

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

MISC. CIVIL APPLICATION NO. E040 OF 2022

PETER NJUTHI KAROMO.....APPLICANT

-VERSUS-

MBOMOYO KINAIYA.....1ST RESPONDENT

LAWGARD AUCTIONEE.....2ND RESPONDENT

AND

SIMON MUGO KARANJA.....INTERESTED PARTY

RULING

1. The record of the Court contains a plethora of applications lodged in this matter, especially by **Peter Njuthi Karomo**, the judgment debtor in **Kajiado CMCC No. 262 of 2014** against the decree holder therein, **Mbomoyo Kinaiya**. Some of the applications were withdrawn along the way while others were rendered spent. As of 29.04.2025, the court directed that the still live motions

dated 5.03.2024 and 3.07.2024, the subject of this ruling, be heard together. For the purposes of this ruling the motions will be referred to as the first and second motion, respectively. Both were filed by **Peter Njuthi Karomo**, the Applicant herein against **Mbomoyo Kinaiya** (hereafter the Respondent).

2. The first motion is brought under Section 3A of the Civil Procedure Act, Order 10 Rule 11, Order 42 Rule 6 and Order 51 of the Civil Procedure Rules, and the live prayers seek that stay of execution pending the determination of this appeal, and that the appeal be marked as '*closed*'. The application was premised on the grounds therein as amplified in the affidavit of the Applicant herein.
3. The Applicant swore the supporting affidavit on the same date asserting that he had filed an appeal on 15th September 2022, which was still pending determination before the Court. He further explains that he had previously filed two applications under certificate of urgency, one in 15th September 2022 and another renewed in 13th April 2023, and that the Court had granted interim orders of status quo pending inter parties hearing.

4. The Applicant deponed further that on the scheduled mention date, the Court was not sitting, leading to the lapse of the interim orders. And that despite efforts by his advocate to have the orders extended through a letter dated 27th April 2023, no action was taken by the Court. That taking advantage of this situation, the Respondent had allegedly moved swiftly to instruct auctioneers to attach the Applicant's property, with the intention of defeating the pending appeal.
5. He further stated that the auctioneers had already proceeded with the attachment, and unless the Court intervened, the appeal would be rendered nugatory. The Applicant also asserted that the Respondent had already repossessed the motor vehicle that is the subject matter of the appeal, and therefore there is effectively nothing left for determination, hence the risk that the appeal may be overtaken by events. Thereby exposing him to irreparable loss and damage should the intended auction proceeds, hence he craved the grant of stay of execution pending the hearing and determination of the appeal. On 7.03.2024, the Duty Judge sitting

- at the High Court at Machakos granted the Applicant the interim orders of stay.
6. Pausing here, it is apposite to note that this cause was instituted as a miscellaneous cause, and not an appeal before this Court via the Applicant's first motion dated 15.09.2022 seeking leave to appeal out of time, which lay unprosecuted until amended to become the amended motion dated 3.07.2024, the second motion.
 7. As expected, the 1st Respondent opposed this application vide his replying affidavit dated 28.6.2024 and stating the ex parte orders of 7.03.2024 were obtained by the Applicant from High Court at Machakos through misrepresentation, concealment of material facts, and by taking advantage of the court recess. The Respondent accuses the Applicant of having misled the court by suggesting that an appeal had already been filed and had high chances of success, yet in reality no appeal existed. Instead, what had been filed was merely a miscellaneous application seeking leave to file an appeal out of time, long after the prescribed

- timelines had lapsed, adding that the leave application was still pending.
8. Taking issue with the fact that the Applicant improperly sought and obtained stay orders in the absence of a valid appeal, and interim orders have since lapsed, the Respondent asserted that the present application is premature, incompetent, and intended to delay execution.
 9. The Respondent complained that the Applicant had frustrated execution of the decree by disposing of or transferring his known assets to third parties, making recovery difficult, as disclosed in auctioneers' reports annexed to the affidavit. Which actions are aimed at denying the Respondent the fruits of a judgment delivered in his favour as far back as 2014 and that continued delay through baseless applications occasions him prejudice. He therefore described the motion as frivolous, misleading and an abuse of the process of the court, urging that it be dismissed.
 10. On 25.06.2025, this court ordered that submissions be filed by the parties on both applications. However, neither the physical record

of the court nor the electronic record on the Case Tracking System (CTS) contain submissions filed with regards to this application.

11. The second motion was brought under the High Court Practice and Procedure Rules, Section 79G, 3A of the Civil Procedure Act, Order 43(1)(g) 2 and 3, Order 42 Rule 6 of the Civil Procedure Rules. Therein the Applicant was primarily seeking leave to file appeal out of time and stay of execution in respect of the judgement dated 7.07.2022 and any consequential orders in **Kajiado CMCC No. 262 of 2014** pending the determination of this appeal. Two further prayers in the motion seek that the appeal and application be marked as closed, as motor vehicle **KAD 673V** (hereafter the subject motor vehicle) has since been repossessed by the Respondent and purportedly sold to a third party.
12. The second application was supported by the affidavit sworn by the Applicant. To the following effect. Reciting the history of the dispute, he averred that by the time the second application was being amended, the Respondent had already retrieved the subject motor vehicle from the Kiserian Police Station, sold it, and utilized the proceeds. And that despite this, the Respondent was

- unjustifiably seeking to auction the Applicant's property, actions that amount to abuse of the court process and illegality, in the absence of a reasonable basis.
13. He swore that following the judgment, he lost touch with his previous advocate on record in the lower court, and by the time contact was made, it was too late to file an appeal within the prescribed timelines, hence the present application seeking leave to appeal out of time. He avers that the appeal has high chances of success and the motion has been brought in good faith, and without undue delay.
 14. By his replying affidavit dated 24.06.2024, the Respondent confirmed that judgment was delivered on the 7.07.2022 his favour, in the presence of counsel for both parties. Immediately after delivery of judgment, the Applicant was granted a stay of execution of thirty days, which lapsed on 7.08.2022. That thereafter, the Applicant changed advocates on 26.07. 2022 who on 15.09.2022 filed an application and draft memorandum of appeal; that the delay in filing the appeal is inordinate and unjustified; that the explanation that the Applicant could not reach

- his previous advocate is false and unsupported, as both the previous and current advocates were located in the same building.
15. The Respondent contended that the Applicant has failed to establish sufficient cause and that his conduct demonstrates indolence, and therefore is undeserving of the equitable remedy sought. The deponent views the second motion seeking stay pending appeal as premature, as no appeal has been admitted, and no draft memorandum of appeal has been attached to the second application. Additionally, execution had already commenced immediately after the lapse of the stay, rendering the application overtaken by events.
16. The Respondent stated that following the lapse of the interim stay, he repossessed the subject motor vehicle, carried out repairs, and disposed of it to a third party after valuation at Kes. 400,000/- whereas the decretal sum awarded by the trial court was Kes. **1,798,381/-** and a net of **Kes. 1,398,381/-** upon discounting the value of the subject motor vehicle. He also alleged that the Applicant has transferred his properties to third parties to

frustrate execution and has obstructed auctioneers from accessing his premises.

17. In conclusion, after recounting the history of the dispute, the Respondent stated that the intended appeal lacks merit, and that the application is an afterthought filed in bad faith to delay his enjoyment of the fruits of his judgment. He urges the court to dismiss the application with costs and, in the alternative, to order the Applicant to deposit the outstanding decretal sum as security should any stay be granted.

Submissions

18. By submissions dated 9.09.2025 the Applicant submitted that the delay in filing the appeal was occasioned by the fact that his former advocate ceased practice leaving him temporarily unrepresented. He relied on **Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1999] 2 EA 231**, where the Court outlined the relevant considerations for extension of time, namely the length of delay, reasons for delay, chances of success, and prejudice to the respondent.

19. The Applicant further cited **Philip Chemwolo & Another v Augustine Kubende [1982–1988] KAR 103**, for the statement that "*blunders will continue to be made... it does not follow that a party should suffer the penalty of not having his case determined on its merits.*" It was therefore argued that the delay was excusable and should not bar the appeal. Which it is contended raises substantial issues with high chances of success, here contending that the Respondent unlawfully repossessed and auctioned the vehicle while still pursuing monetary compensation, conduct amounting to unjust enrichment and abuse of the court.
20. Regarding the prayer for stay of execution, the Applicant invoked Order 42 Rule 6(2) of the Civil Procedure Rules and cited **Butt v Rent Restriction Tribunal [1982] KLR 417**, where the Court held that the discretion to grant stay should be exercised so as not to render an appeal nugatory. He argued that unless stay is granted, he risks suffering substantial loss given the decretal sum and ongoing execution and relying on **Machira t/a Machira & Co. Advocates v East African Standard [2002] eKLR**, where

the Court held that substantial loss must be specifically demonstrated.

21. The Applicant also addressed the prayer for change of advocate after judgment, which on the face of it must be presumed to have already been granted by the court, albeit indirectly.
22. In conclusion, the Applicant submitted that he has demonstrated sufficient cause for extension of time, established arguable grounds of appeal, and shown that he stands to suffer substantial loss if stay is not granted. He urges the Court to find that the Respondent's conduct amounts to unjust enrichment and abuse of process, and to grant his applications.
23. The Respondent's submissions are dated 23rd September, 2025. Attacking the second motion as misconceived, procedurally defective, and lacking in merit, the Respondent prefaced his submissions with the history of the litigation. He asserted that although several applications have been filed in the matter, the firm of **Kagoma & Company Advocates** had not properly come on record after judgment, an issue the court has already disposed of.

24. Regarding the prayer seeking leave to appeal out of time, the Respondent recounts that judgment in the lower court was delivered on 7th July 2022 and that the Applicant being aware of the judgment obtained stay orders on 30th July 2022. This before he instructed new advocates who prepared a memorandum of appeal dated 26th July 2022, and subsequently filed an application on 15th September 2022. The Respondent argues that despite these steps, the Applicant failed to file the appeal within time and has not provided a satisfactory explanation for the delay, which is inordinate and inexcusable.
25. The Respondent cited the principles governing extension of time as set out in **Ivita v Kyumbu [1984] KLR 441**, where the court held that: *"The test is whether the delay is prolonged and inexcusable, and, if it is, whether justice can still be done despite the delay."* And Philip **Chemwolo & Another v Augustine Kubende [1982-88] KAR 103** for the proposition that while mistakes of counsel should not always be visited on litigants, the court's discretion must be exercised judicially so as not to aid indolent parties.

26. The Respondent asserted that the court could not grant orders deeming an appeal as duly filed, as sought here, in the absence of a proper memorandum of appeal. Further the Respondent argued that no appeal has been filed and therefore there is basis for the stay sought. In any event, the Applicant has not satisfied the requirements under Order 42 Rule 6 of the Civil Procedure Rules. Here citing **Antoine Ndiaye v African Virtual University [2015] eKLR**, and **Kenya Shell Ltd v Benjamin Karuga Kibiru & Another [1986] KLR 410**, where it was held that substantial loss is the cornerstone for granting stay.
27. In the Respondent's view, the Applicant has neither demonstrated substantial loss nor offered security for the due performance of the decree, and instead has already disposed of his assets to avoid satisfying the decree. Further, the Respondent contended that the Applicant has approached the court with unclean hands and is attempting to introduce new allegations at the appellate stage which were within his knowledge during trial.
28. In conclusion, the Respondent submitted that the subject motor vehicle was repossessed by the Respondent and later sold to a

third party, and therefore the appeal and application have been rendered moot. And that the Applicant has not proven any irregularity in the repossession or sale and that the decretal sum remains unpaid.

29. He therefore contended that the Applicant has not met the legal threshold for the grant of orders sought and the motions should be dismissed.

Analysis and Determination

30. The court has considered the material canvassed in respect of the two motions. It is evident that the only subsisting prayers in the first motion, namely, prayers (2) and (4) are subsumed in the second motion. As such, the court will consider the former prayers as presented in the second motion, while taking note of the relevant history. That said, the prayers in the first and second motion seeking the *closure* of the appeal are confusing to the court, as no appeal has ever been filed in this matter.
31. In the court's considered view, the key questions arising for determination, is whether the Applicant has met the threshold for the grant of leave to file an appeal out of time, and whether there

exists a competent appeal upon which orders of stay of execution can be anchored.

32. The general power of the court to enlarging time is expressly donated by Section 95 of the Civil Procedure Act (CPA) as read with Order 50, Rule 6 of the CPR. Section 79G of the CPA which provides for time for filing of appeals from subordinate courts contains the proviso to the effect that:

“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.”

33. The principles governing leave to appeal out of time are well-settled. A successful applicant must demonstrate "*good and sufficient cause*" for not filing the appeal in time.
34. In **Thuita Mwangi v Kenya Airways [2003] eKLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

35. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of **Telkom Kenya Limited v John Ochanda and 996 Others [2015] eKLR** that:

“In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to

admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the Court's discretion in curing the pleadings before it. This Court's position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place...."

36. The Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [2014] eKLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court stating inter alia that:

"(T)he underlying principles a court should consider in exercise of such discretion include; 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at

the discretion of the court; 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis; 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted; 6. Whether the application has been brought without undue delay. 7.”

- 37.** In the present matter, judgment in the lower court was delivered on 7th July 2022, and the statutory period for filing an appeal lapsed on 7th August 2022. The Applicant only moved the court through the motion dated 15.09.2022 later replaced by the second motion herein that was filed in July 2024. In between the motion dated 15.09.2022 lay unprosecuted as the Applicant filed numerous applications, including the first motion by which he made false depositions to the Court that he had already filed an

appeal, thus obtaining stay orders from the Duty Judge sitting at the High Court at Machakos.

38. This conduct and the delay in either prosecuting or amending the initial motion in time does not place the Applicant in good light. The delay, spanning close to two years, is prima facie inordinate. The explanation tendered in the second motion is that the Applicant could not reach his erstwhile advocate is unconvincing, especially in light of evidence that the Applicant had already instructed new counsel shortly after judgment. As early as September 2022, the new counsel was already filing the initial motion, and the delay of two years in amending that motion appropriately has not been explained at all. It is not enough for a party seeking the exercise of the court's discretion in his favour to account for the period of delay before moving the court, which in this case has not been convincingly done; the subsequent conduct after a motion for leave is filed and the entire litigation history matters too.

39. A party who takes two years to prosecute an application for leave to appeal out of time while dissipating the court's time through

endless subsequent motions cannot expect the court to be inclined in his favour. More so a party who has blatantly abused the appellate jurisdiction of the court through making false depositions that he had a pending appeal in order to secure orders that he was obviously not entitled to. The history of this litigation goes back over 20 years, and the judgment sought to be appealed was delivered 4 years ago.

40. In the circumstances, the total delay is not only inordinate but insufficiently explained. While courts ought to be slow to shut out litigants, cases belong to the parties and not their advocates; the parties are responsible for ensuring the expeditious progress of their cases. From the material on record, it is evident here that the Respondent stands to suffer the most prejudice on account of the delay herein; he holds a decree which stands unsatisfied four years later, and should not be compelled to pay the price for the indolence and mischief displayed by the Applicant in this case by allowing him to perpetuate the litigation *ad infinitum*.

41. Parties and counsel are equally duty bound to co-operate with the court in the furtherance of the overriding objective to facilitate the

just, expeditious, proportionate, and affordable resolution of disputes in accordance with Section 1A and 1B of the Civil Procedure Act. In **Karuturi Networks Ltd & Anor. Vs. Daly & Figgis Advocates, Civil Appl. NAI. 293/09** the Court of Appeal had this to say concerning the application of the overriding objective in Section 1A and 1B of the Civil Procedure Act:

“The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective.... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court”.

- 42.** Moreover, in the present case the Applicant did not deem it necessary to furnish by his affidavit a draft memorandum of

appeal to enable the court to consider whether the proposed appeal *"raises a bona fide issue for determination by the Court"*.

See **Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited (2020) eKLR**. In the circumstances, the court finds no merit in the prayer seeking leave to file an appeal out of time.

43. The prayer seeking stay of execution is misconceived and must equally fail, and would not have been granted even if the prayer for leave were allowed. This is because it is evident on a plain reading of Order 42 Rule 6(1) of the CPR, that an order to stay execution pending hearing and determination of an appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the Civil Procedure Rules, as no doubt the Applicant was fully aware at the time of making a false statement before the Duty Judge to obtain stay orders on 7.03.2024.

44. The invocation of the jurisdiction of this Court under Order 42 Rule 6 (1) or 6 (6) of the Civil Procedure Rules must be preceded by

- the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the Civil Procedure Rules).
45. The Court of Appeal in **Abubaker Mohamed Al-Amin v Firdaus Siwa Somo [2018] eKLR** while citing with approval the decision of the High Court in **Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased)) [2017] eKLR** approved the reasoning that stay of execution pending appeal must be predicated on an existing appeal.
46. Earlier, the Court of Appeal in the case of **Equity Bank -Vs- Westlink MBO Limited [2013] eKLR** while commenting on Rule 5 (2) (b) of the Court of Appeal Rules, whose wording was at the time substantially similar to Order 42 Rule 6 (1) of the Civil Procedure Rules, and on Order 42 Rule 6 (6) of Civil Procedure Rules, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also

Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga [2012] eKLR).

47. In this case, no appeal existed at the time of the first and second motions and therefore, there is no basis upon which this court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter. The foregoing is sufficient to dispose of the first and second motions herein, which the court has found to be without merit. In the results the motions are hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 23RD DAY OF APRIL 2026.



**C.MEOLI
JUDGE**

In the presence of:

For the Applicant: Mr. Kansiime

For the Respondent: Ms. Wasilwa

C/A: Lepatei

ORIGINAL