

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL MISCELLANEOUS NO. E262 OF 2025

MUMIAS SUGAR LIMITED
APPLICANT

- VERSUS -

DISMAS WANYONYI RATIKA (Suing as the legal
representative of the estate of **BRAMWEL WEKESA**
(DCD)
RESPONDENT

R U L I N G

1. Before me is a Motion on Notice dated 20/11/2025 by the applicant. The same was brought under *Article 159 of the Constitution, sections 3, 3A & 79G of the Civil Procedure Act, Order 5 rule 6, Order 42 rule and Order 51 rule 1 of the Civil Procedure Rules*. The applicant seeks to file an appeal out of time as well as stay of execution of the judgment and decree in Bungoma CMCC No. E184 of 2024 pending the hearing and determination of the intended appeal.
2. The grounds upon which the application was brought were set out in the face of the application and in the supporting affidavit of Ruth Mbalelo sworn on 19/11/2025 as follows; the applicant was aggrieved by the judgment delivered by the trial court on the 9/10/2025 and opted to lodge an appeal

however there was a delay in transmission of instructions from its insurer to its advocates hence the lapse of time. The intended appeal has overwhelming chances of success and raises valid triable issues; that the application has been made without undue delay and that it was willing to abide by any reasonable conditions for grant of stay pending appeal ordered by this court. That it stands to suffer irreparable loss that cannot be compensated by damages if the orders sought are not granted whereas there will be no prejudice occasioned on the respondent as he will have an opportunity to defend the appeal.

3. The application was opposed vide a replying affidavit sworn on the 1/12/2025 by Dismas Wanyonyi Ratika, the respondent herein in which he deposed that judgement was entered in his favour by the trial court on the 13/10/2025 and thus the applicant had 30 days to lodge his appeal which lapsed on the 13/11/2025. That the applicant who is seeking an equitable relief in the form of leave to appeal out of time has failed to give full disclosure as to why he failed to lodge his appeal in time and thus failed to meet the threshold warranting the court's exercise of its discretion. That allowing the instant application would occasion him immense prejudice as it will not only prolong litigation but also owing to his advanced age of 69 and health. That the applicant has not demonstrated sufficient reason to warrant issuance of stay of execution orders as there is no pending appeal and

further the applicant has not demonstrated the substantial loss it will suffer should execution be allowed.

DETERMINATION

4. I have considered the rival affidavits and the oral submissions. On whether the applicant has met the conditions for the grant of leave to appeal out of time. Section 79G of the **Civil Procedure Act states: -**

“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 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.”

5. It is clear from the wording of section 79G of the Civil Procedure Act that, before the court considers an extension of time, the applicant must satisfy the court that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018] eKLR, where it

was emphasized that an applicant seeking enlargement of time to file an appeal, or admission of an already filed appeal, must show that he has good cause for doing so. In *Nicholas Kiptoo Salat Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court of Kenya set out the principles for consideration for extension of time: -

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:

- 1. Extension of time is not a right of a 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 on 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 respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

6. Turning back to the matter before me, the impugned judgment was delivered on the **9/10/2025** while the present application was filed on the **20/11/2025**. This is a delay of 11 days as the applicant ought to have lodged its appeal by the **9/11/2025**.
7. The applicant laid the blame for this delay on a delay in the transmission of instructions from its insurer to its advocates. This was challenged by the respondent, who deposed that the applicant had not fully explained the delay. In my view, the reason advanced by the applicant is reasonable.
8. As regards stay of execution, an application for stay of execution pending appeal is governed by **Order 42, Rule 6 of the Civil Procedure Rules, 2010** which provides as follows: -

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the Court appealed from may order but, the Court Appealed from may

for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(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.

(3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order

upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”

9. The power of a court to grant stay of execution is discretionary as correctly submitted by the respondents. This discretionary power must not be exercised capriciously or whimsically but judiciously. It must be exercised to ensure that it does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court’s decision or that the successful party is not defeated from enjoying the fruits of his judgment. (see *Butt v Rent Restriction Tribunal [1979] KECA 22 (KLR)*).
10. The purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in **RWW v EKW (2019) eKLR** addressed itself on this as hereunder: -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party

suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

11. The first requirement is to consider whether the application was filed without undue delay. As stated earlier herein, the application was filed 7 days after the filing deadline. An adequate reason for the delay was advanced by the applicant which this court has found to be reasonable. Accordingly, though the application was filed after time, the delay was not inordinate.
12. The second requirement is that the intended appeal must be arguable. A brief look at the draft memorandum of appeal reveals that the appeal centers on the apportionment of liability and the award of damages. In my view these are arguable issues.
13. Thirdly, this Court must determine whether or not granting the order will occasion substantial loss to the applicant. Substantial loss was explained in the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, that: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to

substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

14. The applicant has filed an appeal which is waiting a determination and has submitted that they stand to suffer substantial loss if the stay is not granted as they will be denied an opportunity to ventilate their case.
15. On the other hand, the respondent states that he has the right to enjoy the fruits of the judgment since the case was determined on merit and in his favor. However, he did not provide the means of refund if the appeal is successful. Accordingly, the Court is persuaded that the aspect of substantial loss was proved by the applicant.

16. The last consideration is security. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* (2018) eKLR, the court stated that: -

“Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground.”

17. Security is discretionary and it is upon the court to determine the same. In this case, the applicant has offered to comply with any orders issued by the court for grant of orders of stay of execution. On the other hand, the respondent is silent on this aspect.

18. Considering all the above, I find the motion dated **20/11/2025** to have merit and I order as follows;

a) The draft memorandum of appeal dated 19/11/2025 is deemed to be filed and the applicant is directed to file its Record of Appeal within 30 days’ failure of which the appeal stands dismissed.

- b) **The appellant does deposit the entire decretal sum as security for the performance of the decree in a joint interest earning account in the names of the Advocates of the parties in this matter within 30 days of this ruling.**
- c) **In default of (a) & (b) above, the application shall be deemed to have been dismissed with costs and the respondent and execution to issue forthwith.**
- d) **The costs of this application will be in the appeal.**
- Dated, signed and delivered virtually this 16th Day of April 2026.**

R. E OUGO

JUDGE

In the presence of:

Applicant- Absent

Respondent- Absent

Wilkister/ Adan - C/A