He also contends that Counsel for the Applicant has now drafted a Memorandum of Appeal as the Applicant intends to file an appeal against the ruling of the Learned Trial Magistrate that was delivered on 8th May, 2025.
- 22.** He further contends that the appeal is meritorious and has high chances of success. He goes on to state that on 18th June, 2025, the Respondent through Indomitable Auctioneers seized the Applicant's Motor Vehicle.
- 23.** It is his contention that the Motor Vehicle that was seized was a Mitsubishi Fuso F1 Water Boozer registration No. KDG 174C.

- 24.** It is also his contention that the Respondent is likely to auction the said motor vehicle unless the Court issues the orders sought in the application under consideration and allows the Applicant to file the intended appeal.
- 25.** It is further his contention that the Applicant is likely to lose its motor vehicle which was attached while the stay orders were in force.
- 26.** He contends that unless the Court issues the orders sought, the Applicant is likely to suffer substantial loss which cannot be compensated by an award of damages if the intended appeal succeeds.
- 27.** He also contends that unless the prayers sought are granted, the intended appeal may be rendered nugatory and an academic exercise.

28. He further contends that it is in the interest of justice that the present matter be heard expeditiously and without delay.

29. He ends his deposition by stating that the application under consideration has been filed without undue delay as the time within which to appeal lapsed on 9th June, 2025.

The Respondent's Response.

30. The Respondent filed a Replying Affidavit sworn on 25th July, 2025.

31. He deposes that on 25th July, 2024, the trial Court delivered judgement in his favour and awarded him the sum of kshs. 2,053,139/= together with costs and interest.

32. He also deposes that the Applicant filed an application which was dismissed on 8th May, 2025. He goes on to state that the

Applicant has filed the application under consideration seeking for orders of stay of execution of the decree.

33. He further deposes that he has read the draft Memorandum of Appeal and it does not disclose an arguable appeal. He goes on to state that the Applicant has not given a plausible explanation as to why it failed to enter appearance and file a Statement of Defence and yet it was served.

34. It is his deposition that the Applicant has not demonstrated that he is a person who cannot repay the decretal sum in the event the appeal succeeds.

35. It is also his deposition that he is a man of means capable of repaying the said sum of money in the event the Appellant's appeal succeeds.

36. It is further his deposition that he is a licensed auctioneer who has worked for over forty-three years. He goes on to

state that he is also a prominent business man in Kericho with a lot of property.

- 37.** He deposes that notably, he owns land parcel No's Kericho/Kipchimchim/630 and 631 where he has planted tea bushes that are valued at over Kshs. 20,000,000/=. He goes on to state that he will therefore be able to refund the decretal sum within thirty days of any such order.
- 38.** He also deposes that the Applicant's intended appeal is meant to delay the matter and deny him the fruits of his judgement.
- 39.** He ends his deposition by stating that he has been advised by his advocates on record that the Applicant has not sufficiently demonstrated that it will suffer substantial loss if the decretal sum is paid to him.

Issues for Determination.

- 40.** The Applicant filed its submissions on 5th September, 2025 while the Respondent filed his submissions on 10th December, 2025.
- 41.** The Applicant submits on whether the Court should issue orders of stay of execution pending the hearing and determination of the intended appeal.
- 42.** The Applicant relies on **Order 42 Rule 6(2)** of the **Civil Procedure Rules**, the judicial decision of **Robert Mbuvi Ngata & 2 Others vs Josphat Ndambuki Kituu [2016] eKLR** and submits that it has filed the application under consideration timeously.
- 43.** The Applicant also submits that the application under consideration has been filed eleven days after the lapse of the orders of stay of execution.

- 44.** The Applicant further submits that the said period of time cannot be deemed to amount to unreasonable delay. The Applicant relies on the judicial decision of **Antoine Ndiaye vs African Virtual University [2015] KEHC 6783 (KLR)** in support of its submissions.
- 45.** It is the Applicant's submissions that if orders of stay of execution are not granted, then it will suffer substantial loss which cannot be adequately compensated by an award of damages.
- 46.** The Applicant relies on the judicial decisions of **James Wangalwa & another vs Agnes Naliaka Cheseto [2012] eKLR, RWW vs EKW [2019] KEHC 6523 (KLR)**, reiterates the averments in the affidavit in support of the application and submits that if the execution proceeds and the appeal later succeeds, this would then mean that the suit before the trial Court will be re-opened after the Respondent has already satisfied (sic) the prayers sought in the Plaint.

47. The Applicant also submits that if the Respondent executes the decree and the appeal eventually succeeds, it will have a difficult time in recovering the decretal sum.
48. The Applicant further submits that the Respondent has not filed an affidavit of means to demonstrate that he is a licensed auctioneer and a man of means.
49. The Applicant relies on the judicial decision of **Eliud Mugo Kagai vs Wilson M. Njenga [2020] eKLR** and submits that the Court issued orders of stay of execution after the Respondent failed to swear an affidavit of means.
50. The Applicant also relies on the judicial decision of **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & another [2006] eKLR** and submits that the sum of Kshs. 2,467,028 is not a sum that is easily recoverable from an individual.

- 51.** It is the Applicant's submissions that it will suffer substantial loss if the Respondent proceeds with the execution of the decree as it involves a substantial amount of money.
- 52.** It is also the Applicant's submissions that the appeal has high chances of success as can be seen from the grounds of appeal on the draft Memorandum of Appeal that is attached to the affidavit in support of the application.
- 53.** It is further the Applicant's submissions that Courts have from time to time held that an arguable appeal should not be construed to mean an appeal that will succeed. The Applicant relies on the judicial decision of **Kenya Power & Lighting Company Ltd vs Eunice Nkirote Ringera [2020] eKLR** in support of its submissions.
- 54.** The Applicant submits that the Court has the discretion to set the security terms that it considers reasonable and just

under **Order 42 Rule 6 (2) (b)** of the **Civil Procedure Rules**.

55. The Applicant submits that it is willing to abide by any order as to the depositing of security.
56. The Applicant further submits that it is willing and ready to provide a bank guarantee from a reputable commercial bank.
57. The Applicant concludes its submissions by urging the Court to allow the application as prayed.
58. The Respondent relies on **Order 42 Rule 6** of the Civil Procedure Rules and submits that the Applicant must demonstrate that it filed the application under consideration without unreasonable delay, that the Applicant will suffer substantial loss unless the orders of stay of execution are

granted and that the Court has power to issue orders of security for due performance of the decree.

- 59.** On whether the Applicant will suffer substantial loss if orders of stay of execution are not granted, the Respondent reiterates his averments in the Replying Affidavit and submits that the Applicant has not proved that he is not a man of straw who cannot refund the decretal sum in the event the appeal succeeds.
- 60.** The Respondent relies on the judicial decisions of **Coftea Machinery Services Limited vs Akiba Bank Limited & 2 Others [2004] eKLR**, **Kenya Shell Limited vs Benjamin Karuga Kibiru & another (1989) 410**, **Jethwa vs Supreme Styles (1989)**, **Thugge vs Kenya Commercial Bank Limited [1990] KLR 441**, **Masisi Mwita vs Damaris Wanjiku Njeri Civil Appeal No. 107 of 2015**, **Equity Bank Ltd vs Taiga Adams Company Ltd** (citation not given), **Patrick Mutua & another vs Mutua Nyamai**

Civil Appeal No. 73 of 2018, KCB Bank (K) Limited vs Thomas K. T/A Solai Agencies & another [2018] eKLR

and submits that he has demonstrated that he is not a man of straw who is not capable of refunding the decretal sum in the event the appeal succeeds.

- 61.** The Respondent reiterates that the Applicant's Memorandum of Appeal does not disclose arguable grounds of appeal.
- 62.** The Respondent also reiterates that the Applicant has not explained why it failed to file a Statement of Defence and yet it was served with summons to enter appearance.
- 63.** It is the Respondent's submissions that the Applicant has not offered security as required under **Order 42 Rule 6 (2) (b)** of the **Civil Procedure Rules**.
- 64.** It is also the Respondent's submissions that the Applicant merely submits that it is willing to provide a bank guarantee as security for costs.

65. The Respondent relies on the judicial decisions of **Joseph Murangi & another vs Beatrice Kaindi Kaiberia** (citation not given), **Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & another [2014] eKLR** in support of its submissions.

66. The Respondent concludes its submissions by urging the Court to dismiss the Applicant's application as it has failed to meet the threshold for grant of orders of stay of execution as provided for under **Order 42 Rule 6** of the **Civil Procedure Rules**.

Analysis and Determination.

67. Having considered the application, the response thereto and the submissions, my view is that the following issues arise for determination;

a. Whether the Applicant should be granted leave to file an appeal out of time.

b. Whether an order of stay of execution of the judgement and decree issued in Kericho CM ELC Case no. E106 of 2023 should be granted pending the hearing and determination of the intended appeal.

c. Who should bear costs of the application.

A. Whether the Applicant should be granted leave to file an appeal out of time.

68. The Applicant is seeking extension of time within which to file an appeal. The Applicant contends that on 8th May, 2025, the Learned Trial Magistrate dismissed its application dated 18th November, 2024.

- 69.** The Applicant also contends that upon delivery of the said ruling, it's Counsel applied for certified copies of the proceedings and ruling and paid the requisite fees.
- 70.** The Applicant further contends that it's Counsel made several follow ups at the Court registry but they were only supplied with a handwritten copy of the ruling on 16th June, 2025 after time within which to file an appeal had lapsed.
- 71.** It is the Applicant's contention that its advocates on record then filed the application under consideration seeking leave to file an appeal out of time.
- 72.** It is also the Applicant's contention that it has a meritorious appeal with high chances of success.
- 73.** In response, the Respondent contends that the Applicant does not have an arguable appeal as it failed to give a

plausible explanation as to why it did not enter appearance and file a Statement of Defence despite being served with summons to enter appearance.

74. Section 79G of the Civil Procedure Act provides as follows;

“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.”

(Emphasis mine)

75. Under **Section 79G** of the **Civil Procedure Act**, time for filing an appeal from a ruling of a subordinate Court to the High Court and Courts of equal status is thirty days. Further, the law provides 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.

76. In the present matter, the subordinate Court delivered its ruling on 8th May, 2025. It follows that any appeal challenging the said decision ought to have been filed on or before 8th June, 2025.

77. In the judicial decision of **Stecol Corporation Limited v Susan Awuor Mudemb [2021] eKLR** the Court held as follows;

“15. In Charles Karanja Kiiru Vs Charles Githinji Muigwa [2017]eKLR where the Respondent had delayed for 41 days before filing an appeal and where the High Court enlarged

time to enable the respondent file an appeal out of time, the appellant was aggrieved by the order enlarging time claiming that the learned Judge erred in law and fact by exercising his discretion and extending time for filing an appeal out of time yet no sufficient reason had been offered to justify the same, the Court of Appeal cited this Court's decision in Wanjiru Mwangi & Another [2015]eKLR and APA Insurance Co. Ltd Vs Michael Kinyanjui Muturi[2016]e KLR in dismissing the appeal.

16. I will therefore entirely rely on the above binding Court of Appeal decision in determining the merits of this application which is two pronged namely:- whether the prayer for extension of time is merited and whether this Court can validate an appeal which was filed out of time.

17. Under Section 79G of the Civil Procedure Act:

“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 a good and sufficient cause for not filing the appeal in time.”[Emphasis added].

18. The Court of Appeal in the above Case guided that whenever an application for extension of time is before a Court, the Court ought to take into account several factors as observed by Odek JJA in Edith

Gichungu Koine Vs Stephen Njagi Thoithi [2014]eKLR thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this Court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

19. The Court of Appeal further guided that there is also a duty imposed on Courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.” (Emphasis mine)

78. In the judicial decision of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** the Court of Appeal found as follows;

“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 mine)

79. In the above cited judicial decisions, it is evident that certain factors have to be taken into consideration in making decisions on applications for enlarging time within which to file an appeal. They include the length of the delay, the reasons for the delay, the chances of the appeal succeeding if the prayers sought are granted, the degree of prejudice to

the Respondent if the application is allowed, whether the matter raises issues of public importance among others.

- 80.** The Applicant contends that its Counsel was supplied with a handwritten copy of the ruling delivered on 8th May, 2025 on 16th June, 2025.
- 81.** The application under consideration was filed on 23rd June, 2025, which is fifteen days after the time within which to file an appeal had lapsed.
- 82.** The second issue for consideration is the reasons given for the delay. The Applicant contends that the reason why it did not file the appeal within time is because it's Counsel was not supplied with the ruling and/or proceedings within time.
- 83.** This was not disputed by the Respondent.

84. The Applicant attached a copy of a letter dated 14th May, 2025 to its affidavit in support of the application. The letter is addressed to the Executive Officer, Chief Magistrates Court Kericho. The letter requests for a copy of the ruling delivered on 8th May, 2025 in Kericho CM ELC Case No. E106 of 2023.

85. Attached to the said letter is a receipt issued on the said date upon payment of Kshs. 1,000/=.

86. In the judicial decision of **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] KECA 701 (KLR)** the Court held as follows;

“(12)The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s

flow of discretionary favour.

There has to be valid and clear reasons, upon which discretion can be favourably exercisable.” (Emphasis mine)

- 87.** My view is that the Applicant has given sufficient explanation for the delay in filing the appeal.
- 88.** The third issue for consideration is whether the Applicant has an arguable appeal. The Applicant has attached a draft Memorandum of Appeal to its affidavit in support of the application.
- 89.** The Applicant contends that its intended appeal is meritorious and has high chances of success.
- 90.** The Respondent on the other hand contends that the draft Memorandum of Appeal attached to the Applicant’s affidavit

in support of the application does not disclose arguable grounds of appeal.

91. In **Paul Njage Njeru v Kariya K Mugambi [2021] eKLR** the Court while considering a similar application held as follows;

“15. On the chances of the appeal succeeding, the Applicant has annexed a draft Memorandum of Appeal raising 3 grounds of appeal which challenge the trial Court’s exercise of discretion to grant leave to file a claim which was already time barred. The Court considers that an appeal on the question of whether or not the Court could grant leave to appeal out of time and therefore, whether the Court has jurisdiction to entertain the claim is arguable. The Court considers that an arguable appeal is not one which must necessarily succeed and it is not for this Court, at this stage to go into the merits of the appeal, to

avoid embarrassing the Court that will sit on appeal, if leave is ultimately granted and the appeal is filed.” (Emphasis mine)

- 92.** I have perused the draft Memorandum of Appeal. Among the various grounds on the draft Memorandum of Appeal is whether the Learned Trial Magistrate erred in shifting the burden to the Appellant to disprove service instead of requiring the Respondent to prove that there was proper service. My view is that this single ground makes the intended Appeal arguable.
- 93.** The other issue for consideration in making a finding in favour of extension of time within which to file an appeal is whether prejudice may be caused to the Respondent. By prejudice we mean the injustice the Respondent is likely to suffer if time within which to file an appeal is extended.

94. The Respondent did not submit on whether he will suffer prejudice if the orders sought are not granted.

95. Taking into consideration the foregoing, I find that the Applicant has sufficiently explained the reason for the delay in filing of the appeal. It is, therefore, in the interest of justice that time within which to file the appeal is extended. In any case, the Respondent has not demonstrated that he is likely to suffer prejudice if time is extended.

B. Whether an order of stay of execution of the judgement and decree issued in Kericho CM ELC Case no. E106 of 2023 should be granted pending the hearing and determination of the appeal.

96. The Applicant is seeking that the Court issues orders of stay of execution of the decree issued in Kericho CM ELC Case No. E106 of 2023.

- 97.** In response, the Respondent contends that the Applicant has not demonstrated whether it will suffer substantial loss and neither has it offered security for due performance of the decree.
- 98.** The Respondent therefore contends that the Applicant has not met the criteria for grant of orders of stay of execution.
- 99.** Two things are worth noting. Firstly, the Applicant is seeking for leave to file an appeal out of time against the ruling delivered on 8th May, 2025 in Kericho CM ELC Case No. E106 of 2023.
- 100.** Leave to file the said appeal out of time has been granted under issue (a) above.
- 101.** The second thing to note is that the Applicant is seeking orders of stay of execution of the decree issued upon delivery of the judgement in Kericho CM ELC Case No. E106 of 2023 on 25th July, 2024.

102. In the judicial decision of **Njoki & another v Goko**

[2025] KEELC 5404 (KLR) the Court held as follows;

“The law relating to stay pending Appeal is Order 42 rule 6 (2) of the Civil Procedure Rules. The provision anticipates that there is a filed appeal that is pending such that an order of stay of execution of the Judgment and/or decree is predicated on the hearing and disposal of such appeal. Where a party has not filed an appeal, an application under Order 42 Rule 6 of the Civil Procedure Rules would not lie. Having found that there is no pending appeal, the prayer for an order for stay of execution becomes moot. The order for stay of execution as sought herein cannot be granted. It would be absurd to stay a judgment where no appeal has been lodged.”

(Emphasis mine)

103. In the above cited judicial decision, the Court held that an application for stay of execution pending appeal under **Order 42 Rule 6(2)** of the Civil Procedure Rules is filed where an appeal is pending. The Court also held that an application for stay of execution will not lie in instances where an appeal has not been filed.

104. It is also important to note that in the present matter, the Applicant has sought and has been granted leave to file an appeal against the **Ruling** delivered on 8th May, 2025 and not the **Judgement** that was delivered on 25th July, 2024. Staying the said judgment is out of question.

105. More importantly, the Applicant cannot seek stay of execution of the Judgement and decree of the trial Court and yet no appeal has been filed from the said judgement.

C. Who should bear costs of the application.

106. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of **Section 27** of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the Court for good reason, directs otherwise.

Disposition.

107. Taking the foregoing into consideration, I find that the application dated 19th June, 2025 partially succeeds and I order as follows;

a. Leave is hereby granted to the Applicant to lodge an appeal out of time against the ruling delivered on 8th May, 2025 in Kericho CM ELC Case No. E106 of 2023.

b. The costs of this application shall abide the outcome of the appeal.

108. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO
THIS 12TH DAY OF MARCH, 2026.**

**L.A. OMOLLO
JUDGE.**

In the presence of: -

Mr. Alela for Momanyi for the Applicant.

Mr. Koko for Migiro for the Respondent.

Court Assistant; Mr. Joseph Makori.