

REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
HCCA E123 OF 2025

SIMBA COOL EAST AFRICA LTD.....1ST
APPLICANT

SIMBA COACH LIMITED2ND
APPLICANT

VERSUS

DAVID KIHORO WAITHERA.....
.....RESPONDENT

RULING

1. Before the Court is a Notice of Motion Application dated 23rd May 2025 seeking the following orders:

- a) That the Court be pleased to stay execution of judgment and decree in Makindu MCCC/12/2020 David Kihoro Waithera vs Simba Cool East Africa Limited & Simba Coach Limited out of time.
- b) That leave be granted to lodge an Appeal against the entire judgment and decree in Makindu MCCC/12/2020 David Kihoro Waithera vs Simba Cool East Africa Limited & Simba Coach Limited out of time.
- c) That the Court be pleased to stay execution of the decree in Makindu MCCC/12/2020 David Kihoro Waithera vs Simba Cool East Africa Limited & Simba

Coach Limited pending the hearing and determination of the intended appeal.

d) The Court allow the Applicant to furnish the Court with Security in the form of a Bank Guarantee

2. The Application is premised on the grounds set out therein and reiterated in the Supporting Affidavit of Farid Seif Suleiman, sworn on behalf of the Applicants.
3. In support of the application, he averred that the Applicants were aggrieved by the judgment delivered on 24th February 2025 in Makindu MCCC. 12/2020 and wished to appeal against the same; he explained that they only became aware of the judgment after the statutory period for lodging an appeal had lapsed. Meanwhile, the Respondent has commenced execution and have been served warrants of attachment. The applicants contend that they stand to suffer irreparable damage and substantial loss should execution proceed. They maintain that their appeal is arguable, with a high chance of success and will be rendered nugatory unless the orders sought are granted; they further express readiness to furnish security in the form of a Bank Guarantee.
4. The Application was opposed by the Respondent through a Replying Affidavit dated 30th June 2025. The respondent argued that this Court lacked territorial jurisdiction over the matter; that the Application contravened the provisions of

Order 9 Rule 9(a) and that the Applicant's counsel had no audience before the Court. It further contended that e no reasonable explanation had been provided for the delay, and that it would be prejudicial to deny the respondent the enjoyment of the fruits of his judgment due to the Applicant's indolence.

5. They deponed that should the Court be persuaded to grant stay, the Applicants ought to be ordered to deposit the decretal sum of Kshs.632,592/= in a joint interest earning account pending determination of the appeal and further be condemned to pay the auctioneers cost of Kshs. 210,000/=

Submissions

6. The Applicants submitted that in applications for extension of time, each case must be considered on its own unique facts and circumstances as explanations for such delay vary. They relied on the case of ***Njoroge v Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling)***.
7. In the instant case, they argued that the delay emanated from their former advocates' failure to timely inform them of the judgment. They submitted that the mistake of counsel should not be visited on the litigants. In support, they made reference to the following cases ***Kariuki v Wangeci & 7 others (Civil Application E250 of 2023) [2024] KECA 1692 (KLR) (22 November 2024) (Ruling), Geoffrey***

Oguna & another v Mohamed Yusuf Osman & 2 others [2022] eKLR, CFC Stanbic Limited v John Maina Githaiga & another [2013] eKLR and Phillip Chemwolo & Another -vs- Augustine Kubede [1982-88] KLR 103.

8. The Applicant submitted that they had moved the Court timeously upon learning of the judgment delivered on 24th February, 2025 by filing the present Application on 23rd May 2025.
9. They further argued that the decretal sum of Kshs.632,592/- is substantial, and they are apprehensive that the Respondent will not be in a position to refund the money should the appeal succeed, which will occasion prejudice to them.
10. They contended that the judgment was entered without representation of counsel, amounting to a violation of their right to a fair hearing, as they were condemned unheard. Consequently, executing the judgment dated 24th February, 2025 would greatly prejudice them and occasion severe loss to the Applicants, contrary to Article 159(2)(d) of the Constitution.
11. The applicants submitted that awarding the Respondent the decretal sum would wholly and irrevocably render the appeal nugatory. They argued that if execution were to proceed, they could not be adequately compensated by an award of damages. While acknowledging that a successful litigant is entitled to enjoy the fruits of her judgment, they

contended that such enjoyment should not come at the expense of the Applicant's right to pursue an appeal.

12.They further submitted that they were willing to abide by any conditions and terms as to security that the court may deem fit to impose, and expressed readiness to provide security in the form of a bank guarantee.

13.The Respondent on the other hand, submitted that this court lacked territorial or other analogous jurisdiction to determine an appeal emanating from Makindu MCCC/12/2020. She argued that since the matter was determined by the Makindu Magistrate court the appeal lay to the Makueni High Court, thereby automatically divesting this Court of jurisdiction. Reliance was placed on ***National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others.***

14.The respondent further submitted that the application contravened the provisions of Order 9 rule 9 of the Civil Procedure Rules as no application for leave nor consent between Makaka & Associates Advocates and Kokul Fozah & Partners Advocates had been filed by the Applicants. Consequently, she argued that the application was defective and liable to be struck out. Reference was made to cases ***Njoka v Eustace & another [2024] KEELC 6322 (KLR) and Kochieng v County Assembly Service Board & another [2023] KEHC 1681 (KLR).***

15. It was the Respondent's submission that the Applicants had not demonstrated good and sufficient cause for failing to file their appeal within the statutory period prescribed under Section 79G of the Civil Procedure Act. She contended that no credible or satisfactory explanation had been given for their inaction, and that their failure to comply with the clear statutory timelines was indicative of their indolence. She relied on ***Salat v Independent Electoral and Boundaries Commission & 7 others [2015] KESC 31 (KLR), Thuita Mwangi v Kenya Airways Ltd [2003] eKLR***

16. The Respondent also relied on the case of ***Chepkemoi v Sangogo (Administrator of the Estate of the Late Taputany Kibeta) [2025] KEHC 2102 (KLR)***, to argue that a delay of three months was prejudicial. She emphasized that execution had already commenced and allowing the application would unjustly deny her the fruits of a valid judgment entered in her favour.

Analysis and Determination

17. I have carefully considered the Application, replying affidavit and the parties' rival written submissions. Before addressing the merits of the application, I must first deal with the preliminary raised by the Respondent as to the competence of the Application. These objections if upheld, are dispositive and could determine matter without need to consider its merits.

18.The respondent first disputed the territorial jurisdiction of this Court to hear and determine the application, contending that the matter ought to have been filed in the High Court at Makueni since it emanates from a decision of the Magistrates Court in Makindu.

19.The Applicants though clearly aware of this contention having been served with the replying affidavit, did not respond to the issue either by way of a supplementary affidavit or in their submissions. It therefore remains unclear why the Applicants chose to file the Application in this Court rather than the Court at Makueni.

20.Indeed, the impugned judgment having been delivered by the subordinate Court at Makindu, it follows that territorial jurisdiction for any appeal or related applications lies with the High Court at Makueni.

21.That said, territorial jurisdiction is administrative and procedural rather than substantive. It does not override the Court's inherent jurisdiction. If this were the only contention raised, I would have exercised the Court's inherent power and directed that the Application be transferred to the High Court at Makueni for hearing and determination.

22.However, the Respondent has also contended that the application contravened Order 9 Rule 9 of the Civil Procedure Rules and was therefore incompetent and ought

to be struck out. Again, the Applicants did not bother to respond to the issue.

23. The rules and procedure for engagement of an advocate post judgment are expressly set out in Order 9, rule 9 of the Civil Procedure Rules which provides as follows;

“ When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court :

***a) Upon an application with notice to all the parties;
or***

b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

24. It is not in dispute that at the trial before the subordinate court, the applicants were represented by the firm of Kokul Fozah & Partners Advocates. The present application, however, was filed by M/S Makaka & Associates Advocates. It is also not in dispute that the application was filed post judgment, thereby triggering the mandatory requirement of Order 9 rule 9 of the Civil Procedure Rules.

25. The provisions of Order 9 Rule 9 are couched in mandatory terms. In ***Jackline Wakesho v Aroma Café [2014] eKLR*** the Court held as follows;

“Although the foregoing objection appears like a technical procedural issue, this Court finds that the default by the Applicant goes to the jurisdiction of the Court to entertain the motion. The reason for the foregoing reasoning is that the Court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack locus standi. The Court has been asked to invoke the oxygen principle under Section 1A and 1B of the Civil Procedure Act and entertain the Motion. The Court will not however do that. The reason for the foregoing is twofold. Firstly, there are several judicial pronouncements cited by the claimant which show that Court's have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Order 9 rule 9...”

26. Accordingly, compliance with the provisions of Order 9 Rule 9 of the Civil Procedure requires either an order of the Court, upon application, with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate.

27. In the absence of prior leave or consent, the Applicant's Notice of Motion Application dated 23rd May 2025 was filed by a firm of advocates not properly on record, and therefore lacking locus standi to move the Court on behalf of the Applicants. The inevitable result is that the application is incurably defective and is hereby struck out with costs to the Respondent.

28. 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.