REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
MISCELLANEOUS APPLICATION NO. E122 OF 2025

-between-

RIZALIFE LIMITED ..... APPLICANT

-versus-

1. SWISS CORPORATE INTERIORS LIMITED
2. DESMOND CHAWIYAH TUTU
3. BERYL AWUOR MUGA
.....RESPONDENTS

RULING

Background:

1. *Rizalife Limited*, the Applicant herein, sought the services of the Respondents for the supply and installation of flooring and window blinds at their office premises. It paid the Respondents a negotiated sum of Kshs. 190,680.00 for the flooring and Kshs. 150,000.00 for the blinds.

2. On 28th February 2024, the Applicant instituted *Milimani Small Claims Court Commercial Case No. E2262 of 2024,* (hereinafter referred to as ***'the suit'***) seeking a refund of Kshs. 600,000.00. It was its case that the Respondents failed to complete the contracted works. Upon being served, the Respondent filed a Statement of Defence denying the claim and a Counter-claim claiming sums of money for materials procured and services rendered which remained unsettled.

3. In its judgment rendered on 15th November 2024, the trial Court dismissed the Applicant's claim and allowed the Respondents' Counter-Claim for the sum of Kshs. 108,100.00, with costs assessed at Kshs. 20,000.00. It was that decision that aggrieved the Applicant and *vide* the

instant application, the Applicant sought leave to lodge an appeal out of time.

The Application:

4. The Applicant filed a Notice of Motion dated 18th July 2025, seeking the following orders: -

    1. *Spent.*

    2. *THAT the Honourable Court be pleased to grant leave to the intended Appellant/Applicant to lodge its Appeal out of time against the entire judgement delivered by the Honourable G. Simatwo on 15th November, 2024 in Nairobi SCCCOMM No. E2262 of 2024 - Rizalife LTD -vs- Swiss Corporate Interiors LTD & 2 Others, dismissing the intended Appellant/Applicant's Statement of claim dated 23rd February, 2024 and allowing the 1st Respondent's Counter-Claim with costs assessed at an all-inclusive sum of Kenya Shillings Thirty Thousand Only (Kshs. 20,000.00/-).*

    3. *THAT pending the inter partes hearing and determination of this Application, this Honourable Court be pleased to grant an Order for Stay of Execution of the Judgement and all consequential Orders arising therefrom;*

    4. *THAT this Honourable Court be pleased to grant an Order for Stay of Execution of the Judgement and all consequential Orders arising therefrom pending the hearing and determination of the intended Appeal;*

    5. *THAT if Prayer No. 2 hereinabove is granted, the Memorandum of Appeal annexed to the Affidavit in support of the Application filed herewith be deemed to have been filed and service thereof be dispensed with upon payment of the requisite court fees;*

    6. *THAT the costs of and incidental to this Application be costs in the intended Appeal.*

5. The Application was supported by the Affidavit and Further Affidavit of *Gengiz Djemil Riza*, deposed to on 18th July 2025 and 23rd October 2025, respectively. He stated that on 15th November 2024, the scheduled date of judgment delivery,

the Court was not sitting and no notice was published to that effect. He deponed that despite the judgment indicating it was delivered via email, it was never sent to the Applicant's Advocates and that the judgment was only uploaded to the Judiciary Case Tracking System on 27th February 2025, and a copy was secured in April 2025 after numerous follow-ups.

6. The Applicant asserted that the delay was completely unintended, inadvertent, and out of its control. It was its case that the intended appeal raises triable issues, among them the fact that the Subordinate Court lacked jurisdiction because it delivered the judgment more than 60 days after the claim was filed, contrary to Section 34(1) of the Small Claims Court Act.

7. The Applicant expressed willingness to deposit the decretal amount as security for the stay orders.

The Submissions:

8. In its written submissions dated 23rd October 2025, the Applicant submitted that its quest for stay of execution meets the threshold set under Order 42 Rule 6 of the Civil Procedure Rules, 2010. In reference to the decision in *Chris Munga N. Bichage -vs- Richard Nyagaka Tongi & 2 Others* (2013) eKLR, the Applicant argued that the intended appeal is arguable and not frivolous. The Applicant further submitted that if the stay is not granted, execution by the Respondents will cause substantial financial loss, rendering the appeal nugatory. It urged the Court to exercise judicial discretion in the interest of justice.

9. On the issue of delay, the Applicant relied on the case of *Jaber Mohsen Ali & Another -vs- Priscillah Boit & Another* [E& L No. 200 of 2012 eKLR] to argue that what constitutes unreasonable delay depends on surrounding circumstances. It was its position that their delay was justified due to the trial Court's failure to provide the judgment on time.

10. The Applicant urged the application to be allowed as prayed.

The Respondents' case:

11. The Respondents opposed the application *via* the Replying Affidavit of *Desmond Tutu Chawiyah*, sworn on 11th August 2025. It was his deposition that the delay of approximately eight months from the judgment delivery in November 2024 to the filing of the application in July 2025 is excessive, inordinate, unexplained, and unreasonable. He asserted that the Applicant failed to demonstrate that the delay was beyond its control or to show sufficient cause to warrant an extension of time.

12. The Respondents further argued that the intended appeal is speculative, lacks merit, and raises no triable issues. Addressing the Applicant's jurisdictional challenge, it was its case that the Applicant misinterpreted the law to assume a delay beyond 60 days strips the Small Claims Court of jurisdiction, as Section 34 of the Small Claims Court Act is merely inspirational and acts as a guideline.

13. Finally, the Respondents claimed that granting the application would cause prejudice to them as they have invested resources in executing the judgment.

Analysis:

14. Having carefully appreciated the tenor of the application, the depositions of the parties as well at the arguments in the written submissions, the issues that arise for determination are as follows: -

    i. *Whether the Applicant has demonstrated sufficient cause to warrant leave for extension of time to lodge an appeal.*

    ii. *Depending on (i) above, whether the Application meets the threshold for the grant of an order for stay of execution pending appeal.*

15. This Court will now address the issues sequentially.

[a] Whether the Applicant has demonstrated sufficient cause to warrant leave for extension of time to <u>lodge an appeal:</u>

16. The power to grant leave to appeal out of time involves the exercise of judicial discretion since the time within which a party must institute an appeal is provided for in Section 79G of the Civil Procedure Act. That period is 30 days from the date of the decree or order appealed against, excluding from such period any time which the Court appealed from may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. There is as well the liberty for extension of said period.

17. In ***Nick Salat -vs- Independent Electoral and Boundaries Commission & 7 others*** *(Application 16 of 2014) [2014] KESC 12 (KLR),* the Supreme Court approvingly made reference to the decision of the Supreme Court of California in *Silverbrand -vs- County of Los Angeles* [2009] 46 Cal. 4th 106 where jurisdictional significance of timeous filing of an appeal was discussed as under: -

> *As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite.*
>
> > *…. Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal.*
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> *….. The purpose of this requirement is to promote the finality of judgements by forcing the losing party to take an appeal expeditiously or not at all.*

18. In the ***Nick Salat case*** [supra], the Learned Judges of the Apex Court identified the principles applied by a Court in exercising discretion. They observed;

> *… Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts*

which litigants have to lay a basis where they seek courts to grant it.

19. Further, the Supreme Court referred to the Court of Appeal decision in ***Paul Wanjohi Mathenge -vs- Duncan Gichane Mathenge*** [2013] eKLR which laid out the principles to be satisfied in the following terms;

> *... I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance*
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> *For instance, in Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported), the Court expressed itself thus: -*
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> > *…. 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 in general the matters which this court takes into account in deciding whether to grant an extension of time are: first,* ***the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted****. (emphasis added)*

20. The Apex Court then crystallized the applicable principles as follows: -

> *..... 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; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court* ***Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; Whether there will be any prejudice suffered by the respondents if the extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time…*** *[emphasis added].*

21. Returning to the case at hand, whereas the judgment was delivered on 15th November 2024, the instant application was filed on 18th July 2025. That was a delay of around 7 months in taking into account the grace period in Section 79G of the Civil Procedure Act. The Applicant attributed the delay to systemic issues, specifically that the judgment was purportedly delivered in their absence, failed to be emailed as recorded, and was only uploaded to the case tracking system on 27th February 2025.

22. There is no evidence to rebut the Applicant's contention that it only procured a copy of the judgment in April 2025. While the Respondents correctly point out that the delay is substantial, the Applicant cannot be blamed for the failure by the Court to avail the judgment in the Judiciary Case Tracking System until April 2025.

23. To buttress the position further, this Court has intently perused the impugned judgment. It indicates that it was indeed delivered *via* e-mail on 15th November 2024. There was, however, no evidence of the Applicant's e-mail address used as well as the evidence of delivery thereof. Therefore, in this Court's view, the circumstances of the delay establish sufficient cause and have been explained to the satisfaction of this Court.

24. Having found merit in the Applicant's quest for extension of time, a consideration of the next issue follows.

[b] Whether the application meets the threshold for the grant of an order for stay of execution pending appeal:

25. *Order 42 Rule 6(2)* of the *Civil Procedure Rules* provides for stay of execution in the case of an appeal. It further provides for the conditions to be fulfilled in such applications being *whether substantial loss may result to the Applicant unless the order is made, whether the application has been made without unreasonable delay and the issue of security for the*

due performance of such decree or order as may ultimately be binding on the Applicant.

26. The foregoing requirements have been the subject of Court interpretation. A trailblazer is the decision in Civil Application Nai 6 of 1979, ***Butt -vs- Rent Restriction Tribunal*** [1979] eKLR, where Court of Appeal while referring to the decision of Bret, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459 made the following compelling remarks: -

> *…. It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458: -*
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> > *…. I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.*

27. The Learned Judges then crystallized the applicable conditions as hereunder: -

    a. *The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.*

    b. *Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.*

    c. *Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.*

    d. *Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2)*

> *(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.*

28. The Court will now revert a look at the above requirements.

a) Substantial Loss:

29. The Applicant submitted that should the Respondent execute its judgment; it would not be able to repay the amount should its appeal be successful. It also argued that the Respondents would attach goods they use in their trade thus affecting service delivery to its customers, hence, suffering substantial loss.

30. In ***National Industrial Credit Bank Ltd -vs- Aquinas Francis Wasike & Another*** (2006) eKLR the Court of Appeal held thus;

> *….. Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.*

31. The Respondents did not counter the Applicant's concerns. As such, this Court is, therefore, inclined to find that substantial loss will occur, more so to the business, if execution proceeds.

b) Delay:

32. For the reasons as articulated for, as this Court dealt with the aspect of grant of extension of time to appeal, the delay cannot be attributed to the Applicant. The delay was, hence, satisfactorily explained.

c) Security:

33. The objective of security is to ensure that a Respondent is shielded from starting all-over the process of execution in the

event the appeal fails. In Civil Appeal (Application) 38 of 2013 ***Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 others*** [2014] eKLR the Court of Appeal laid down the basis for ordering for security as follows: -

> *… The rationale for security for costs is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party. In Noormohamed Abdulla -vs- Ranchhodbhal J. Patel & Another (1962) E.A. 448, it was held: -*
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> > *…. The order for security for costs in such a case is not directed towards enforcing payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties.*

34. In this course, the Applicant has indicated willingness to abide by any conditions as will be set by this Court to ensure the Respondent is not disenfranchised should the appeal fail. This limb of the requirements is, therefore, satisfied.

Disposition

35. As I come to the end of this ruling, I wish to apologize to the parties for the late delivery of this decision which was to be in February 2026. The delay was occasioned by my engagement at the Judicial Service Commission where I serve as a Commissioner given that the Commission has been running interviews since December 2025 to date. Once again, galore apologies.

36. In light of the foregoing, this Court finds the Notice of Motion dated 18th July 2025 to be meritorious. It is hereby allowed in the following terms: -

    [a] Leave is hereby granted to the Applicant to lodge an appeal out of time against the

judgment delivered on 15th November 2024 in Nairobi SCCCOMM No. E2262 of 2024.

[b] The Applicant shall file a Memorandum of Appeal in a substantive appeal file and serve it within 14 days of this order.

[c] An order of Stay of Execution of the Judgment in Nairobi SCCCOMM No. E2262 of 2024 is hereby granted pending the hearing and determination of the intended Appeal, subject to the Applicant depositing the sum of Kshs. 108,100/- in Court within 30 days of this order. For clarity, the said sum shall be deposited in the main appeal file.

[d] In the event of non-compliance with orders [b] and/or [c] above, the order for stay of execution shall stand automatically vacated and the Respondents shall be at liberty to execute.

[e] As the Applicant was not to blame for the delay, parties shall bear their respective costs of the application.

[f] This file is hereby marked as CLOSED.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **30th** day of **April, 2026.**

A.C. MRIMA
JUDGE

Ruling virtually delivered in the presence of:

Mr. Macharia, Learned Counsel for the Appellant/Applicant.

Ms Musambaki holding brief for **DR. Miyawa** for the Respondent.

Michael/Amina – Court Assistants.