REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION NO. 209 OF 2025

ABDI RASHID SHEIKH……..……APPLICANT
-VERSUS-
DALMAS ONYANCHA ONGARI……..RESPONDENT

RULING

1. The application before court is a motion dated 23 May 2025 in which the applicant prays as follows:

> ***"2.That this Honourable court be pleased to issue temporary stay execution of the judgment and decree in MOMBASA CIVIL CASE NO. E0l0 OF 2020 entered on 19th May, 2025 pending the hearing and determination of the application inter parties.***
>
> ***3.That this Honourable court be pleased to stay execution of the judgment and decree in MOMBASA CIVIL CASE NO. E0l0 OF 2020 entered on 19th May, 2025 pending the hearing and determination of this application.***
>
> ***4.That this Honourable court be pleased to grant leave to the Applicant to appeal out of time against the judgement in MOMBASA CIVIL CASE NO. E0010 OF 2020 entered on 19th May, 2025 for Kshs. 1,541,221/=."***

2. The application is brought under section 3A, 79G and 95 of the Civil Procedure Act cap. 21; Order 22 rule 22, Order 42 Rule 6 Order 50 rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules. It is supported by the affidavit of Abdi Rashid Hassan who has sworn that as the insured owner of the motor vehicle registration number KCQ 576 N, judgment was entered against him in **Mombasa Chief Magistrates Court Civil Case No. E0010 of 2020.** According to that judgment, the applicant was ordered to pay Kshs. 1,541,221/= on account of general and special damages.
3. Hassan has sworn further that the judgment was initially set to be delivered on 27 February 2025 and then 4 March 2025 but was subsequently delivered on 19 May 2025 without any notification to his advocates.
4. By the time he instructed his counsel to appeal against the judgment, time for the appeal had lapsed. To be precise, the appeal ought to have been filed by 19 June 2025. That notwithstanding, the applicant has sworn that the mistakes of his advocates should not be visited upon him.
5. The respondent has opposed the application and sworn a replying affidavit to that effect. According to the respondent, the application is meant to delay him from enjoying the fruits of his judgment and, therefore, it is filed in bad faith. In proof of this fact, the respondent has brought to the attention of this Honourable Court the fact that the

application was only filed after the respondent filed his statement for assessment of costs.

6. According to the respondent, on 19 May 2025, a copy of the judgment was sent to both counsel for the applicant and the respondent via email. In the judgment, the court granted a 30-day stay of execution.
7. Although the judgment was emailed to the parties' respective counsel on record, the respondent's counsel still notified the applicant's counsel of the judgment on 20 May 2025.
8. The respondent has also sworn that the execution process has not commenced and, thus, there is no basis for orders for stay of execution. As a matter of fact, his costs are pending assessment and he has not even extracted the decree.
9. The respondent has sworn that his claim in the magistrates' court arose after he sustained serious physical injuries that have, as well, affected him mentally. This has weighed heavily on his family, which relies upon him as the only breadwinner. Accordingly, it is unfair and prejudicial to him if the settlement of the decree is delayed any further.
10. Section 79G of the Civil Procedure Act states that appeals to this Honourable Court from decrees or orders in the lower court must be filed within thirty days from the date of the decree or order appealed against. There is a proviso that the appeals may be filed out of time if there is

"good and sufficient cause" for failure to file the appeal in time. The section read as follows:

> ***79G. Time for filing appeals from subordinate courts***
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> ***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.***

11. Thus, the court may exercise discretion and extend time to file an appeal out of time if it can be demonstrated that an applicant has a good and sufficient cause for the delay in filing an appeal. The question here is whether the applicant had such good and sufficient cause.
12. The applicant's reason for not filing the appeal within time is that his advocates were not aware of when the judgment was delivered. However, they have not controverted the respondent's evidence that the court sent the judgment to the parties' representatives by way of email on 19 May 2025. Exhibited to the respondent's affidavit is a copy of the email from

Hon. Burudi Josephat Kalo forwarding the judgment which the applicant intends to appeal against. The e-mail is addressed to info@dac-law.co.ke and Annah K. Kamau, whose email address is indicated as wakiliwako@gmail.com. The applicant's counsel have not denied receiving the email and the attached judgment.

13. But even if it was to be presumed that the applicant's counsel did not receive the email from Honourable Kalo, there is evidence that the respondent's counsel wrote to the applicant's advocates notifying them that judgment had been delivered on 19 May 2025. The notification was sent and received on 20 May 2025, a day after the judgment had been sent to the parties' respective counsel.

14. There is proof that the letter was received because it is stamped as having been received by the applicant's firm of advocates on 20 May 2025. This evidence has not been controverted as none of the advocates in the applicant's firm of advocates has sworn any affidavit to that end.

15. What this evidence boils down to is that it is not true, as the applicant wants the court to believe, that the applicant's firm of advocates was not aware of the judgment early enough to file the appeal within the prescribed time.

16. In these circumstances, I cannot find what one would regard as a *"good and sufficient cause"* for the delay in filing the appeal in time. In fact,

there is no cause at all and hence no material upon which this court can exercise its discretion in favour of the applicant.

17. It has been held that exercise of discretion in favour of an applicant in such circumstances is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable error but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. This was so held in **Shah versus Mbogo & Another (1967) EA 116** at page 123. Although the case was about setting aside *ex parte* judgment, those principles are in my humble view, as much relevant and applicable to the applicant's case.

18. In the absence of any reason or any good and sufficient reason why the appeal could not be filed within the prescribed timeline, the applicant's application would fit the description of an application that is deliberately intended to obstruct or delay the course of justice. For this reason, the application not only has no merits but it is also an abuse of the due process of court. The application is hereby dismissed with costs to the respondent.

Signed, dated and delivered on 24 April 2026

Ngaah Jairus
JUDGE