

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CORAM: R. MWONGO, J.
MISCELLANEOUS CIVIL APPLICATION NO. E038 OF 2025

ISAAC MURIITHI.....APPLICANT KIMATHI

-VERSUS-

DAVID MURIITHI KIVERE.....1ST RESPONDENT
GERALD MBUTHIA KIURA.....2ND RESPONDENT

R U L I N G

The Application

1. The applicant filed a notice of motion dated 12th May 2025, which is supported by the grounds set out on its face and the facts deposed in the supporting affidavit thereof. The orders sought are as follows:
 - 1) Spent;
 - 2) That leave be granted to the Applicant herein to lodge an Appeal against the judgment and decree issued by Hon. Atieno Joan Otieno delivered on 11th December, 2024 in Embu CMCC E214 of 2023;
 - 3) Spent;
 - 4) That this Honourable Court be pleased to grant stay of execution of the Judgment and Decree issued by Hon. Atieno Joan Otieno delivered on 11th December, 2024 in Embu CMCC E214 of 2023 pending the hearing and determination of this application;
 - 5) That this Honourable Court be pleased to grant a stay of execution of the Judgment and decree issued by Hon. Atieno Joan Otieno delivered on 11th December, 2024 in Embu CMCC E214 of 2023 pending the hearing and determination of the intended Appeal;
 - 6) Spent; and
 - 7) That the costs of this application be provided for.
2. In Embu CMCC E214 of 2023, the trial court awarded the respondents Kshs.808,390/=. The applicant, being aggrieved by the findings of the trial court, resolved to appeal but a delay occurred, hence the application herein. He stated that in his view, the appeal is arguable and it raises triable issues. He stated that it is necessary that an order for stay of execution be made so that the subject matter of the suit is not lost. He offered security for performance in the form of his motor vehicle registration number KCH 794S valued at

Kshs.900,000/=. He added that if the court grants the orders prayed, the respondents will not suffer any prejudice. He annexed to the application, a copy of the intended memorandum of appeal for perusal by the court.

Replying Affidavit

3. The 2nd respondent filed a replying affidavit stating that the applicant had 30 days within which to lodge an appeal, which time ended on 11th January 2025. That the applicant filed the application after his application to reopen the defense case at the trial court was dismissed. He argued that the 4-month delay is inordinate and inexcusable and that the applicant does not deserve the orders ought.
4. He stated that the delay was occasioned by the applicant's own making and it is only meant to keep him from enjoying the fruits of his judgment. That the stay of execution order is not merited either and that he is able to refund the decretal amount if the appeal succeeds. According to him, the appeal did not have any chances of success. He urged the court to dismiss the application and let him execute for the decretal amount.

Parties' Submissions

5. The application was canvassed by way of written submissions.
6. The applicant submitted that the delay of only 3 months in filing the appeal, occurred when he moved the trial court for orders to reopen his case and present more evidence. That it is a delay which the court may excuse. He cited the case of **Philip Keipto Chemwolo & another v Augustine Kubende [1986] KECA 87 (KLR)** where the court acknowledged that mistakes are bound to happen from time to time.
7. He argued that his intended appeal has high chances of success and he relied on the cases of **Ngei v Kibe & another [2021] KECA 243 (KLR)**, **Mbarak Said Ali & another v Sultan Palace Development Limited [2021] KECA 443 (KLR)** and **Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KECA 782 (KLR)**.
8. He submitted that the orders for stay of execution may be granted on discretion of the court on the strength of section 1A of the Civil Procedure Act and Order 42 Rule 6(2) of the Civil Procedure Rules. It was his submission that the delay in bringing the application is not inordinate, and that substantial loss may result if the order is denied. Reliance was placed on the cases of **Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] KEHC 4573 (KLR)**

and **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] KEHC 8358 (KLR)**.

9. On the question of security for performance, he relied on the cases of **Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others [2014] KEHC 2430 (KLR)** and **Gitahi & another v Warugongo [1988] KECA 123 (KLR)** and argued that the vehicle he has offered is sufficient and will offer protection to the respondents in any event.
10. He reiterated that his intended appeal is arguable and worthy of the court's time. In support of this argument, he relied on the case of **Manchar Singh Sagoo & another v Caroline Njeri Mwicigi & 3 others [2018] KECA 513 (KLR)**.
11. The 2nd respondent submitted that a delay occurred when the applicant moved the trial court for an order to reopen his case once judgment had already been delivered. When that application was dismissed, he then filed the application herein, albeit too late. He argued that the applicant did not explain why he chose to move the lower court for reopening his case instead of filing the application herein in the first place.
12. According to him, the applicant's application herein is a tactic to delay him from enjoying the fruits of his judgment, and this is greatly prejudicial to him. He stated that the logbook of the motor vehicle which the applicant has offered as security is not suitable and that he ought to offer security in the form of money or a bank guarantee or any other form as the court may order. It was his submission that the applicant is undeserving of the orders and he urged the court to dismiss the application. He relied on the case of **Salat v Independent Electoral and Boundaries Commission & 7 others (supra)**.

Issue for determination

13. The issue for determination is whether the application has merit.

Analysis and Determination

14. The applicant seeks stay of execution of the decree in Embu CMCC E214 of 2023 and leave to appeal out of time against the findings of the trial court. Stay of execution is provided for under Order 42 Rule 6(2) of the Civil Procedure Rules which is as follows:

“(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

15. The grounds for extension of time to appeal are set out in section 79G of the Civil Procedure Act 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 added]

16. The impugned judgment was delivered on 11th December 2024. The application herein was filed about 4 months after the impugned decision was rendered. The applicant stated that the delay occurred because he was first trying to move the trial court for an order seeking to reopen his case and adduce further evidence.

17. The delay of 4 months cannot, in itself, be said to be unreasonable. Furthermore, the explanation given is reasonable and not far-fetched given that the applicant was acting towards challenging the decision made against him.

18. The conditions set under Order 42 Rule 6 of the Civil Procedure Code include provision of and security for performance. To this end, the applicant has offered his logbook for a motor vehicle valued at Kshs.900,000/= but the 2nd respondent contended that this is not adequate security. In the case of ***Regional Institute of Business Management v Lucas Ondong’ Otieno [2021] KEHC 8218 (KLR)***, the applicant sought to provide a motor vehicle logbook as security in a stay application. The court stated thus:

“In this case, the director who is offering to deposit a logbook for her vehicle in lieu of the security ordered by the court is not a party to the appeal. In any event, a motor vehicle is a fluid asset whose value is not static but depreciates with time. Considering that even if the logbook is deposited in court the vehicle will continue to be in the

use and control of the applicant's director, I am in agreement with the respondent's submission that many things can happen to the said vehicle before the appeal is determined and there is no guarantee that its value will not have completely diminished by the time the appeal is concluded. Having taken all relevant factors into account, it is my finding that the motor vehicle logbook being offered by the applicant's director is not a good or proper substitute for the security ordered by the court." [Emphasis added]

19. Further, in **Simba Coach Limited v Kiriiyu Merchants Auctioneers [2019] KEHC 8787 (KLR)** it was held:

*"So is [a] motor vehicle logbook an ideal security in the circumstances? The issue of a logbook being used as security for stay of execution of a decretal sum has been widely discussed by courts in other cases. In **Lochab Brothers Ltd vs. Lilian Munabi Nganga & 2 Others [2007] eKLR**, for example, the court dismissed a similar application to substitute security with a logbook, the court expressed the view that:*

'there is no guarantee that by the time the appeal will be heard and determined the vehicle will be worth the same money or it be there at all. The vehicle is still under the control and use of the applicant. Many things can happen to it before the appeal is heard. It can be wasted and its value diminished or it can even be involved in an accident and be completely damaged. I am not saying that this is going to happen but it can happen. If that happens then there will be no security for the respondent to fall back on if the appeal is not successful. Deposit of motor vehicle log book is therefore not a satisfactory security.'

*In the recent case of **Esri Star Ltd & Another vs. Sila Oweshiwani [2018] eKLR** the court held that "a motor vehicle or a trailer, as in this matter, is the worst form of security that an applicant can offer with the aim of obtaining orders for stay of execution in a case involving a money decree."*

From the forestated authorities, it is clear that a logbook is not and cannot be the ideal security in the circumstances owing to the circumstances and the uncertainties that it possesses in terms of how the respondent will recover the decretal sum."

20. The offer for security in the form of a logbook is, therefore not practical in this case. The court is inclined to order that the applicant provides security in another suitable form, considering that a stay of execution order is a discretionary relief which the court may give on any other conditions.

21. The applicant has explained the reason for delay in filing the application herein and found that the delay was not inordinate. From a perusal of the draft memorandum of appeal, the applicant is challenging the trial court's findings on both liability and quantum. The court may, in its discretion, extend time to appeal under Section 79G of the Civil Procedure Rules in the interest of justice.

22. In doing so, it is noted that the rights of the applicant to appeal are considered alongside the rights of the respondents to enjoy the fruits of their judgment.

Disposition

23. Ultimately, I find that the application herein has merit. Orders are hereby made as follows;

- 1) Stay of execution is hereby granted on condition that the applicant deposits 65% of the decretal amount into court within 30 days of this ruling, failing which the stay order will lapse and the respondents may proceed to execute; and
- 2) Consequently, upon compliance with (a) above leave to appeal out of time is granted. The applicant shall file his memorandum of appeal within 45 days from the date hereof.

24. Costs of the application shall be in the cause.

25. Orders accordingly.

Delivered, dated and signed at Embu High Court this 22nd day of April, 2026.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. Nyoro for Applicant
2. Sirma holding brief for Mwhia for Respondent
3. Kathambi for 2nd Respondent
4. Stella Kithinji - Court Assistant