



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI COUNTY

COURT NAME: MAKUENI HIGH COURT

CASE NUMBER: HCCCMISC/E050/2025

PETER MWANZIA MUSYOKI VS TABITHA SYOKAU
MUTISYA

RULING

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI
MISC.CIVIL APPLICATION NO. E050 OF 2025

PETER MWANZIA MUSYOKI.....APPLICANT

VERSUS

TABITHA SYOKAU MUSYOKI.....RESPONDENT

RULING

1. The Applicant has moved this court vide an application brought under Sections 1A, 1B,3A and 95 of the Civil Procedure Act, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules seeking for the following ORDERS:-

a. Spent.

b. THAT Leave be granted to the firm of Messrs. WM.
KITHUKA &



COMPANY ADVOCATES to come on record for the Proposed Appellant/Applicant.

c. THAT this Honourable Court be pleased to grant the Proposed Appellant/ Applicant Leave to file the intended Appeal out of time against the Judgment of the trial court delivered on 23rd April,2025 in Makindu Small Claims Court Claim No, E017 of 2025 Tabitha Syokau Musyoki Versus Peter Mwanzia Musyoki.

d. THAT this Honourable court be pleased to grant an Order of stay of execution of the Judgment of the trial court delivered on 23.04.2025 in Makindu Small Claims Court Claim No. E017 of 2025- Tabitha Syokau Musyoki Versus Peter Mwanzia Musyoki and all other consequential Orders emanating therein pending the hearing and determination of this application.

e. THAT this Honourable Court be pleased to grant an Order of stay of execution of the Judgment of the trial court delivered on 23.04.2025 in Makindu Small Claims Court Claim No, E017 Of 2025 Tabitha Syokau Musyoki Versus Peter Mwanzia Musyoki and all other consequential Orders emanating therein pending the hearing and determination of the intended Appeal.

f. THAT the costs of the application be in the cause.

2. The application is based on the following grounds that the Honourable Trial Court in its Judgment delivered on 23rd April,2025 in MAKINDU SMALL CLAIMS NO.E017 OF 2025-TABITHA SYOKAU MUSYOKI versus PETER MWANZIA MUSYOKI dismissed the Appellant's counter-claim and upheld



the Respondent's claim by awarding her the sum of Kshs. 83,700/=as compensation for the injuries sustained.



3. That the Applicant herein is aggrieved with the said Judgment and intends to Appeal to this Honourable Court.

4. That the Proposed Appellant/Applicant faced financial challenges/constraints which barred him from instructing his advocates on time to enable them file the intended appeal within the legal time limits and that the delay in filing the intended Appeal is not intentional.

5. That the Respondent herein is keen on executing the Judgment and Decree of the trial court as she proceeded to file Notice to show Cause dated 23rd June,2025 which is reserved for hearing on 08th July,2025 and it is evident from the foregoing that there is imminent threat of execution of the Judgment and Decree of the trial court.

6. That the Appeal is arguable with high chances of success stands to be rendered nugatory if the Orders sought are not granted.

7. The application is supported by an affidavit by PETER MWANZIA MUSYOKI who avers that he is the proposed Appellant/Applicant and that the trial court its Judgment delivered on 23rd April,2025 in Makindu Small Claims Court Claim No.E017 Of 2025 Tabitha Syokau Musyoki Versus Peter Mwanzia Musyoki dismissed the Applicant's counter claim and awarded the Respondent's claim by awarding her the sum of Kshs. 83,700/= as compensation for injuries sustained.

8. He avers that he is aggrieved by the said Judgment and wishes to prefer an Appeal before this Honourable Court.

9. He states that he was unable to instruct his advocates on



time for purposes of filing the intended appeal within the legal time limits owing to financial constraints and that the delay in filing the intended Appeal is not intentional.



10. That the Respondent herein is keen on executing the Judgment and Decree of the trial court and proceeded to file Notice to show cause dated 23.06.2025 which is reserved for hearing on 08.07.2025.

11. That it is evident from the foregoing that there is imminent threat of execution of the Judgment and Decree of the trial court and he stands to suffer immeasurable loss should the Order for stay of execution be denied.

12. That the intended Appeal is arguable with high chances of success and it stand to be rendered nugatory should this Honourable court decline to grant the Order therein and there is no inordinate delay in filing the present application.

13. The application is opposed by a replying affidavit sworn by TABITHA SYOKAU MUSYOKI who avers that she is the Respondent herein. She avers that the Small Claims Court is a time bound Court with timelines within which matters ought to be concluded.

14. She contends that the Applicant has been indolent as neither himself nor his advocate was present on the date of the judgment, and the judgment was posted in the CTS on 23rd April, 2024 on the same day the judgment was delivered hence there was no delay in posting the judgment and despite the Honourable Trial Court granting 30 days stay of execution, the Applicant has not demonstrated to this Court that he exercised vigilance to utilize the chance and obtain the typed proceedings from the trial court. That there exists no letter by the firm of W.M Kithuka & Co. Advocates that has been annexed in the present application to show that the proceedings at the trial Court have been requested and that the instant Application is brought late in time, it is an afterthought and a delay tactic by the Applicant herein made



in bad faith, misconceived, incompetent, unmerited and an abuse of the Court process.

15. She avers that it is a general rule that a Court of Law ought not to deny a successful litigant of the fruits of her judgment save in exceptional circumstances where to decline to do so may well amount to stifling the right of



the unsuccessful party to challenge the decision in a higher Court. In the interest of justice and fairness, she contends and urge this Honourable Court to have its sight fixed on doing justice in accordance with the Law and prevent abuse of the process of this Court as it is outright that the annexed Memorandum of Appeal does not raise any serious issues for consideration by this Honourable Court.

16. She avers that the Decision of the trial Court as delivered on **the 23rd day of April, 2025** was well reasoned and no evidence has been adduced before this

Honourable Court to the contrary and the award by the Learned Trial Magistrate was within the range applied by most Courts and as such she reiterates that the intended Appeal and the instant Application by the Applicant herein is a waste of time and has no chances of success.

17. That the leave sought to file the Appeal out of time is inordinately delayed and hence this Court should not entertain the said Application and considering the Applicant has not advanced any believable justification for his inordinate delay in filing the Appeal and the Application ought to fail.

18. That an Applicant for stay of execution pending an Appeal is obliged to satisfy that a substantial loss may result to him unless the orders are granted; that the Application has been made without unreasonable delay; and that such security has been deposited as the Court orders for the due performance of such decree or order as may ultimately be binding on the Applicant.

19. The application was canvassed by way of written submissions, the applicant submits that the issues for determination are:-



- i. Whether the applicant has presented sufficient cause to warrant this court exercise its discretion by enlarging time sought.
- ii. Whether the Applicant has met the threshold for grant of stay of execution pending appeal.



20. On Whether the applicant has presented sufficient cause to warrant this court exercise its discretion by enlarging time sought, the Appellant submits that this court's power to extend time as sought by the applicant is derived from Order 50 Rule 6 of the Civil Procedure Act which provision of law simply means that the threshold which the Applicant ought to meet is satisfying the court that they had a good and sufficient cause for failing to file the appeal in time. They place reliance on **Kenya Ports Authority versus Silas Obengele Civil Application No. Nai 297 of 2004(2006)2KLR** and the Supreme Court decision in **Nicholas Kiptoo Arap Korir Salat Vs the Independent Electoral and Boundaries Commission & Others(2014)eKLR.**

21. They submit that the learned judge in **Peter Mathenge T/A Imperial Water Services versus James Maloba Juma ERLCA No. E210 of 2023(2024) KEELRC 1753KLR** derived the principles to be considered by courts whenever called upon to extend time.

22. The submit that section 38 of the small claims Act provides that a person aggrieved by the decision or order may appeal to the High Court and further Rule 30 of the small claims Rules provides that a person aggrieved by the judgement or order of the court may pursuant to Section 38 of the Act Appeal to the High Court in accordance with Order 42 of the Civil Procedure Rules 2010. They also place reliance on section 79G of the civil procedure Act and argue that from the provision of the law, an applicant must prove to the satisfaction of the court that they have a good and sufficient cause for failing to file the appeal in good time which was enunciated in the case of **Diplack Kenya Limited versus William Muthama Kitonyi(2018)eKLR.**

23. They submit that it is not disputed that the trial court delivered its judgement on the **23rd April,2025** and the application seeking leave to file appeal out of time was filed on the 2nd July,2025. That the reason for the delay is that the applicant faced financial



hardship which position has neither been challenged and/or rebutted by the Respondent. It is the Applicant's position that the financial challenges/hurdles he faced prevented him from instructing his advocates in good time so that the appeal could have been filed in time. It is the Applicant's submissions that the delay was regrettable and not intentional on the part of the applicant. They further submit that the applicant has



presented before this court to its satisfaction good and sufficient cause for failing to file the appeal in time.

24. That further the Respondent has failed to inform this court that she stands to suffer prejudice should this Honourable court grant the leave sought to have the intended appeal filed out of time.

25. They submit in summary that the applicant has to the satisfaction of the court presented sufficient and/or good cause for the delay in filing the intended appeal on time. That the delay in filing the intended appeal is regrettable and not intentional. They submit that there is no evidence that has been adduced before this court in proving indolence on the part of the Applicant as alleged by the Respondent.

26. They submit that the principles upon which an Order of stay of execution can be granted were spelt out in **BUTT vs RENT RESTRICTION TRIBUNAL (1982) 1 KLR** where the Court of Appeal held that;-

"(1.). The power of the Court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such away as not to prevent an appeal.

(2). 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 that appeal court reverse the Judge's discretion.

(3). 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.

(4) The court in exercising its discretion whether to grant(or) refuse an application for stay will consider the special circumstances of the case and unique requirements.

The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of



appeal.



(5) 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 such security as ordered will cause the order of stay of execution to lapse."

27. The law regarding to the granting of Orders for stay of execution pending appeal is to be found under Order 42 Rule 6 (1) of the Civil Procedure Rules which provides:-

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed may for sufficient cause order stay of execution of such decrees or order, and whether the application for such stay will have been granted or refused by the court appealed from , the court to which such an appeal is preferred shall he at liberty, on an application been made, to consider curb application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay of execution made by the court from whose derision the appeal is preferred may apply to the appellate court to have such order set aside."

28. They submit that the conditions that have to be met by an applicant in order for courts to grant orders for stay of execution pending appeal are to be found under sub rule 2 which provides:-

"No order for stay of execution shall be made under Sub rule 1 unless;

(a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without undue delay and (b) Such security as the court orders for the due performance of such degree or order as may ultimately be binding on him has been given by the applicant,"

29. They submit that in **HELLEN NDUMBA LUKA vs FLORENCE RIINYA & JANET K. GUANTAI ELCA NO. E037 OF 2022** had this to say;

"As such, for an applicant to move the court into exercising the said



discretion in his favour, the applicant must satisfy the court substantial loss may result to him unless the stay is granted , that the application has been made without undue delay and that the applicant has given security or is ready to give security/or due performance of the decree.

30. That to grant or reject an Order of stay of execution is a discretionary power bestowed upon this Honourable Court by the relevant provisions of the law.

31. In **GEOFFREY MURIUNGI & ANOR vs JOHN RUKUNGA M'OMONYO (Suing as the legal representative of the estate of Kinoti Simon Rukungu(deceased))** the court stated that:-

“the undisputed purpose' of stay pending appeal is to prevent a successful appellant from becoming the holder of a barren result for the reason that he cannot realise the fruits of his success in the appeal ”

32. On the issue of substantial loss, they submit that it is not in dispute that an applicant must prove that he stands to suffer substantial loss if the order for stay of execution is not granted.

33. They submit that the Respondent proceeded to file notice to show cause why the applicant should not be committed to civil jail for failure to satisfy/pay the sum of Kshs.103,865/= being the decretal sum together with interest and costs of execution. That it is not in doubt that the decree been sought for execution involves a monetary decree. The Respondent on the other hand has not proven to court that she is financially capable of refunding the said sums should the intended Appeal be allowed. The Respondent has not rebutted this position. That from the foregoing it is evident that the applicant has sufficiently proven that he stands to suffer substantial loss should this court decline to grant the order for stay of execution.



34. They submit that in DOMINIC vs MUYIENDA(Suing as the personal representative anti administrator of the Estate of Nicholas



**Maraga(deceased) CIVIL. APPEAL NO. E049 OF 2023(2023)
KEHC**

26969(KLR) the court held that ;-

"In the present case, the Applicant is apprehensive about the Respondent's financial standings. It was therefore incumbent upon the respondent to prove that she is not a woman of straw and is capable of refunding the decretal amount in the event that the appeal succeeds. Proof of financial standing is an evidential burden that can only be discharged by the respondent....The respondent asserted that she is a business lady and a farmer who will be able to refund the decretal amount should the need arise. I am therefore not satisfied that the respondent will be able to refund the decretal amount because she did not file any affidavit of means or furnish any evidence to show her net worth"

35. That the Learned judge cited with approval the case of **ABN AMRO BANK vs LEMOND FOODS LIMITED CIVIL APPLICATON NO. 15 OF 2002** where the Court of Appeal held that;

"The legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if its paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has - such as land, cash in bank and so on."

36. They submit that in **CATHERINE KANGAI vs JUDITH KAINDA NYOMBA & LYDIA KANINI KWENGA ELC MISC. E003 OF 2024** the court

held as follows ;

"The applicant has a burden to show that substantial loss she is likely to suffer if no stay order is granted.....In this case the applicant has stated that if the impugned decree is executed and the orders of eviction are issued, her houses standing on the suit properties will be demolished and she, together with her children will be left homeless and will suffer irreparable loss. It is my considered view, if the stay is not granted, the applicant may be evicted and her houses demolished and therefore the appeal may be rendered nugatory. I am therefore inclined



to allow the stay orders."



37. On the issue of security, they submit that it is not in dispute that security is one of the ingredients that has to be met by an applicant to enable court exercise its discretion by granting stay pending appeal orders. They submit that the Applicant is willing to comply with any conditions that this Honourable court may deem fit and just to order in exercise of its wider discretion and in

support of this they place reliance on **KENYA TANZANIA UGANDA LEASING**

COMPANY LTD VS. MUKENYA NDUNDA [2013]eKLR and that based on the foregoing, they submit that the present application is merited and humbly urge the court to grant the orders sought therein.

38. The Respondent on their part frames two (2) issues for determination. These are: -

i. Whether the Applicant is entitled to Leave to file the intended appeal out of time.

ii. Whether the Applicant has met the threshold for order of stay of execution pending appeal.

39. On whether the Applicant is entitled to Leave to file the intended appeal out of time,

40. That the ground that the applicant's advocate mis diarized the judgement date hence their absence in court on the judgement date, it is submitted that no such evidence of mediatization has been exhibited before this Court. That the Applicant lacked legal fees to instruct his Advocate it is submitted that this does not disclose any good and/or sufficient cause why the appeal was not filed within the Thirty (30) days' time prescribed by the law under Section 79G of the Civil Procedure Act CAP 21 Laws of Kenya.



41. That there was delay in posting the judgement of the Court is contradicted by the CTS because the judgement was posted on the same date when it was delivered.



43. They submit that appeals should ordinarily be filed within thirty (30) days from the date of decree or order appealed against and where the appeal is filed outside the statutory time, the Applicant must demonstrate good and sufficient cause for the delay. That the burden lies squarely on the Applicant to demonstrate the reason for the delay to the satisfaction of this Honourable Court.

44. They submit that the grant of leave to appeal out of time is a matter of discretion by the Court. That the underlying principles that govern the exercise of discretion by courts was well laid out in **MWANGANGI - VS - MUGI (CIVIL APPEAL NO. 1 OF 2023)** where the learned judge adopted the reasoning of the Supreme Court in the case of **NICHOLAS KIPTOO KORIR ARAP SALAT VS IEBC AND 7 OTHERS[2014] eKLR.**

45. They submit that in the present case, judgement was delivered on **23rd April 2025** and duly posted on the CTS on the same day without delay. That the Honourable trial court in its judgement had granted the Applicant a thirty (30) day stay of execution. They contend that the Applicant does not deny knowledge of such judgement; he instructed his Advocate who wrote a letter Dated 14th may 2025 to the trial Court requesting the trial court's proceedings. That this letter was written before the lapse of the Thirty (30) days stay of execution and before the lapse of statutory appeal time after which the Applicant went into a very deep slumber until the Respondent filed a Notice to Show cause to the Honourable trial Court.

46. That It is upon being served with the Notice to Show Cause that it dawned to him that he could Appeal and since time had long run, he began by crafting the present Application hence the explanation tendered to this Honourable Court that the Applicant lacked legal fees to instruct his advocate and that his advocate mis diarized the judgement date. It is submitted that these cannot amount to a good and sufficient cause for the Honourable Court to sympathize with the Applicant.



47. They submit that it is undisputed fact that suits belong to the parties and not their advocates; thus, it is not enough for the Applicant to fault his advocate for his inertia, he had an obligation to follow up on directions given by the Court to ensure they were executed well. They submit that this principle was



reiterated in **MWANGANGI-VS-MUGI** (supra) where the learned Judge adopted the thinking of the Court of Appeal in **HABO AGENCIES LIMITED - V& WILFRED ODHIAMBO MUSINGO [2015] eKLR.**

48. They submit that the Applicant herein had a duty to follow up and know the correct judgment date instead of relying entirely on his Advocate's misleading diary. That faulting his Advocate for mis diarization of judgment date is not enough reason to justify his inaction.

49. They contend that this Application has been inordinately delayed and without a sufficient reason for the delay. They argue that the Applicant enjoyed Thirty (30) days stay of execution and suddenly rushed to Court for leave to appeal out of time upon being served with Notice to Show Cause.

50. They submit that the Application and the intended appeal have been brought as an afterthought and delay tactic to frustrate the Respondent' s efforts to execute and enjoy the fruits of her judgment. That ironically, the Applicant in his Further Affidavit avers that his advocate requested for typed proceedings upon obtaining instructions to appeal against the decision of the trial court and goes ahead to attach a letter Dated 14th May 2025, notably before lapse of the statutory period, yet the main reason he seeks leave to appeal out of rime is because he lacked legal fees to instruct his advocate. That this is a glaring indication that the Applicant's averments are marred with blatant lies and inconsistencies and this Court cannot be reasonably expected to act on the Applicant's lies. That the ground that he lacked legal fees to instruct his advocate to appeal has been proven to be false through his own averments in the Further Affidavit.

51. That the Applicant's Memorandum of Appeal annexed to this application does not establish a prima facie case with chances of success. That the Applicant does not disclose any point of Law as required by Section 38 of Small Claims Act, 2016 which section requires that all appeals from Small



Claims Court to High Court must be purely on points of law only. That the Applicant' s Memorandum of Appeal for the intended Appeal is not based on points of law but rather mere averions and empty, blames to the learned Magistrate.



52. They submit that the trial Court' s award was well reasoned and within a reasonable range thus no error in law was committed by the Learned Magistrate. That granting leave to appeal will prejudice the Respondent's right to enjoy the fruits of her judgement.

53. They submit that they have demonstrated that the intended appeal is an afterthought and delay tactic, is frivolous, vexatious, misconceived, misuse of Courts process and a waste of Court's precious time and further that the Applicant is lying to this Honourable Court that he could not afford legal fees to instruct his advocate to appeal in time yet he had duly instructed the advocate to write letter to the Honourable trial Court to supply them with typed proceedings for the purpose of appeal, long before the appeal time had lapsed.

54. On whether the Applicant has met the threshold for order of stay of execution pending appeal, they submit that the conditions for stay of execution

have been elucidated in the case of **DOMINIC VS MUYIENDA {SUING AS THE PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF NICHOLAS MARAGA (DECEASED) (CIVIL APPEAL E049 OF 2023)** which conditions must be satisfied conjunctively.

55. That the burden of proving each of these conditions lies with the Applicant and in the instant application, the Applicant has proved none of the above. They argue that the Applicant has not demonstrated that he will suffer substantial loss if the order of stay of execution is not granted and the application has been brought without unreasonable and importantly, the Applicant has not furnished any security of costs to the court as the orders for due performance of such decree or order which may be binding on him.



56. They submit that the Applicant has failed to prove that he will suffer significant financial and/or other loss if the judgment is executed before the appeal is heard as he has not adduced any iota of evidence to substantiate his assertion that he will suffer immeasurable loss. That the mere fact that the process of execution has been put in motion as the Applicant avers in his application does not amount to substantial loss.



57. That the core purpose of stay of execution orders is to preserve the subject matter in dispute but the Respondent should not be unduly prejudiced and/or precluded from enjoying the fruits of her judgement based on mere apprehension and fears that are not evidenced. They submit that the subject matter of the dispute being decretal amount, sum of Ksh 83, 700/= plus Ksh. 20, 000/= costs awarded, is a liquidated amount and the Respondent is capable of refunding the Applicant should the intended appeal succeed. They humbly submit that mere assertion that the Applicant will suffer 'immeasurable loss' does not meet the standard of issuance of stay of execution and must fail.

58. They submit that the Applicant has inordinately delayed in bringing the present Application for stay of execution. That the Judgement subject of the orders of stay of execution was delivered on 23rd April 2025, stay of execution by the trial court lasted 30 days, and the instant application was only filed on 2nd July 2025; well after the lapse of stay and only after service of a Notice to Show Cause Dated 23rd June 2025. They argue that this delay has not been accounted for, with proper and sufficient reasons hence this conduct is not only indolent but also demonstrates that this application has been made in bad faith. They submit that this Application has been made in a very late date and the Applicant is guilty of laches hence the same is an afterthought and a delay tactic by the Applicant herein. They submit that the Applicant cannot benefit from this inordinate delay and for the interest of justice his application ought to fail.

59. They submit that the Applicant has neither offered nor committed to provide any form of security for the due performance of the decree as required by the Law. That he just averred in his Further Affidavit that he is ready to comply with any order that the Court may deem fit and he has not stated when and how he will deposit security for due performance.



60. That the position of the law is that the Applicant seeking stay of execution must not only propose but also be ready and willing to furnish security failure to which renders the Application incompetent. That furnishing security for due performance is a judicial process and even if the Respondent was to fail to refund the same in case the appeal succeeds, the Applicant is at liberty to recover through an action in Court. They place reliance in [Gianfranco Manenthi](#)



61. That from the forgoing it is clear that security for due performance is not optional but a condition and it must be one which shall achieve due performance of the decree which might ultimately be binding on the Applicant. They submit that the Applicant should deposit the decretal amount that shall be payable by him at the time the appeal is lost, costs of the suit and the interest if he so desires to Appeal, to enable the Respondent to recover if the intended appeal fails. They contend that should this Honourable Court be inclined in granting the Applicant time to the file Appeal, then they pray this Honourable Court to grant the leave with conditional stay that the Applicant herein deposits the whole of the decretal sum with the Court within a period of Twenty one (21) days before filing of the intended Appeal.

62. That in light of the foregoing, they submit that the application has been brought with inordinate delay. That they have demonstrated that the Applicant has not adduce a good and sufficient cause hence he is not entitled to the leave to appeal out of time. They contend that they have also shown that the Applicant has not satisfied the conditions for the stay of execution to issue hence he does not deserve the Courts sympathy. They submit that the Application is unmerited and the court ought to dismiss it with costs to the Respondent.

Analysis and Determination

63. I have carefully considered the application and the submissions placed before me.

64. The issues for determination are whether the applicant has established grounds for the enlargement of time to allow the applicant to file an appeal out of time and whether an order of stay of execution should issue.

65. On whether time should be enlarged enlarge time for the



applicant to file an appeal out of time, it is not in dispute that the Applicant did not lodge his appeal within the stipulated period of thirty days upon the delivery of the judgement sought to be appealed against. It is also not in dispute that section 79G of the Civil Procedure Act allows a party to lodge an appeal out of time if an applicant demonstrates good and sufficient cause as to why the appeal could



not be filed in sufficient and good time.

66. Section **79G of the Civil Procedure Act** provides 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.

67. From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In **MUGO & OTHERS VS. WANJIRU & ANOR [1970] EA 482** the court stated as follows:-

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularized before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”

68. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in **THUITA MWANGI V KENYA AIRWAYS LTD [2003] eKLR**. They include the following:



- i. *The period of delay;*
- ii. *The reason for the delay;*



- iii. *The arguability of the appeal;*
- iv. *The degree of prejudice which could be suffered by the if Respondent the extension is granted;*
- v. *The importance of compliance with time limits to the particular litigation or issue; and*
- vi. *The effect if any on the administration of justice or public interest if any is involved.*

69. It is noted that the impugned judgement was delivered on **23/4/2025** and hence the Memorandum of Appeal ought to have been lodged latest the 23/5/2025. The present application and draft memorandum of appeal were filed on 4/7/2025 . Is the delay excessive? The delay becomes excessive if it is not explained . The explanation is lack of legal fees. However, there was already counsel on record before the time for appeal expired. Is it plausible that the applicant may not have had the money to pay for the filing of the appeal? That is not a far-fetched reason. It has not been shown that he is a man of means . The other one is that counsel misdiarised the judgment date, no evidence was placed before court to support this. And in any event the judgment was posted on CTS.

70. The Supreme Court in **Nicholas Kiptoo Arap Salat vs IEBC & 7 Others [2014] eKLR** set out certain underlying principles that a court should consider in the exercise of discretion in regard to extension of time ,inter alia; *extension of time is not a right of a party as 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 prejudice suffered by the Respondent 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 considered for extending time.*



71. I find the explanation about legal fees to be reasonable. The prejudice that the respondent will suffer can be compensated by way of costs.



72. As regards the prayer for stay of execution pending the intended appeal, the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules provides for three conditions to be met by an applicant seeking such a prayer and which are inter alia; that the application must be filed without undue delay; that the Applicant stands to suffer substantial loss if the order is not granted; that the Applicant is ready and willing to offer security for the due performance of the decree which will ultimately be binding upon him/her.

73. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:-

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

2. 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 that appeal court reverse the judge’s discretion.

3. 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.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. 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 for costs as ordered will cause the order for stay of execution to lapse.”

74. The guidance offered above is useful as it provides for the space for the court to consider the circumstances of each case.



75. Substantial loss is a factual issue which must be raised in the supporting affidavit and further supported by evidence. In **Machira T/A Machira & Co.**



Advocates vs East Africa Standard [2002] eKLR it was held that an applicant's ground for substantial loss must be specific and detailed as it is not enough merely stating that substantial loss will result or that if the appeal is successful it will be rendered nugatory.

76. The applicant has demonstrated that his appeal would be rendered nugatory .

77. The application was filed outside the statutory period. There was delay . The explanation for the delay has been accepted by this court.

78. From the pleadings the money may appear small but that is why there is a small claims court. The key thing in my view is that the court must balance the appellant's right to an appeal and the respondents (decree holder's) right to the fruits of her judgment. This is protected buy the security that the applicant must propose and provide.

79. The applicant has not proposed or offered any security for the performance of the decree. However, the court is obligated to attach the security to the order of stay.

80. In view of the foregoing observations, the Applicant's application dated 2/7/2025 is merited. It is allowed in the following terms.

i. The Applicant is granted leave to file and serve a Memorandum of Appeal within 7 days hereof.

*ii. An order of stay of execution of the judgement and decree in Makindu Small Claims Court Claim No, E017 Of 2025 Tabitha Syokau Musyoki Versus Peter Mwanzia Musyoki be and is hereby granted on condition that the Applicant pays **half the decretal sum to the Respondent within 30 days hereof** to run from 11th May 2026.*



iii. *The balance of the decretal sum deposited into a joint interest earning account in the names of both counsel for the parties within*



thirty (30) days hereof to run from 11th May 2026. In default of (ii) and (iii) the stay shall lapse and execution will issue.

iv. The costs of the application to abide the abide in the appeal.

Orders Accordingly

RULING, dated, signed and delivered virtually this 8th
May 2026 Mumbua T Matheka

Judge

CA Chrispol

Ms. Kyalo for Applicant

Mr. Muendo for Mr. Muthiani for respondent

RULING HCCCMISC E050 OF 2025

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SIGNED BY/FOR:
LADY JUSTICE MATHEKA, TERESIA MUMBUA

