

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI COMMERCIAL AND TAX DIVISION
MILIMANI LAW COURT
HCCOMM CIVIL CASE NO. 469 OF 2007

**IMPULSE DEVELOPERS COMPANY
LIMITED.....PLAINTIFF**
VERSUS

BARKAT DEVELOPERS LIMITED.....
1ST RESPONDENT

RUKENYA KABUGUA 2ND
RESPONDENT

WILLIAM KAMAU..... 3RD
RESPONDENT

MOHAN MAHESH ALIAS JAGJIT SINGH FLORA..... 4TH
DEFENDANT

**NANCY WANJIRU WAIGANJO ALIAS
NANCY NDEGWA.....**
5TH DEFENDANT

EQUITY BANK LIMITED.....
6TH DEFENDANT

BERNARD MULWA.....
7TH DEFENDANT

RULING

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1. This matter comes up for the Ruling in respect of the following applications.
 - (i) The 6th Defendant's application by way of Notice of Motion dated 30th April, 2025.
 - (ii) The Plaintiff's application by way of a Notice of Motion dated 13th May 2025.

Background Facts

2. On 31.10.2023, this Court (**Mabeya J.**) delivered a judgement awarding special damages to Kshs.6,000,000/= together with interest at 15% per annum from 21.12.2006 until payment in full. The amount was payable by the 6th Defendant who was also directed to settle the costs of the Plaintiff's suit.
3. The 6th Defendant filed an application by way of a Notice of Motion dated 11.12.2023. It sought for a stay of execution pending the hearing and determination of an Appeal to the Court of Appeal.
4. The Court (**Mabeya J.**) by a Ruling dated 14th November 2024 granted the stay of execution pending Appeal, as sought. This was on condition that the 6th Defendant gave a Bank guarantee from any other bank other than itself, for

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the decretal sum within twenty-one (21) days from the date of the Ruling.

5. The 6th Defendant delayed in complying with the order and was late by ten (10) days in furnishing the guarantee. It therefore seeks the following orders in the Notice of Motion dated 30.4.2025

a) *Spent.*

b) *Spent.*

c) *THAT this Honourable Court do order a stay of execution of the judgment delivered in this matter on 31.10.2023 and resultant Decree pending the hearing and determination of the 6th Defendant's Intended Appeal to the Court of Appeal.*

d) *THAT costs be provided for.*

6. This application is opposed by the Plaintiff.

7. The Plaintiff on the other hand prays for the following orders in the Notice of Motion dated 13th May, 2025.

1. *Spent.*

2. *The Plaintiff be and is hereby granted leave to execute the judgment and decree issued herein on 31st October, 2023 before costs are ascertained.*

3. *The costs of this application be provided for.*

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8. The Court directed that the two applications be argued together. That they be disposed of by way of written submissions. Counsel also gave oral highlights to the submissions.

Issues for Determination

9. The Court has considered the two applications and the responses filed, the submissions and the oral highlights by Counsel for the parties.
10. The Court frames two (2) issues for determination of the two applications.
 - a) *Whether the Court should extend time for furnishing of the Bank guarantee by the 6th Defendant.*
 - b) *Whether leave should be granted to the Plaintiff to execute the decree, before ascertainment of costs.*

Analysis

11. The two applications filed by the parties call for exercise of this Court's discretion.
 - a) **Whether the court should extend time for furnishing of the Bank guarantee by the 6th Defendant.**

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12. The power to extend time is donated to this Court by the provisions of **Section 95 of the Civil Procedure Act** which states as follows:

95. Enlargement of time

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

13. The leading decision on extension of time is the Supreme Court decision in **Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR)**. The Apex Court set out the guiding principles as follows:

“This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a court should consider in exercise of such discretion:

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. What is the position of the Court of Appeal application No Civil Application Sup No 5 of 2014(UR 2014) seeking certification? Is a letter to the Registrar sufficient to withdraw an application before the Court of Appeal? Paragraph 86.”

14. Applying these principles to this case, the Court notes following; The 6th Defendant says it furnished the Bank Guarantee outside the twenty-one (21) days period ordered. The delay was by ten (10) days. It attributes the delay to the approval process of the guarantee by the Co-operative Bank that has provided the guarantee. The Court has seen the letter of guarantee by Co-operative Bank of Kenya dated 13.12.2024. The court has also seen the Plaintiff's Advocate's letter dated 23.4.2025. It intimates that given

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that the guarantee was provided for after the twenty-one (21) days period, the stay has lapsed. It calls for the entire decretal sum of Kshs. 22,497,000.00 and accumulated interest of Kshs. 16,497,000.000.

15. The Plaintiff in its Replying Affidavit points out that the guarantee was furnished late in the day. That no Record of Appeal has been filed within the required time. The Plaintiff has filed an application before the Court of Appeal, seeking to strike out the Record of Appeal. The Court is urged not to extend time for furnishing the guarantee. It is also contended that the format of the guarantee provided by Co-operative Bank is not in the acceptable format and it was not uploaded to the Court's Case Tracking System. (CTS).
16. The 6th Defendant had filed a Further Affidavit. It explains that it did apply for typed and certified copies of the transcripts of the trial. That they will be applying for certificate of delay. Therefore, the Appeal to the Court of Appeal is still valid. Lastly that the format of guarantee furnished by the Co-operative Bank is valid.
17. To this Court, the reasons furnished by the Defendant for delay in furnishing the guarantee are plausible. The Bank furnishing the guarantee would require to satisfy itself through its own internal processes. The delay of Ten (10) days is also not inordinate. As things stand, there is a

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guarantee letter to the Deputy Registrar of the Court dated 13th December, 2024.

18. The Court leans towards allowing the extension of time. Should the Court of Appeal strike out the Appeal (on an application by the Plaintiff as intimated), the stay granted herein will have ran out its course. For now, that judgement call on whether the Appeal is still live and valid lies before another Court. That is the Court of Appeal and not before this Court. We need not to say more.
19. An extension of time finds favour in the guiding principles set out in the **Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR)** case above. The guarantee as issued is valid for purpose of these proceedings.

b) Whether leave should be granted to the Plaintiff to execute the decree, before ascertainment of costs.

20. Having granted an execution of time, it means that the Court needs not consider whether to grant leave to execute before costs are ascertained.
21. **Section 94 of the Civil Procedure Act** states as follows:

94. Execution of decree of High Court before costs ascertained

Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

22. The Court follows the decision in the case of **Bamburi Portland Cement Company Limited v Imranali Chandbhai Abdulhussein [1996] KECA 202 (KLR)**, where **Shah JA** stated as follows:

"I would like to end by making some pertinent observations as regards the execution of the decree. Section 94 of the Civil Procedure Act requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the

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other party and heard inter partes. Order 21 r 7(4) of the Civil Procedure Rules purports to confer on the registrar and deputy registrar the power specifically given to High Court under section 94 of the Act. Rule 7(4) is clearly ultra vires section 94 of the Act because the section reserves that power exclusively to the High Court.”

23. It is therefore clear to this Court that leave to execute the decree before ascertainment of costs is the exception rather than the rule. The Court has to be satisfied that there exist valid reasons why execution should proceed before costs have been ascertained. As matters stand the 6th Defendant is already enjoying a stay of execution.
24. The Court allows the 6th Defendant’s application with no orders to costs and proceeds to dismiss the Plaintiff’s application on costs.

Determination

25. The Court after having considered the two applications dated 30.4.2025 and 13.5.2025 makes the following orders:
 - a) The 6th Defendant’s application dated 30th April 2025 is allowed as prayed.
 - b) There is no order as to costs of the said application.

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- c) The Plaintiff's application dated 13.5.2025 is dismissed for lack of merit.
- d) There be no orders as to costs.

26. It is so ordered.

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

**NJOROGE BENJAMIN K.
JUDGE**

In the presence of:

Mr. Ashioya holding brief for Mr. Havi S.C for the Plaintiff.

Miss Kairu holding brief for Miss Mburu for the 6th Defendant.

Peter Wabwire - Court Assistant.