

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. APPLICATION NO.E051 OF 2025

HIRJI PREMJI DABASIYA A.K.A HITESHAPPLICANT

VERSUS

COLONEL NYATABIGA NYAINGIRI.....1ST RESPONDENT

BHACHU INDUSTRIES LUKENYA SITE.....2ND RESPONDENT

CORAM

Before Lady Justice Jemimah Keli

C/A Otieno

RULING

1. The applicant, dissatisfied with the judgment of the lower court in Mavoko ELRC E064 of 2022: Colonel Nyatabiga Nyaingiri -Vs- Bhachu Industries Lukenya Site and Hirji Premji Dabasiya aka Hitesh, dated 3rd July 2025, and being out of time for appeal, filed the instant application by way of Notice of Motion dated 21st October 2025 brought under Section 3A and 63(E) of the Civil Procedure Act (Cap 21), Order 42 Rule 6, Order 51 Rule 1 Of The Civil Procedure Rules, 2010 , Section 79G of The Civil Procedure Act and Order 50 Rule 6 of The Civil Procedure Rules, for Orders that:
 - a. THAT there be a stay of execution of the Judgment and/or decree delivered on the 3rd July, 2025 in Mavoko ELRC E064 of 2022 : Colonel Nyatabiga Nyaingiri -Vs- Bhachu

Industries Lukenya Site and Hirji Premji Dabasiya aka Hitesh pending the hearing and determination of the intended appeal.

- b. THAT the Applicant be granted leave to furnish security for the performance of the decree as may be ordered by the court.
- c. THAT this Honourable Court be pleased to grant the Applicant leave to file an appeal out of time against the Judgment/decree delivered on the 3rd day of July, 2025 in (Mavoko ELRC E064 of 2022: Colonel Nyatabiga Nyaingiri -Vs- Bhachu Industries Lukenya Site and Hirji Premji Dabasiya aka Hitesh.
- d. THAT the annexed draft Memorandum of Appeal be deemed as duly filed and served upon payment of the requisite court fees.
- e. THAT costs of this application be in the cause/ or as the Court may deem fit.

Grounds of the application

- 2. The Judgment/decree in Mavoko Elrc E064 Of 2022: Colonel Nyatabiga Nyaingiri -Vs- Bhachu Industries Lukenya Site and Hirji Premji Dabasiya Aka Hitesh was delivered on the 3rd day of July, 2025. The Applicant being aggrieved by the said decision intends to appeal. The Respondent has commenced execution proceedings. Unless stay is granted, the applicant will suffer substantial loss and the appeal will be rendered nugatory. The Application has been made without unreasonable delay. The Applicant is ready and willing to provide security for the due performance of the decree. It is in the interest of justice that the stay of execution be granted. The statutory period of thirty (30) days within which to appeal has lapsed. The delay in filing the appeal was occasioned by failure of service of the Judgment by the claimant. The intended appeal raises arguable and triable issues with high

chances of success. No prejudice will be suffered by the Respondent if the application is allowed. It is in the interest of justice that the Applicant be granted leave to file the appeal out of time.

3. The application was supported by the sworn affidavit of Hirji Premji Dabasiya dated 21st October 2025 where he annexed as his evidence a judgment delivered on 3rd July 2025 (HPD1" is a copy of the judgment/decree), a copy of intended memorandum of appeal (HPD2" is a draft Memorandum of Appeal) of which the deponent averred raised arguable grounds of appeal and a copy of Proclamation notice("HPD3").
4. The application was opposed by the judgment holder/respondent, who filed a replying affidavit dated 10th November 2025. The respondent stated he held a judgment in his favour which remains unsatisfied, admitted he had commenced execution, and that the applicant had not demonstrated he had an arguable appeal or he would suffer substantial loss. The respondent stated that the delay was not justified, as the applicant was represented by an advocate who was served with all pleadings, including the judgment. The respondent urged that the current advocates for the applicant, Ms Wawere Wanjau & Company, were not properly on record in light of the provisions of Order 9 Rule 9 of the Civil Procedure Rules. The applicant was represented by Dennis Gicheru Wanjiru & Co. Advocates at trial up to judgment.
5. The applicant filed a further affidavit dated 27th January 2026 in reply to the respondent, where he annexed a consent by a previous law firm to change advocates of even date and

further reiterated he had an arguable appeal and was not served with the judgment nor his previous advocates.

6. The application was canvassed by way of written submissions. Both parties filed.

Decision

7. The court discerned the following to be issues for determination on the application-
- i. Whether the application for extension of time to appeal was merited
 - ii. Whether the application for stay was merited.

Whether the application for extension of time to appeal was merited

8. Rule 12 of the Employment and Labour Relations Court (Procedure) Rules 2024

provides time for filing an appeal to the court as follows:-

‘12. (1) Where a written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified under that written law.

(2) Where an appeal is from a magistrate’s court or where no period of appeal is specified in the written law referred to in sub-rule (1), the appeal shall be filed within thirty days from the date the decision is delivered.’’

9. The judgment of the Trial Magistrate Court was delivered on the 3rd July 2025. The application was filed on the 22nd October 2025. According to Rule 12(2) of the Court(supra), the appeal ought to have been filed within 30 days. The appeal ought to have been filed in court on or before the 2nd August 2025.
10. The applicant states the delay was not an inordinate and stated the delay was occasioned by failure of service of the judgment by the claimant. The excuse was denied by the respondent, but no evidence of service was annexed. The applicant stated that the intended appeal raised arguable issues. Rule 18 of Employment and Labour Relations Court (Procedure) Rules 2024 provides for extension of time to file appeal as follows:- ‘ 18. *The Court may, if circumstances justify, extend the time prescribed for the filing of an appeal or any document relating to an appeal.*’
11. The principles for extension of time for filing appeals were stated by the Supreme Court Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR where it upheld its
its
earlier decision in Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR) as follows:- ‘29] *As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:*
“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and

whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;

5. whether there will be any prejudice suffered by the respondents, if 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” [emphasis supplied].” The court upholds the Salat decision to apply in the instant application.

12. The Applicant stated the delay was caused by the lack of service of the judgment by the claimant and that upon service, the instructions to appeal were issued. The Court is satisfied that the delay was not inordinate and was explained. The respondent did not file evidence of timely service of the judgment. I gave the respondent the benefit of doubt.

13. On whether there is arguable appeal- The proposed grounds of appeal disclosed in the draft memorandum of appeal were –
 - a. THAT_the learned trial magistrate erred in law and fact in failing to properly evaluate the evidence on record in establishing and/or affirming the alleged employer - employee relationship between the Appellant herein and the 1st Respondent.
 - b. THAT the learned trial magistrate erred in law and fact in allowing the threshold of proof too low and/or relying on insufficient evidence to assert the alleged employer - employee relationship between the Appellant herein and the 1st Respondent.
 - c. THAT the learned trial magistrate erred in law and fact in disregarding the appellant's response to the claim and/or Third Party Notice and evidence in denial of the claim against him.
 - d. THAT the decision of the trial court was against the weight of evidence and the law. The Court finds that the existence of an employer-employee relationship goes to the root of the claim for unfair termination. On this singular ground, the court finds the applicant had disclosed the intended appeal raises arguable issues.

14. On the prejudice to the respondent, I find the same is addressed by costs. The costs of the application is thus awarded to the respondent.

b. Whether the Court should grant the Intended Appellant stay of execution of the Judgment delivered on 3rd July 2025 pending the hearing and determination of the Appeal.

15. It is instructive to note that the impugned Judgment is dated 3rd July 2025. The Employment and Labour Relations Court (Procedure) Rules 2024 on stay of execution in case of appeal states:-

“21. (1) Where an application for stay of execution pending appeal has been lodged, the applicant shall, in the supporting affidavit, declare whether a similar application has been filed in any other court

(2) An application for stay of execution pending appeal shall be filed in the appeal file.”

16. Since the Rules are silent on the conditions for granting stay then the lacuna is addressed by Order 42 Rule 6 (2) of the Civil Procedure Rules to wit:-

“(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.’’

17. I have granted the Intended Appellant leave to lodge their appeal out of time. No application for stay pending appeal was filed in the Trial Court. Indeed, a notice of proclamation was issued in the process of execution (‘HPD3’)
18. This Court’s mandate, therefore, is to decide whether the Intended Appellant has met the conditions for the grant of an order of stay of execution, pursuant to Order 42 Rule 6 (2) of the Civil Procedure Rules. Firstly, has the Intended Appellant proved that they will suffer substantial loss if the orders are not granted? The Intended Appellant insists that they will suffer substantial loss since the Respondent has already commenced execution by issuance proclamation notice (‘HPD3’) against his goods. This was admitted by the respondent who averred the execution had commenced lawfully.
19. *In Timsales Limited Vs. Hiram Gichohi Mwangi, Civil Appeal Number 94 of 2008 (2013) eKLR the Honourable Court held that the mere fact that the process of execution has commenced or is likely to commence does not amount to substantial loss for the reason that execution is a legal process and that the Appellant must establish other factors. In the instant case, the Intended Appellant has merely demonstrated that execution has commenced against them. The Respondent cannot be faulted for wanting to enjoy the fruits of their judgment. In fact, the Honourable Court in the case of Thomas M. Nguti & 196 Others vs Kenya Railways Corporation [2022] e KLR emphasized that, in considering whether stay*

orders ought to be granted, the Court must consider that a successful party should be allowed to enjoy the fruits of their judgment. This position had earlier been affirmed in the case of Machira T/A Machira & Co Advocates vs East African Standard No. 2 [2002] KLR 63.

20. The Respondent states that the applicant had not demonstrated substantial loss beyond unsubstantiated fears of recovering sums of money, rendering the intended appeal nugatory. The court noted that the respondent had not demonstrated his ability to re-pay the decretal sum. On the party on whom the burden of proving the Respondent's financial ability falls, in National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] KECA 333 (KLR)The Court of Appeal stated that:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example **section 112** of the Evidence Act, **Chapter 80** Laws of Kenya.”As the Respondent has not shown his ability to repay the decretal sum if he proceeds with execution and the appeal succeeds, I find and hold that the Applicant is likely to suffer substantial loss if a stay of execution is not granted.

21. Further, the law contemplates that a litigant who intends to appeal the decision of a court may be granted stay of execution of the said decision, on condition that they deposit a security for the performance of the decree. In the case of Michael Ntouthi Mitheu v Abraham Kivondo Musau [2021] KEHC 4530 (KLR) the Honourable Court pronounced itself as follows on the reason why security should be given:-

*“22. However, the law still remains that where the applicant intends to exercise its undoubted right of appeal, and in the event it was eventually to succeed, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security, and it is trite that once the security provided is adequate its form is a matter of discretion of the Court. See *Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100. (Emphasis Mine)*. The applicant has demonstrated good faith by stating that he is ready and willing to deposit reasonable security as the court may direct. The respondent urged that the entire decretal sum, plus costs and interest, be deposited in an interest-earning account in the joint names of the parties’ advocates on record.*

22. The third condition to consider is whether the application been made without unreasonable delay. The present application was brought almost 3 months after delivery of the Judgment. The court could already held the delay was not inordinate while allowing extension of time , earlier in the ruling.

The court finds that there is a high likelihood of the appeal being rendered nugatory in the event the Intended Appellant is successful in the appeal, as their assets are likely to have been sold, and there is no certainty that the Respondent will be able to repay the decretal sum. In Butt v Rent Restriction Tribunal [1979] KECA 22 (KLR) where the Court of Appeal gave guidance on how a Court should exercise discretion in an application for a stay of execution, that: -

‘If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

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:

23. I therefore grant stay of execution of the Judgment/decreed delivered on the 3rd day of July, 2025 in (Mavoko ELRC E064 of 2022 : Colonel Nyatabiga Nyaingiri -Vs- Bhachu Industries Lukenya Site and Hirji Premji Dabasiya aka Hitesh pending the hearing and

determination of the intended appeal, on condition that the Intended Appellant deposits the entire decretal sum and costs in Court within 30 days of this Ruling.

24. In the upshot the application is allowed as follows:-

- a. The Court grants an Order of stay of execution Judgment/decreed delivered on the 3rd day of July, 2025 in (Mavoko ELRC E064 of 2022 : Colonel Nyatabiga Nyaingiri -Vs- Bhachu Industries Lukenya Site and Hirji Premji Dabasiya aka Hitesh. pending the hearing and determination of the intended appeal, on condition that the Intended Appellant deposits the entire decretal sum and costs in Court within 30 days of this Ruling.
- b. The Appellant is hereby granted leave to file and serve their Memorandum of Appeal within 14 days of this Ruling. In default, the appeal stands dismissed.
- c. Costs of the application to the respondent.

25. The parties are to take directions on the appeal on 5th June 2026.

26. It is so Ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8TH DAY OF MAY, 2026 .

JEMIMAH KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Applicant : Absent

Respondent: Langat h/b Jeruto