



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION NO. E162 OF 2025

**WEST KENYA SUGAR COMPANY LIMITED
APPLICANT**

VERSUS

**SUSSIE AYUMA INYANGALA 1ST
RESPONDENT**

**PHILIP SIDANI 2ND
RESPONDENT**

**THE ATTORNEY GENERAL 3RD
RESPONDENT**

**THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE ...
4TH RESPONDENT**

**(Being an application for leave to appeal out of time against the
Judgment and Decree of the Hon. P. Mutua (CM) in Kakamega CMCC
Cause No. 283 of 2016 and No. 284 of 2016 delivered on 21st May 2025)**

RULING

1. Before this court for determination is a Notice of Motion application dated 7th November 2025. The Applicant seeks two main orders: a stay of execution against the judgment delivered on 21st May 2025 in Kakamega CMCC Cause No. 283 of 2016 and No. 284 of 2016 (consolidated). The Applicant further seeks leave to file and serve the Memorandum of Appeal out of time.

2. For purposes of the proceedings, the matter was heard contemporaneously with Kakamega HCC. Misc. No. 163 of 2025 where the deponent was cross-examined on his supporting affidavit.
3. The application is supported by the affidavit of the Applicant's Administrative Officer, Bernard Shimenga, sworn on the same date. The deponent avers that immediately after the judgment was delivered, its milling operations were severely disrupted by an acute shortage of sugarcane, culminating in the complete closure of the factory in April 2025. This was compounded by a formal directive issued by the Kenya Sugar Board, via a letter dated 7th August 2025, ordering the temporary closure of all milling operations in the Lower and Upper Western Sugar Catchment Areas for three (3) months, with effect from 12th August 2025.
4. The Applicant further averred that the directive disrupted the administrative and financial functions of the company and therefore they were unable to access their legal documents or instruct Counsel for the Applicant to file an appeal within the prescribed timelines.
5. The Administrative Officer deponed that the execution of the judgment was dormant until 4th November 2025, when the company was served with the proclamation notice of attachment of its assets. It is the proclamation of attachment which prompted the Applicant to instruct their Counsel to file the

application for leave to appeal out of time and for stay of execution of the impugned Judgement.

6. The Applicant reiterated that the delay was regrettable and not inordinate and that the delay was caused by the industry-wide closure and financial/administrative constraints.
7. It asserted that its appeal has a high chance of success and that it is not frivolous. The Applicant indicated that it is ready and willing to give security as the court will order for due performance, and that the Respondents would suffer no prejudice if the application is allowed
8. The 1st and 2nd Respondent filed their grounds of opposition dated 10th November 2025, stating that the application is bad in law and failed to disclose any reasonable and sufficient cause to justify the orders being sought and that the application is an abuse of the court's process.
9. During the hearing, learned counsel for the Respondents applied to have Bernard Shimenga, the Applicant's Administrative Officer and deponent of the supporting affidavit, cross-examined on oath to test the veracity and validity of the affidavit.
10. During cross-examination by Mr. Abok for the Respondents, the said deponent, stated that he had passed through Nairobi for personal reasons on his way to Mombasa for his son's graduation. He denied visiting any office in Nairobi and said that he did not know anyone by the name Ochutsi J. Munyendo, and denied appearing before him.

11. When shown the supporting affidavit, he said that he signed it in Nairobi on 7th November 2025, and that he was confused and did not know in which office he had signed the affidavit, further stating that he has only made reference to the non-official visit.
12. On re -examination by Mr. Javer, he said that he went to Nairobi in November 2025, once, when he was passing through Nairobi to Mombasa, and then again when he went to sign the affidavit. Although he did not remember where he signed the affidavit, he maintained that he signed it before a Commissioner for Oaths.
13. He claimed that the reason they were seeking leave to file the appeal out of time was that by the time they received the judgment, most of their staff had been sent home, hence there was a communication breakdown.
14. The application was canvassed by way of written submissions.
15. In its submissions, the Applicant quotes Section 5 of the Oaths and Statutory Declarations Act (CAP 15). It maintains that the deponent's evidence was clear during cross-examination and re-examination, that he was in agreement with the contents of the affidavit, that he was in Nairobi where the affidavit was commissioned, and that he appended his signature to the affidavit and acknowledged that he was before the Commissioner for Oaths.
16. The Applicant argues that the deponent had made a stop in Nairobi while on the way to Mombasa to attend his son's graduation and later went to Nairobi on another date to sign the affidavit before a Commissioner for Oaths on 7th November 2025.

It asserts that it had met the statutory requirement in Section 5 of the Oaths and Statutory Declarations Act as further affirmed by the deponent's oral testimony.

17. On the location of the commissioning, the Applicant avers that the deponent could not tell the exact place, as Nairobi is a large city and that the failure to identify the exact place did not invalidate the affidavit.
18. The Applicant further submits that the deponent's inability to recall the name of the Commissioner for oaths should not invalidate a duly commissioned affidavit. It aligns itself with the case of ***Dardanelli & 6 others vs Tilito & 3 others (2025) KEELC 392 (KLR)*** and argues that, according to Rule 7 of the Oaths and Declarations Act, the duty was on the Commissioner to know the deponent before them and not the deponent to recall the name of the Commissioner.
19. The Applicant prays that the court admits the affidavit as there was no evidence that the person who commissioned the affidavit was unauthorised, or that the deponent was not present, or that the jurat is false.
20. The Respondents contend that the oral testimony by Mr. Bernard Shimenga during cross-examination failed to support the application dated 7th November 2025. They claim that the deponent was not truthful during cross-examination as he asserts that he passed by Nairobi on his way to Mombasa in November 2025 for personal reasons, and stated that he never visited any office in Nairobi, and that he did not know Ochutsi J.

Munyendo, who was apparently the advocate who commissioned the affidavit, and was stationed in Nairobi.

21. According to the Respondents, PW1 was not truthful all along, as he told the court he never signed the document before any advocate in Nairobi and never knew the advocate who commissioned the affidavit, and later feigned ignorance and claimed that he had signed the document when he visited Nairobi later but could not recall the office or the Commissioner's name.
22. They aver that the orders sought by the Applicant are based on judicial discretion, which they aver is not absolute but qualified and that the Applicant has not come to court with clean hands. In support, they cite the case of ***Mbogo and another vs Shah (1968) 1EA.***
23. Having carefully considered the application, the affidavit on record, the oral testimony of the deponent, and the submissions by both parties regarding the supporting affidavit, this Court finds the following preliminary issue must be determined first: *Whether the supporting affidavit was properly commissioned in accordance with the law.*
24. Section 5 of the Oaths and Statutory Declarations Act provides that:- ***“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”***

25. In the present case, the Respondents allege that the supporting affidavit sworn by the deponent was defective as the said deponent was not in Nairobi on 7th November 2025 on the day of swearing the affidavit and hence it was therefore improperly commissioned. The allegations that the deponent was not present at the time of commissioning the supporting affidavit go to the root of the case and, as such, need to be addressed.
26. The deponent, Bernard Shimenga, was cross-examined on 22nd January 2026, and at first, he denied having been in Nairobi for official duties. He claimed he passed through Nairobi on his way to Mombasa, but later stated he was confused and insisted that he had sworn the affidavit in the presence of the commissioner in Nairobi.
27. The Respondents, being the ones making the allegations that the deponent was in Nairobi in the date the affidavit was commissioned, bear the legal and evidentiary burden to prove their claim.
28. It is a cardinal and trite principle of the law of evidence that he who alleges must prove. This principle is firmly anchored in sections 107, 108 and 109 of the Evidence Act (Cap. 80), which states that whoever desires the court to give judgment as to the existence of a fact must prove that fact.
29. In ***Miller v Minister of Pensions [1947] 2 All ER 372***, in considering the burden of proof, Lord Denning held that: -
- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a***

criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

30. A perusal of the proceedings shows that although the deponent officer was cross-examined and re-examined, the Respondents did not tender any evidence whatsoever in support of their assertion that the deponent never appeared before the Commissioner for Oaths. No travel records, oral evidence, documentary proof or other material have been placed before the court to demonstrate that Mr. Shimenga was never in Nairobi on the material date. Mere assertions in submissions or oral arguments do not constitute evidence.
31. On the other hand, the supporting affidavit on its face bears a jurat indicating that it was sworn in Nairobi on 7th November 2025 before a Commissioner for Oaths. There is a presumption that the affidavit was sworn in the said place in the presence of the Commissioner unless the contrary is proved. The Respondent has failed to rebut this presumption with credible evidence.

32. The principle that “*he who alleges must prove*” has been consistently applied by Kenyan courts in similar challenges to affidavits. Allegations of improper commissioning or falsehood in a jurat must be strictly proved by the party asserting them. In the absence of such proof, the court cannot strike out or disregard a duly commissioned affidavit.
33. The Respondents’ reliance on the deponent’s alleged testimonial inconsistencies did not shift the burden onto the Applicant. Even where oral testimony raises questions, the initial burden remains on the party challenging the affidavit to produce evidence disproving the facts stated in the jurat.
34. I am satisfied that the Respondents have not discharged the burden placed upon them. The challenge to the supporting affidavit, therefore, fails. I hold that the affidavit of Bernard Shimenga, sworn on 7th November 2025, was properly sworn and shall be considered in determining the substantive application.

Applicant’s Submissions

35. In its submissions, the Applicant raises two issues for determination. On the first issue of whether they had met the threshold for extension of time to file the appeal out of time, it cites the Supreme Court case of ***Nicholas Kiptoo Korir Arap Salat vs IEBC and 7 others [2014] eKLR***, on the principles the court ought to consider when granting leave to appeal out of time.

36. The Applicant further submits that its case has a reasonably high chance of success and makes reference to the reasoning in ***Kihagi vs Yuchoka & 8 others [2023] KEELC 20463 (KLR)***.
37. On whether it will suffer substantial loss if the application is not allowed, it relies on the case of ***Antoine Ndiaye vs African Virtual University (Civil Suit 422 of 2006) [2015] KEHC 6783(KLR)***. It argues that it had received a proclamation notice from the auctioneers who had attached its properties, and that they are yet to recover from the suspension of its business.
38. It asserts that the Respondents will not suffer any prejudice should its application be allowed and that they would get a chance to defend the intended appeal.
39. As to whether it should be granted a stay of execution, it relies on Order 42 Rule 6 and contends that it had met the requisite conditions for stay, having established that the delay was not inordinate and it would likely suffer substantial loss if the application for stay is not allowed. It relies on the case of ***RWW vs. EKW (2019) KEHC 6523 (KLR)***. It submits that the attachment of its motor vehicles is detrimental to its business as it would cause loss of business revenue, which are essential tools of trade, and if execution is allowed, it would render the appeal nugatory.
40. It submits that it is willing to provide security as would be directed by the court and prays that the court exercises its discretion in its favour.

1st and 2nd Respondents Submissions

41. The 1st and the 2nd Respondent filed their submissions raising two issues for determination: whether there are sufficient and good reasons given to warrant filing an appeal out of time, and whether the provisions of Order 4 rule 6 (2) have been satisfied to warrant a stay of execution pending appeal.
42. As to whether the Applicant had given sufficient reasons to warrant filling the appeal out of time, they quote Section 79 (G) of the Civil Procedure Act on the timelines for filing of the appeal.
43. Regarding the principles that the court should consider in exercising the discretion, they rely on ***First American Bank of Kenya Ltd vs Gulab P. Shah & 2 others [2002] 1 EA 65*** and ***Edith Gichugu Koine vs Stephen Njagi Thoithi [2014] eKLR.***
44. They submit that the Applicant failed to satisfy any of the principles to enable the court to exercise its discretion to grant leave for them to file their appeal out of time.
45. On the length of time, they submit that the impugned judgment was delivered on 21st May 2025 in the presence of both parties, yet the Applicant filed the application on 7th November 2025, which was over 6 months later than the 30 days stipulated.
46. Regarding the explanation for the delay, they contend that it was not an issue in the present case and should not be used to deny them the fruits of the judgment in the case which they aver was filed in 2016 which was over nine (9) years ago.
47. They aver that the Applicant did not demonstrate any plausible or good and sufficient explanation for the delay.

48. They contend that the Applicant's intended appeal failed to raise arguable points, contending that the appeal was argumentative and would not result in a different outcome from the decision of the trial court and further that the Applicant had not come to court with clean hands.
49. On whether the Applicant had satisfied the requirements under Order 42 rule 6 (2), they aver that the alleged substantial loss had not been demonstrated by way of evidence on record. They cite the case of ***James Wangalwa & another vs Agnes Naliaka Cheseto (2012) eKLR.***
50. In conclusion, they aver that their costs had been taxed on 22nd October 2025 in the presence of all parties, and the decretal sum was not paid for a period of over 6 months. They submit that they were in the process of executing the judgment and pray that the application be dismissed as it lacks merit, and that they be allowed to enjoy the fruits of the judgment.

Analysis and Determination

51. Having considered the application, the affidavits and submissions in support thereof, I find that there are two main issues for determination, being:-
- a) Whether the Applicant has demonstrated sufficient cause to warrant the grant of leave to file the Memorandum of Appeal out of time.
 - b) Whether the Applicant has satisfied the conditions under Order 42 Rule 6(2) of the Civil Procedure Rules for the grant of stay of execution pending appeal.

52. Regarding the first issue, Section 79G of the Civil Procedure Act requires an appeal from the subordinate court to be filed within 30 days of the date of judgment or order. It states that:-

“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.”

53. Although the court has discretion to extend time to admit an appeal out of time, such discretion is exercised in accordance with the principles of law. In ***Leo-Sila Mutiso Vs. Rose Hellen Wangari Mwangi Civil Application No. 251 Of 1997 at Nairobi***, it was stated that the court has a wide discretion which should be exercised judiciously, taking into account the reason for the delay, the duration of the delay, the likely prejudice to the Respondent and possibly the chances of appeal.

54. The Supreme Court in ***Nicholas Kiptoo Korir Arap Salat v Independent Electoral and Boundaries Commission & 7 others (Supra)*** further laid down the guiding principles that a court must consider when exercising its discretion to extend time. These include: (a) the length of the delay; (b) the explanation for the delay; (c) the degree of prejudice to the other

party; and (d) whether the intended appeal raises arguable points. The court emphasised that the discretion must be exercised judiciously and not capriciously. Further, it has been held that each case should be determined on its own merit and all relevant circumstances considered.

55. Applying those principles to the present case, the judgment sought to be appealed was rendered on 21st May 2025. The 30 days' period for filing the appeal expired on or about 20th June 2025. The present application was filed on 7th November 2025, after a delay of approximately five and a half months. A period of over 5 months is, on the face of it, inordinate, considering the strict timelines set by the Act. It was therefore incumbent on the Applicant to offer sufficient reasons why the court should grant leave to file appeal out of time.
56. According to the Applicant, acute shortage of mature cane from April 2025 led to virtual closure of the Applicant's operations resulting in financial distress further compounded by the temporary closure of the sugar milling operations in the Lower and Upper Western region pursuant to the Kenya Sugar Board directive of 7th August 2025. This was beyond their control and paralysed their administrative and operational functions. Courts have recognised that external factors, such as statutory directives, force majeure events, or unforeseen disruptions in regulated industries, may constitute sufficient cause. See ***First American Bank of Kenya Ltd v Gulab P. Shah & 2 others (Supra)***.

57. I note that the execution process itself remained dormant for several months after judgment. The Applicant moved immediately upon service of the proclamation notice on 4th November 2025. The delay cannot, therefore, be described as inordinate.
58. In respect to the final issue, the Applicant has demonstrated that the intended appeal is not frivolous. It raises points that are arguable. I need not delve into the degree of arguability. This court is not required at this stage to determine the appeal on the merits, but to be satisfied that the grounds raised are arguable.
59. In the spirit of substantive justice and the need to promote the right to be heard, I hold that the application for leave to appeal out of time is thus merited.

Stay of Execution

60. The legal requirements for stay of execution are provided under Order 42 Rule 6(2) of the Civil Procedure Rules. The Applicant must demonstrate:-
1. *Substantial loss may result unless the order is made.*
 2. *The application has been made without unreasonable delay;*
 3. *Security for the due performance of the decree has been provided.*
61. The Applicant has placed before the court uncontroverted evidence of a proclamation notice dated 4th November 2025, where their motor vehicles, which constitute their essential tools of trade, were proclaimed.

62. The attachment and sale of these vehicles would not only cause immediate and irreparable financial loss but would effectively cripple the Applicant's operations and render the intended appeal nugatory. This constitutes substantial loss within the meaning of the law. See ***Antoine Ndiaye v African Virtual University [2015] KEHC 6783 (KLR)*** and ***RWW v EKW [2019] KEHC 6523 (KLR)***.
63. The Respondents' argument that the Judgment has been pending since 2016 overlooks the fact that the Judgement was delivered in May 2025. The Applicant cannot be penalized for the delay in the determination of the suit by the court as this was beyond the control of the Parties.
64. The Applicant has offered to furnish security in such sum and form as the court may direct. To that end it did deposit half the decretal sum in court. This is a critical safeguard that eliminates any real prejudice to the Respondents. Any other prejudice can be offset with an order for costs.
65. Weighing all the factors, the Applicant has satisfied the requirements of Order 42 Rule 6(2).
66. The court therefore makes the following orders:-
- i. The Applicant is granted leave to file and serve the Memorandum of Appeal within fourteen (14) days from the date of this Ruling.
 - ii. The Execution of the Judgment delivered on 21st May 2025 and any subsequent decree or order in Kakamega CMCC Nos. 283 of 2016 and 284 of 2016 (Consolidated) be

hereby stayed pending the hearing and determination of the intended appeal.

- iii. The Applicant shall deposit security in the sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/=) in a joint-interest earning account to be operated by the Advocates of the parties.
- iv. The Applicant shall pay the costs of the application assessed at Kshs. 30,000/= to the Advocates for the 1st and 2nd Respondents within fourteen (14) days.
- v. In default of any of the conditions set out in Clause (iii) and (iv), the orders of stay shall automatically lapse.

Dated, signed, and delivered at Kakamega this 23rd day of April 2026.

**A. C. BETT
JUDGE**

In the presence of:

Mr. Javer for the Appellant/Applicant

Mr. Mulama for the 1st and 2nd Respondents

Court Assistant: Polycap

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