REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. E256 OF 2025

TOGETHER AS ONE MICRO INVESTMENTS……..1ST APPLICANT

JOSEPH MACHARIA MUTHONI…….2ND APPLICANT

VERSUS

GEORGE MBAGU KINUTHIA T/A IMMEDIATE AUCTIONEERS…….RESPONDENT

R U L I N G

Brief facts

1. The application dated 8th October 2025 seeks for orders of leave to file an appeal out of time against the ruling of Thika CM Court in Misc. Civil Application No. E077 of 2024 delivered on 12th August 2025. The applicants further seek for orders of stay of execution of the said ruling pending the hearing and determination of the appeal.

2. The respondent opposed the application and filed Grounds of Opposition and a Replying Affidavit dated 17th November 2025 and 30th December 2025 respectively.

Applicants' Case

3. The applicants state that the ruling in the lower court was delivered on 12th August 2025 denying their advocate audience on the basis that a notice of appointment had not been filed. Being aggrieved by the decision, the applicants state that they have lodged an appeal. Despite the appeal being properly filed, the applicants aver that they were served with a proclamation notice dated 6th October 2025 seeking to attach their property to enforce the ruling.

4. The applicants state that they sought to challenge the bill of costs filed in the lower court in Misc. Civil Application No. E102 of 2024 as there existed a contractual agreement between the parties and a substantial amount had been paid to the respondent through their representative one Jeremiah Mwago. The applicants further state that their previous advocates had lodged their appointment on their behalf but the same could not reflect via the CTS, a fact that was caused by delay of the system and thereby they were denied audience when the same was fixed for taxation.

5. The applicants state that the learned magistrate on 25th January 2025 proceeded to tax the bill without their

representation thus disregarding their responses hence causing immense loss and prejudice. The applicants further state that their advocates applied for setting aside and review of the court's order but the said application was dismissed on a technicality devoid of merits hence against the rules of natural justice.

The Respondent's Case

6. The respondent states that on 15th May 2024, he filed an application and bill of costs both dated 25th March 2024 seeking for payment of auctioneer's charges and expenses from the applicants. The matter came up for mention on 8th October 2024 and the court directed that the matter be mentioned on 22nd October 2024. The respondent avers that he served the applicants with the application and mention notice dated 15th October 2024. On 22nd October 2024, the court issued directions as to the hearing of the application and scheduled the hearing for 3rd December 2024. The respondent states that he served the applicants directly as they had no legal representation. On 3rd December 2024, the matter came up for hearing but the applicants had not entered appearance or filed any documents. One Mr. Ochieng' from the firm of Musyoka Munyao Advocates attempted to come on record but having not filed any documents in support of his appointment, they had no right of audience before the court.

7. The respondent states that the applicants filed their Notice of Appointment on 16th February 2025. On the same day, the learned magistrate allowed the application dated 25th March 2024 as it was unopposed. The respondent argues that the applicants cannot claim mapping challenges as they had been served with the application dated 25th March 2024 and had more than enough time to apply for mapping and enter appearance before the date of hearing. The respondent further argues that the applicants and

   their advocates were all along aware of the matter but failed to enter appearance and file an appropriate response despite being granted tine on numerous occasions to do so.

8. The respondent states that the applicants filed an application dated 30th January 2025 seeking to review the orders given by the court, which application was dismissed on 12th August 2025. Thus, there being no orders of stay, the respondent states that he was well within his rights to execute against the applicants for the sums due and owing as per the proclamation notice dated 6th October 2025.

9. The respondent argues that the instant application offends Order 9 Rule 9 of the Civil Procedure Rules as the firm of B. G. Mwangi & Co. advocates came on record without the leave of the court or consent of the parties

long after the conclusion of proceedings in the lower court. Thus the firm of B.G. Mwangi & Co. Advocates has no capacity to institute the instant proceedings.

10. The respondent argues that the applicants are attempting to lodge an appeal 48 days after the ruling was delivered and thus the Memorandum of Appeal dated 8th October 2025 is not properly before the court. Further, the applicants have not provided any good reason for such delay in time and the assertion that the previous advocate has been indisposed and did not inform the applicants of the outcome of the review is baseless and unsupported by any documentary evidence. The respondent

argues that all parties were aware of when the ruling of the court was to be delivered and the applicant's neglect or omission to maintain and exercise due diligence in relation to the matter cannot be a ground for enlargement of time to file an appeal.

11. The respondent states that since the delivery of the impugned ruling on 12th August 2025, the applicants have never made any move to apply for certified copies of the proceedings and ruling to facilitate the filing of any appeal. Thus the instant proceedings are an afterthought.

12. The respondent states that granting the prayer for stay would cause undue prejudice to him as he is entitled

to enjoy the fruits of his judgment. Further the applicants have not demonstrated any irreparable harm or loss that they may suffer as the sums due and owing Kshs. 67,172.59/- have been owing since the year 2021 and the same are payments for the work done as an auctioneer. The respondent avers that the proceedings in Thika Misc. Applications E015, E013, E014, E016, E017, E065 and E012 remain to be matters independent of the instant proceedings and ought to be litigated as such with no bearing to the instant proceedings.

13. Parties put in written submissions.

The Applicants' Submissions

14. The applicants argue that the cause of action arose in Nairobi and both parties conduct their principal business in Nairobi and no sufficient reason was advanced to justify the lower court in Thika exercising jurisdiction. The filing in Thika was therefore procedurally improper and contrary to established principles of territorial jurisdiction. The applicants further argue that disputes concerning auctioneers' fees fall within the exclusive jurisdiction of the Auctioneers Licensing Board as provided by Rule 55 of the Auctioneers Rules, thus the lower court lacked both subject matter and territorial jurisdiction to entertain the respondent's claim.

15. The applicants rely on the case of **Tobias M. Wafubwa vs ben Butali [2017] eKLR** and submit that an appeal constitutes a separate and distinct proceeding and a party is at liberty to appoint an advocate of choice without leave. The applicants further rely on Section 79G of the Civil Procedure Act and submit that they became aware of the impugned ruling upon service of a proclamation notice dated 6th October 2025. They further submit that there was no notice of delivery of the ruling and previous counsel failed to communicate the outcome. However upon discovery, the applicants submit that they moved the court promptly and therefore the delay has been explained and it is not inordinate. To support their contention, the applicants rely on the case of **Nicholas Kiptoo arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**.

16. The applicants rely on the decision in **Philip Chemwolo & Another vs Augustine Kubede (1882-1988) KLR** and submit that they should not be punished for the inadvertence of counsel. The applicants further submits that execution has already commenced and is no longer speculative as the respondent has issued a proclamation notice dated 6th October 2025 targeting their tools of trade and office equipment. Thus if execution is allowed to proceed, their business will be paralyzed, employees displaced and goodwill irretrievably damaged.

17. The applicants submit that they have expressed their willingness to comply with any conditions that the court may deem fit including the provision of security. The applicants further submit that the intended appeal raises serious and arguable issues of law, including the denial of the right to legal representation, denial of audience on the basis of procedural technicalities and questions of jurisdiction.

18. Relying on the case of **Wilson vs Church (No. 2) (1879) 12 ChD 454**, the applicants submit that the respondent shall not suffer any prejudice that cannot be compensated by costs while they stand to suffer irreparable harm if execution proceeds.

The Respondent's Submissions.

19. The respondent relies on **Order 9 Rule 9 of the Civil Procedure Rules** and the cases of **Kenya Petroleum Refineries Limited vs Ngoa 53 Others [2025] KEELC 4241 (KLR); Daktari vs Hussein [2024] eKLR** and **Kithinga & Another vs Kithinga & Another [2024] KEHC 13672 (KLR)** and submits that the ruling dated 12th August 2025 had already been entered and execution had commenced when the firm of B.G. Mwangi & Co. Advocates purported to come on record for the applicants without the leave of the court or consent executed between the applicants' former advocates and the present advocates. Thus the purported

change of advocates is a nullity in law. It is trite that where an advocate is not properly on record, all pleadings, applications and submissions filed by such advocate are incompetent and liable to be struck out. Consequently the application dated 8th October 2025 together with the supporting affidavit and submissions are fatally defective and ought to be struck out.

20. The respondent relies on **Order 42 Rule 6 of the Civil Procedure Rules** and the cases of **Vushram Ravji Halai vs Thornton & Turpin [1990] KLR 365** and **Carter and Sons Ltd vs Deposit Protection Fund Board & Two Others Civil Appeal No. 291/1997** and submits that the applicants have failed to satisfy the conditions to warrant them orders of stay of execution. The applicants have not demonstrate any substantial loss they will suffer nor have they shown that execution was unlawful, irreparable or incapable of restitution. Relying on the case of **Gianfranco Manenthi & Another vs Africa Merchant Assurance Company Ltd [2019] eKLR**, the respondent submits that the applicants have not offered any form of security for the due performance of the decree.

21. The respondent submits that the application was not filed timeously as the ruling was delivered on 12th August 2025. The respondent further argues that stay of execution cannot be granted to await a speculative appeal where no appeal has been filed, as is the instant

case. Thus, the prayer for stay is legally untenable and amounts to an abuse of the court process.

22. The respondent relies on **Section 79G of the Civil Procedure Act** and the cases of **Nicholas Kiptoo arap Salat vs Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** and **Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR** and submits that the explanation by the applicants that the delay was caused by their former advocates in failing to inform them of the impugned ruling, is untenable and unsupported by evidence. The applicants have not provided any records, correspondence or affidavits from the alleged indisposed advocates to substantiate the said claim. The respondent argues that the applicants only approached the court after execution had already been lawfully commenced pursuant to a valid court process. The respondent further argues that the instant application is a belated afterthought precipitated by execution rather than a bonafide and timeous pursuit of appellate remedies and is undeserving of the discretionary relief sought.

23. The respondent further submits that granting the said orders would occasion prejudice to him as he was already in the process

of lawfully executing the decree and is entitled to finality of litigation.

24. The applicants filed supplementary submissions and reiterated the contents of their submission. They submitted and added that the respondent has persistently engaged in filing multiple and vexatious bill of costs against them under various miscellaneous applications including Applications No. E015, E013, E014, E016, E017, E065 and E012 which are all at different stages of determination. The applicants submit that the multiplicity of the suits all arising from the same series of transactions is not coincidental but demonstrates a deliberate pattern aimed at harassing them, subjecting them to unnecessary litigation and unjustly burdening them with costs.

The Law

Whether the firm of B.G. Mwangi & Co. Advocates is properly on record

25. **Order 9 Rule 9 of the Civil Procedure Rules** provides:-

> **"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court:-**
>
> i. **Upon an application with notice to all the parties; or**

ii. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

26. The above principles were further set out by **Radido J** in the case of **Kazungu Ngari Yaa vs Ministry V. Naran Mulji & Co. [2014] eKLR** as follows:-

> **"My understanding of the provision is that the requirements under (a) and (b) are disjunctive. The requirements envisage two different scenarios and the only commonalities are that, there has been a judgment and there was an advocate on record previously.**
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> **In the first scenario under (a) the new advocate or the party in person makes a formal application to the court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under the first scenario, the consent of the previous advocate is not necessary, but the party must give notice to the other parties and then satisfy the Court to grant leave.**
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> **In the second scenario under (b), the new advocate or party in person needs to secure the written consent of the previous advocate**

on record, file the consent in court and then seek leave to come on record. My understanding of the scenario under (b) is that a formal written application is not necessary and that once the written consent has been filed,

an oral or informal application would be sufficient to move the court."

Relying on the above persuasive authority, the question then begs as to whether non-compliance with Order 9 Rule 9 is fatal to warrant the dismissal of the application herein.

27. This was discussed in the Court of Appeal in the case of **Tobias M. Wafubwa vs Ben Butali [2017] eKLR** where it was held that:-

"We would go further to add that, provided that where the failure to comply with Rule 9 did not undermine the jurisdiction of the court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then Article 159 of the Constitution and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings."

28. A similar approach was invoked in the case of **Boniface Kiragu Waweru vs James K. Mulinge [2015] eKLR** where in addressing the issue of non-compliance with **Order 9 Rule 9** this Court observed thus:

> **"All in all we are not persuaded that non-compliance with Order III Rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity**
>
> **efficacious as the provision was meant to be. Indeed all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say was procedural and not fundamental. It did not cause prejudice to the appellant at all…"**
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> **In the instant case, the learned judge took the view that, the issue being one of failure to comply with Rule 9 was a procedural lapse that did not go to the root of the appeal and duly invoked the directions of Article 159 of the Constitution in dismissing the appellant's application.**
>
> **By declining to dismiss the appeal on account of non-compliance, was by exercise of the learned judge's discretion. The guiding**

principles on the exercise of discretion by the trial court are that an appellate court will not interfere with such exercise unless it is demonstrated that the trial court misdirected itself, or considered matters it should not have considered, or failed to take into account matters it should have taken into account, and in so doing arrived at the wrong decision. (See Mbogo & Another vs Shah (1968) EA 93 and United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd [1985] EA 898).

However, non-compliance with Order 9 Rule 9 of the Civil Procedure Rules is not fatal but venial omission which would be cured under Article 159(2)(d) of the Constitution and the oxygen principle. But of course, that is a matter for discretion of the court which should be exercised on the principles enunciated by the Court of Appeal in the Tobias Case.

29. From the above decisions, it is evident that non-compliance with Order 9 Rule 9 is not fatal because the provision is merely procedural and as such the procedural flaw is curable under Article 159(2)(d) of the Constitution of Kenya, of which obligates the court to dispense justice without undue regard to procedural technicalities.

30. In applying the guidelines above to the circumstances of this case, I am of the view that the Court should exercise its discretion and allow the applicants' counsel regularize its position by filing the consent executed by both firm of advocates and upon such filing of the consent seek leave to come on record.

Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;

31. **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.

32. It is clear from the wording of section 79G of the Civil Procedure Act that before the court considers extension of time, the applicant must satisfy the court that 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 vs William Muthama Kitonyi [2018]eKLR** an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

33. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] eKLR** enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

"The underlying principles a court should consider in exercise of such discretion should include:-

a) **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;**

b) **A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**

c) **Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;**

d) **Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**

e) **Whether there will be any prejudice suffered by the respondent if the extension is granted;**

f) **Whether the application has been brought without undue delay.**

34. Similarly in the case of **Paul Musili Wambua vs Attorney General & 2 Others [2015]eKLR,** the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“…….it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not

based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

35. The ruling herein was delivered on 12th August 2025 and the applicants filed the current application on 8th October 2025. This is about 26 days outside the time limited for filing an appeal. The applicants have attributed the delay in filing their appeal on the ground that their previous advocates were indisposed and did not inform them of the outcome of the applications.

36. On perusal of the record, the ruling in the lower court was delivered on 12th August 2025 in the absence of both parties. The ruling was in respect of the 1st applicant's application dated 30th January 2025 seeking for orders of review and setting aside of the orders issued on 3rd December 2024. From the record, the applicants argue that they were denied a chance to defend the respondent's bill of costs as they experienced some challenges with the CTS. I have perused the record and noted that the applicants were served with the bill of costs and application both dated 25th March 2024 and the applicants' advocates on 4th September 2024 acknowledged receipt of the said application vide email and further requested for 7 days to file their response in relation to the series herein but never filed any response. It is noted that the

applicants were served on 16th October 2024 with the notice of application which had the annexed bill of costs and the subsequent mention notice dated 15th October 2024 and hearing notice scheduling the matter for

hearing on 3rd December 2024. On the said 3rd December 2024, the applicants had neither entered appearance or filed any documents in response to the application and counsel for the applicants attempted to come on record for the applicants but he had not filed any notice of appointment, hence he had no right of audience. The lower court allowed the application as prayed. The attempt by the applicants' advocate on the said date supports the position that the applicants were served with the application and hearing notice. As such, the applicants' cannot argue that they had mapping challenges as they were served with the application on 16th October 2024. The applicants then filed a notice of appointment on 16th February 2025 and sought to have the application dated 30th January 2025 to be heard. The lower court in dismissing the application noted that the applicants were aware of the matter as their counsel acknowledged receipt of the application and pleaded for 7 days to file their responses. Thus the issues of non mapping in the e-filing system was an afterthought and a delaying tactic. The application arising from the impugned ruling was the applicants' application yet they argue that their former advocates did not inform them of the outcome. The applicants have not substantiated their claim with any evidence. It would have been prudent for the applicants to file an affidavit of their advocate but they failed to do so. The applicants only seem to blame their previous advocates for not informing them.

37. The law is clear that it is the responsibility of a litigant to be vigilant and proactive in following up on their cases. This principle was enunciated in the case of **Habo Agencies Limited vs Wilfred Odhiambo Musingo (Civil Appeal Application 124 of 2004) [2015] KECA 987 (KLR) (16 January 2015) (Ruling)** where the court held:-

It is not enough for a party in litigation to simply blame the advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasised that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.

38. Further in the case of **Rajesh Rughani vs Fifty Investment Ltd & Another (2005) eKLR,** the Court of Appeal held:-

It is not enough simply to accuse the advocate for failure to inform as if there is no duty on the client to pursue his matter. if the advocate was simply guilty of inaction that is not excusable mistake which the court may consider with some sympathy.

39. Thus, although the delay of twenty six days may not be inordinate, the failure to give plausible reasons for the delay is not excusable.

40. On the perusal of the annexed Memorandum of Appeal and the ruling of the trial court, it is my considered view that the appeal does not raise pertinent issues of law. Thus, it is evident that the

chances of the appeal succeeding if the instant application is granted are not high.

41. In the circumstances it is my considered view that the applicants have not established to the satisfaction of the court that time should be enlarged to enable them file their appeal. Consequently, the memorandum of appeal dated 8th October 2025 is not deemed as properly filed and is struck out.

42. Having declined to grant the prayer for admitting the appeal out of time, the prayer for stay of execution of the trial court's ruling automatically fails since there is no existent appeal. It is thus my considered view that the application dated 8th October 2025 lacks merit and is hereby dismissed with costs to the respondent. The orders herein shall apply to Civil Appeal Nos. E257, E258, E259, E260, E261, E262, E264, E265, E268 and E269 of 2025.

43. It is hereby so ordered**.**

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 7TH DAY OF MAY 2026.

F. MUCHEMI

JUDGE