

IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
MISC. APPLICATION NO. E490 OF 2025

JOHN OMOLO

OWENGA.....APPLICANT

VERSUS

KISUMU AIRPORT TAXI OPERATORS

CO-OPERATIVE SOCIETY LT

(KIATO).....RESPONDENT

R U L I N G

Introduction

1. By a Notice of Motion dated 16th May 2025, the Applicant approached this Court seeking the following substantive prayers: -

- (i) Setting aside of the warrants of arrest issued by the Co-operative Tribunal on 7th May 2025 in Tribunal Case No. 901 of 2018;
- (ii) Stay of execution of the Tribunal's final award delivered on 17th August 2023;
- (iii) Enlargement of time and leave to file an appeal out of time against the said award; and

- (iv) Stay of execution pending the intended appeal.
 - (v) Costs of the application abide the outcome of the appeal.
2. The motion is anchored on the grounds that the Applicant was not notified of the Tribunal's award by his former advocates and that he was attending to the illness of his spouse. He relies on Section 79G of the Civil Procedure Act, Order 42 Rule 6(2) of the Civil Procedure Rules, and authorities on extension of time and stay. He expresses willingness to furnish reasonable security.
 3. The Respondent opposed the application, terming it frivolous and contending that the application comes approximately 21 months after delivery of the award, with no sufficient cause for the delay. It argues that the High Court has no jurisdiction in the manner invited to set aside warrants issued by the Tribunal.
 4. It was further the Respondent's position that leave to appeal out of time is in the circumstances of the case undeserved, and that the threshold set under Order 42 Rule 6 for granting a stay has not been met by the Applicant. The Respondent asserts that no substantial loss has been demonstrated and no security has been offered.

5. The Respondent contended that its members continue to be deprived of Kshs. 4,867,787.45 adjudged due by the Tribunal.
6. The matter proceeded by way of written submissions, the Applicant filed his submissions dated 9th July 2025, whilst the Respondent's submissions are dated 7th August 2025.

Analysis and Determination

7. Before proceeding to the analysis, it is critical that I first set out the background of this matter.
8. The application arises from proceedings before the Co-operative Tribunal in Tribunal Case No. 901 of 2018, wherein the Respondent, Kisumu Airport Taxi Operators Co-operative Society Ltd (KAITO), instituted a claim against the Applicant alleging misappropriation of funds and breach of a debt agreement dated 12th January 2018.
9. The dispute was heard on its merits before the Tribunal, and upon conclusion of the proceedings, a final award was delivered on 17th August 2023 in favour of the Respondent. The Tribunal found the Applicant liable and ordered him to pay a sum of approximately **Kshs. 4,726,566.92** together with costs and any attendant reliefs.
10. Following delivery of the award, no appeal was lodged within the statutory period prescribed under Section 81 of the Co-

operative Societies Act and Section 79G of the Civil Procedure Act. The award, therefore, remained unchallenged and capable of execution.

11. The Respondent subsequently initiated execution proceedings before the Tribunal. In particular, it filed a Notice to Show Cause dated 8th April 2025 requiring the Applicant to demonstrate why execution should not issue against him.
12. Upon hearing the said application, the Tribunal issued warrants of arrest against the Applicant on 7th May 2025 as a means of enforcing the decree. It is this warrant
13. Aggrieved by both the award and the ensuing execution process, the Applicant filed the present application.
14. With the above background in mind and having carefully considered the application, the response thereto, and the applicable law, the Court finds the following require determination:
 - i. Whether the prayer for leave to appeal out of time is merited
 - ii. Whether the warrants of arrest should be set aside
 - iii. Whether the Applicant satisfies the threshold for stay of execution pending appeal.

Whether the prayer for leave to appeal out of time is merited

15. The jurisdiction of this Court to extend time for filing an appeal is donated by Section 79G of the Civil Procedure Act, which 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 within the prescribed period.
16. It is now settled that the power to extend time is discretionary and must be exercised judiciously, not capriciously. The guiding principles were succinctly set out in **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231**, and include: the length of the delay; the reason for the delay; (possibly) the chances of the intended appeal succeeding; and the degree of prejudice to the respondent.
17. The Supreme Court of Kenya in Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR) has reaffirmed the above tests, with the Court emphasising that extension is not a right and delay must be sufficiently explained.
18. In the present case, there is no dispute that the delay herein is substantial. The impugned award was delivered on 17th August 2023 while the present application was filed on 16th May 2025, a period of approximately twenty-one (21) months.

19. Ordinarily, such delay would militate against the grant of the orders sought. However, the Court must interrogate whether, notwithstanding the length of delay, sufficient cause has been demonstrated to warrant the exercise of discretion in favour of the Applicant.
20. Here, the Applicant attributes the delay to caring for his sick wife and lack of communication from former counsel. He produced certain medical documents, but they pertain primarily to 2022, not the relevant period. However, the material demonstrates that the Applicant faced genuine personal hardship.
21. While the Respondent has challenged the adequacy of this explanation, the Court takes the view that the right of appeal is a fundamental component of the right to a fair hearing. Where there is a plausible, albeit imperfect, explanation for delay, the Court should lean in favour of sustaining rather than extinguishing that right.
22. The Court is persuaded that the explanation, though not entirely satisfactory in accounting for every period of delay, is not wholly implausible. The allegation that the Applicant was unaware of the delivery of judgment, coupled with personal hardship, provides a basis, albeit marginal, for the exercise of the Court's discretion in his favour.

23. Regarding the arguability of the intended appeal, the Court is clear that it is not required at this stage to make definitive findings on the merits of the intended appeal. It suffices if the Applicant demonstrates that the intended appeal is arguable and not frivolous.
24. The draft memorandum of appeal raises issues touching on liability, indebtedness, and the propriety of the Tribunal's findings. Without making definitive findings, the Court is satisfied that the intended appeal is arguable. As pointed out by the Court of Appeal in **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231**, arguability need only be "possible", not certain.
25. On the Prejudice test, it is clear from the record that the Respondent represents a SACCO whose members' funds remain unpaid; prejudice is obvious. However, prejudice can be mitigated through appropriate conditions, including security.
26. In balancing the competing interests, the Court must weigh the Respondent's right to enjoy the fruits of its judgment against the Applicant's right to be heard on appeal.
27. The Court is satisfied that the interests of justice will be best served by allowing the appeal to proceed, subject to conditions that safeguard the Respondent.

28. In the circumstances, and notwithstanding the inordinate delay, the Court is inclined, on a strictly conditional basis, to exercise its discretion in favour of the Applicant.

Whether the warrants of arrest should be set aside

29. The Tribunal issued the warrants in execution of its own judgment. The Respondent correctly argues that execution orders are orders of the Tribunal, which should be challenged before the Tribunal, and that an appeal from such a ruling does not lie as of right without leave.

30. I agree. This Court cannot set aside the Tribunal's warrant of arrest in the absence of a proper appeal or review before that Tribunal. However, where the Court is minded to grant leave to appeal out of time and to consider stay, as in the present case, it becomes necessary to preserve the substratum of the intended appeal.

31. Accordingly, enforcement measures such as warrants of arrest ought to be held in abeyance pending compliance with the conditions imposed by the Court.

Whether the Applicant is entitled to stay of execution pending appeal

32. The jurisdiction of this Court to grant stay of execution pending appeal is anchored under Order 42 Rule 6(2) of the

Civil Procedure Rules, which provides that no order for stay shall issue unless the Applicant satisfies the Court that:

- (a) substantial loss may result unless the order is made;
- (b) the application has been made without unreasonable delay; and
- (c) such security as the Court orders for the due performance of the decree has been given.

33. On substantial loss, the Respondent cites **James Wangalwa & Another v Agnes Naliaka Cheseto (2012) eKLR**, holding that execution alone is not substantial loss. However, here the Applicant faces imminent arrest, and if imprisoned, he may be unable to prosecute the intended appeal effectively. This satisfies the threshold of real risk of prejudice.

34. On delay, although the application was brought after a prolonged period, the Court has already found that, in the interests of justice, the delay may be excused.

35. On Security, the Applicant has offered to comply with security terms set by the Court. The Respondent insists on security, referencing **Arun C. Sharma v Ashana Raikundalia (2014) eKLR**, which emphasizes that security guarantees performance of the decree.

36. The Court must balance the competing rights of the parties. As was stated in **Butt v Rent Restriction Tribunal [1982] KLR 417**, a stay should be granted where necessary to ensure that an appeal is not rendered nugatory.

37. In this case, the Court having granted leave to appeal out of time, I am of the view that an order for stay of execution is justified but only on strict conditions, consistent with **Samvir Trustee Ltd v Guardian Bank Ltd (2007) eKLR**, which requires balancing the parties' rights.

38. Consequently, to balance the Applicant's right of appeal and the Respondent's right to enjoy its judgment, leave to appeal out of time is hereby granted, but on the following conditions:

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- i. The Applicant shall deposit Kshs. 2,500,000 into a joint interest-earning account in the names of both advocates within 30 days.
- ii. In default, the stay shall automatically lapse without further order.
- iii. The warrants of arrest shall be suspended for 30 days to allow compliance with the above conditions.
- iv. If the Applicant fails to comply, the warrants shall revive automatically.

39. Costs of this application shall be in the intended appeal.

40. It is so ordered.

SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS

19TH MARCH 2026

A handwritten signature in blue ink, appearing to read 'ADO MOSES', is written over a light-colored rectangular background.

**ADO MOSES
JUDGE**

In the presence of: -

C/A - Moses

Ms. Odhong.....for the Applicant

Ms. Wochuna..... for the Respondent

ORIGINAL