

REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
HCCCMISC E164 OF 2025

HIGHREND ABISAYI AUSI

.....**APPELLANT**

VERSUS

EMILY MUTISO KING'OO.....

.....RESPONDENT

RULING

1. Before the Court is an application dated 26th May 2025 seeking leave to file an appeal out of time and a further order of stay of execution in respect of the Judgment in Kithimani CMCC No. E065 of 2021 delivered on 12th March 2025, pending the hearing and determination of the intended appeal.
2. The application is supported by an affidavit sworn on 26th May 2025 of Sylvia Imbisi a legal officer at Occidental Insurance Company Limited the Applicant's insurer.
3. The Applicants contend that being aggrieved with the judgment of the lower court, they are desirous of appealing against it. However, the statutory period for lodging the appeal has since lapsed. They explained that the delay was occasioned by late receipt of the instructions to lodge an appeal, as the judgment advice was not promptly communicated to the insurer. They argue that the delay was excusable and not inordinate.

4. The applicants further state that they are apprehensive that the respondent may proceed with execution at any time, which would result in loss of property if execution ensues. They also averred that they were willing to abide by any reasonable conditions which the court may impose as a prerequisite condition for the grant of stay, including provision of security.
5. The Respondent filed grounds of opposition dated 29th May 2025, contending that the application is frivolous, bad in law and an afterthought, brought solely to frustrate her enjoyment of the fruits of a lawfully obtained judgment.
6. The respondent further argued that there has been inordinate delay in bringing the application as judgment was delivered on 12th March 2025 while the application was filed on 26th May 2025. She emphasized that the Applicant has made no effort to settle the claim. The respondent submitted that should the Court allow the application, then the Applicant ought to be ordered to release to the Respondent half of the decretal sum and costs amounting to Kshs. 1,480,073/= and deposit the balance of Kshs. 1,480,073/= in court within (14) fourteen days.
7. The application was canvassed by way of written submissions summarized here under;
8. The Applicants reiterated the averments in their application and submitted that Section 79G gives the court discretion to extend time for lodging an appeal out of time.

9. They argued that there was a plausible reason for the delay and that the delay was neither deliberate nor inordinate delay. In support, they relied on the case of ***Ndambuki & another v E-Gap Solutions Limited (2025)***.
10. The applicants further contended that their intended appeal was arguable, as it seeks to challenge the trial court's assessment of damages. They maintained, that the respondent would not suffer any prejudice if the application is allowed, whereas they stand to suffer substantial loss if execution proceeds.
11. The Respondent on the other hand submitted that the applicant had not provided any good and convincing reason for the delay in filing the appeal to warrant the exercise of the Court's discretion to grant of the orders sought. She argued that the Applicants had failed to meet the threshold for the grant of an order for stay of execution.
12. The respondents further submitted that should the court allow the application, then half the decretal sum of Kshs. 1,480,073/= should be released to her, with the balance deposited in Court within (14) fourteen days.
13. To support her position, the Respondent cited several authorities, including ***Machakos Hcca Misc. Application No. 59 Of 2020 Ainushamsi Multiple Hauliers Agencies Limited -Vs- Francis Ndengwa & Another Machakos Hcca Misc. Application No. E004 Of 2021 Peter Kioko & Another -Vs- Elizabeth Wanza***

Musyoki, Machakos Hcca No. 249 Of 2013- Beatrice Munene Vs Molly Wangui Gitahi

Analysis and Determination

14. I have carefully considered the application before this court, the reply filed thereto, as well as the written submissions of the parties. The twin issues for determination are whether the application meets the threshold for enlargement of time to file an appeal out of time and whether the conditions necessary for the grant of stay pending appeal have been satisfied.
15. On the first issue, under Section 79G of the Civil Procedure Act, provides that appeals from subordinate courts to the High Court must be filed within a period of thirty (30) days from the date of the judgment from which the appeal lies. The proviso to the section, however, empowers the court to extend time for filing an appeal where sufficient cause has been shown.
16. It is well settled that the decision whether or not to allow an extension of time to file appeal is exclusively a discretion of the court. Such discretion must be exercised judiciously and only where sufficient cause is demonstrated, taking into account both the length of delay and the reasons advanced for it. See the case of ***Nicholas Kiptoo Arap***

Korir Salat v Independent Electoral & Boundaries Commission & 7 others (2014) eKLR

17. In the present case, the impugned judgment was delivered on 12th March 2025. The Notice of Motion was filed on 26th May 2025, approximately two and a half months later. The Applicants attributed the delay to non-communication of the judgment advice due to unforeseen technical difficulties with email correspondence between their insurer and counsel. Although no documentary evidence of the alleged email difficulties was provided, I find that a delay of two and a half months delay is not inordinate and/or unreasonable in the circumstances.
18. Turning on the second issue Order 42 Rule 6(2) of the Civil Procedure Rules sets out the conditions for the grant of stay pending appeal. The applicant must demonstrate that;
- a. Substantial loss may result if stay is not granted;
 - b. The application has been made without unreasonable delay; and
 - c. Such security for the due performance of such decree or order has been given.
19. The Applicants submitted that they stand to suffer substantial loss including loss of property, if execution proceeds. The decretal sum herein was Kshs.2,90,146/- which is a considerable amount. The Respondent did not file

an Affidavit of Means to demonstrate her ability to refund the decretal sum should the w the intended appeal succeed.

20. The Court of Appeal in ***Absalom Dova vs. Tarbo Transporters [2013] eKLR***, stated that: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree.”

21. Similarly in ***G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another*** the Court held as follows:-

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

22. Guided by these authorities, in the absence of proof that the Respondent would be able to refund the decretal sum

without any hardship, this court is satisfied that the Applicant would suffer substantial loss.

23. The Court has already found that the application was filed without unreasonable delay, accordingly, the Applicant has met the second condition for grant of an order for stay of execution pending appeal.

24. On the third condition, the Applicant have indicated willingness to provide security by depositing the decretal sum in a joint interest earning account. This demonstrates readiness to balance their right of appeal with the respondent's right to enjoy the fruits of her judgment.

25. Balancing these competing rights, that is the Applicants' right to exercise his right of appeal and the equally important Respondent's right to enjoy the fruits of her judgment this court finds that greater injustice would be occasioned to the applicant if they were denied an opportunity to ventilate their Appeal on merits. Granting stay ensures that the appeal is not rendered nugatory, while appropriate security safeguards the respondent's interest.

26. For the foregoing reasons, the Court finds that the Notice of Motion Application dated 26th May 2025 is merited and is allowed in the following terms:

- a. The Applicant is granted leave to file and serve Memorandum of Appeal against the judgment

delivered on 15th March 2025 in Kithimani CMCC No. E065 of 2021;

- b. The memorandum of appeal shall be filed within 14 days of this ruling;
- c. Stay of execution in respect of the Judgment in Kithimani CMCC No. E065 of 2021 is granted pending the hearing and determination of the appeal, on condition that the Applicant deposits half the decretal sum in an interest earning account held jointly by Counsels for both parties within 45 days of this Ruling; in the alternative the said amount be deposited in court within the same period, failing which execution to issue
- d. The costs of the Application shall abide the outcome of the appeal.

Orders accordingly.

Dated, signed and delivered at Machakos this 9th day of April, 2026

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant