

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
CIVIL APPLICATION NO. E789 OF 2023

-between-

**THIKA ROAD HEALTHCARE
SERVICESAPPLICANT**

-versus-

**NICELIFE HEALTHCARE
PHARMACEUTICALS LIMITED
RESPONDENT**

RULING

Background:

1. On 1st July 2022, the trial Court entered an *ex-parte* judgment against *Thika Road Healthcare Services*, the Applicant herein, in *Milimani Chief Magistrates Commercial Court Case No. 3683 of 2019*. [hereinafter referred to as '***the suit***']. Subsequently, the Applicant filed an application dated 30th September 2022 seeking stay of execution and suspension of warrants of attachment. The application was dismissed on 3rd March 2023. The Applicant instituted second application seeking similar orders but was dismissed on 11th August 2023.
2. Dissatisfied with the foregoing outcomes, the Applicant filed a Notice of Appeal and moved this Court by way of a Notice of Motion. The latter application was heard by way of written submissions and is the subject of this Ruling.

The Application:

3. Through the Notice of Motion dated 14th August 2023, the Applicant sought the following orders: -
 1. *Spent.*
 2. *THAT the Honourable Court be pleased to grant leave to the Appellant/Applicant to file and serve the record of appeal out of time.*

3. *THAT the Honourable Court do give time within which service of the said Record of Appeal is to be effected on the Respondents.*
 4. *THAT pending inter-partes hearing of this Application the Honourable Court be pleased to issue stay orders of execution of the Ex-parte Judgment and decree entered on 1st July 2022 by the Chief Magistrate's Court at Milimani Commercial Courts in Civil Case No. 3683 of 2019 and its consequential orders and Ruling and Order given on 3rd March 2023 and by restraining the Decree Holder/Respondents herein whether by themselves, their agents, employees, servants or anyone acting on their behalf from attaching, auctioning proclaiming, giving instructions for auction, attachment, harassing, threatening, advertising, publishing, or otherwise doing anything prejudicial regarding the Appellant/Applicant's movable properties or medical equipment pending obtaining of Certified Court proceedings and filing of the intended appeal in the High Court to set aside ex-parte Judgment.*
 5. *THAT pending hearing and determination of the Application herein the Honourable Court be pleased to issue stay orders of execution of the Ex-parte Judgment and decree entered on 1st July 2022 by the Chief Magistrate's Court at Milimani Commercial Courts in Civil Case No. 3683 of 2019 and its consequential orders and Ruling and Order given on 3rd March 2023 and by restraining the Decree Holder/Respondents herein whether by themselves, their agents, employees, servants or anyone acting on their behalf from attaching, auctioning proclaiming, giving instructions for auction, attachment, harassing, threatening, advertising, publishing, or otherwise doing anything prejudicial regarding the Judgment Debtor/Applicant's movable properties or medical equipment pending obtaining of Certified Court proceedings and filing of the intended appeal in the High Court to set aside ex-parte Judgment.*
 6. *THAT the Honourable court do issue such further Orders as it may deem fit and convenient in the circumstances of this case.*
 7. *THAT costs of this application be in the cause.*
4. The application was predicated on the grounds on its face and the depositions of *Dr. Erneo Mageto Moruri Nyakiba*, the Director of the Applicant. He deposed that the delay in filing the instant application was occasioned by the serious illness and hospitalization of the its previous Advocate, who suffered a fall

and broken leg in February 2022. He stated that the debt claimed is exaggerated, as the Applicant has already paid approximately Kshs. 1,875,893.00 towards the pharmaceutical products supplied. He further claimed that the Respondent has instructed *Fantasy Auctioneers* to attach hospital equipment, which would cause irreparable loss to the hospital and its patients in a marginalized area.

5. As regards the appeal, he deposed that it would be rendered nugatory if the execution proceeds, as life-saving medical infrastructure could not be compensated in monetary terms.

The Submissions:

6. Through written submissions dated 13th May 2025, the Applicant argued that it has met the threshold for a stay of execution under Order 42 Rule 6(2) by demonstrating substantial loss and that the application was made without inordinate delay. Relying on *Butt -vs- Rent Restriction Tribunal* [1979] eKLR, the Applicant submitted that the Court's discretion must be exercised to ensure that a successful appeal is not rendered nugatory.
7. Regarding the extension of time, the Applicant relied on the case of *Wachira Karani -vs- Bildad Wachira* [2016] eKLR for the principle that sufficient cause should receive a liberal construction to advance substantial justice where no negligence is imputed. The Applicant further contended that the *ex-parte* proceedings violated its right to a fair hearing under Articles 25(c) and 50(1) of the Constitution.
8. Finally, drawing support from the decision in *Patel -vs- E.A. Cargo Handling Services Ltd* [1974] EA 75, the Applicant urged the Court to prioritize doing justice between the parties over punishing a party for mistake or inadvertence.
9. In the end, the Applicant urged this Court to allow the application as prayed.

The Respondent's case:

10. The Respondent opposed the application through written submissions dated 16th July 2025. From the outset, it characterized it as a dilatory tactic to avoid settling a legitimate debt. It submitted that the Applicant was habitually indolent, failing to appear for hearing on 10th May 2022 and failing to seek a stay when judgment was delivered on 1st July 2022. The

Respondent highlighted that the memorandum of appeal was filed 409 days after the judgment, a period which constituted an inordinate delay.

11. Relying on *Dilpack Kenya Limited -vs- William Muthama Kitonyi* [2018] KEHC 4858 (KLR) and *Feroz Begum Qureshi and Another -vs- Maganbhai Patel and Others* [1964] EA 633, the Respondent argued that merits of a case cannot override a lack of valid excuse for delay. The Respondent further cited the authority in *Daphne Parry -vs- Murray Alexander Carson* [1963] EA 546, to advance the argument that even liberal construction must follow judicial principles and that the Court must guard against being led by sympathy where there is no *bonafide* explanation.
12. In conclusion, the Respondent relied on the precedent in *First American Bank of Kenya Ltd -vs- Gulab P Shah & 2 Others* [2002] 1 EA 65 and *Ratman -vs- Cumarasamy* [1964] 3 All ER 933 to emphasize that where there is no explanation for delay, there should be no indulgence.
13. The Respondent then prayed that the application be disallowed.

Analysis:

14. On consideration of the application, the response and the parties' submissions, the following two issues emerge for determination in this matter: -
 - i. *Whether the Applicant meets the threshold for enlargement of time.*
 - ii. *Depending on (i) above, whether the Applicant meets the conditions for a stay of execution.*
15. The issues shall be considered in seriatim.

[a] Whether the application meets the threshold for enlargement of time:

16. *Section 79G* of the *Civil Procedure Act* sets a 30 days' timeline within which a party must institute an appeal. The provision also opens a window for appeals to be admitted out of time if the Appellant satisfies the Court that there was a good and sufficient cause for not filing the appeal in time.
17. Addressing the above issue, the Supreme Court in ***Nick Salat -vs- Independent Electoral and Boundaries Commission***

& 7 Others [2014] eKLR established that extension of time is an equitable, discretionary remedy, not a right, and enunciated the following applicable principles: -

... 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.*

18. Additionally, the Court of Appeal in **Paul Musili Wambua vs Attorney General & Others** (2015) eKLR said as follows in considering an application for extension of time and leave to file a Notice of Appeal out of time: -

...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.

19. Flowing from the foregoing guidance, this Court will analyse the following factors:

- a) Length of the delay:

20. The *ex-parte* judgment was delivered on 1st July 2022. The Memorandum of Appeal is dated 14th August 2023. It represents a delay of 1 year and 44 days. Under the *Nick Salat* principles, the burden is on the Applicant to explain this lapse in time to the satisfaction of the Court.

b) Reason for the Delay:

21. The Applicant attributed the delay to the serious illness and hospitalization of their previous Advocate, who suffered a broken leg in February 2022. In addition, in the Affidavit, the Applicant deposed that they were actively pursuing a review application in the Chief Magistrate's Court during the said period.

22. Having perused the annexures to the Applicant's affidavit, there is indeed a clinical discharge summary from Aga Khan University, marked EMMN1. It is in respect of *Evans Ondieki*, previous Counsel for the Applicant. There is also on record of evidence of money transfer of Kshs. 1,124,950/- in favour of the Respondent. While the Respondent argued that the Applicant was habitually indolent, the record indicates the Applicant's Counsel was not only indisposed, but also, was not entirely silent. He was attempting to seek redress in the trial Court until the final dismissal of their application on 11th August 2023.

23. This Court finds that the attempt to resolve the matter in the subordinate Court coupled with the Learned Counsel's indisposition provide a plausible, though borderline, explanation for the delay.

c) Any triable issue:

24. The Applicant claimed to have made payments to the Respondent totalling Kshs. 1,875,893/-, including a specific transfer of Kshs. 1,124,950/- on 27th March 2021. The evidence suggests that the *ex-parte* judgment may have been based on an exaggerated debt claim.

25. In light of the rendition in ***Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi***, the existence of triable issues regarding the actual debt owed weighs in favour of granting the Applicant their day in Court. That is the case here.

d) Prejudice:

26. The degree of prejudice the Respondent stands to suffer is that of delay in realizing the decretal sum. Such can be compensated by way of costs.
27. In sum, this Court finds sufficient reasons to extend time in this matter.

[b] Whether the application meets the conditions for a stay of execution:

28. **Order 42, Rule 6** of the **Civil Procedure Rules** provides that an Applicant must satisfy the following conjunctive requirements for the grant of stay of execution pending appeal; that is to say: -
 - i. *The application has been made without unreasonable delay;*
 - ii. *Substantial loss may result to the Applicant unless the order is made; and*
 - iii. *That the Applicant is willing to furnish such security as the court order for the due performance of such decree.*
29. It is not lost that the purpose of stay pending appeal as held in the case of **RWW vs. EKW** [2019] eKLR, is as follows: -

... The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs... Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.
30. In *Civil Application Nai 6 of 1979, Butt -vs- Rent Restriction Tribunal* [1979] eKLR, the Court of Appeal crystallized the conditions for grant of stay 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.*

31. The Court will hence appreciate the circumstances of the case in light of the above statutory provision and overarching principles.

a) Delay:

32. Since delay has already been discussed to the satisfaction of this Court in the preceding issue, the only requirements to consider are in respect to substantial loss and security for due performance of the decree. It must, nonetheless, be noted that while 409 days is a significant delay, the principles of equity dictate that a hospital's ability to serve the public should not be sacrificed at the altar of technicality when a *bonafide* medical reason for Learned Counsel's delay has been provided.

b) Substantial loss:

33. The obligation imposed upon an Applicant as regards substantial loss was brought out clearly in the case of *James*

Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR where the Court observed thus;

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

34. Drawing from the foregoing, this Court must balance the prejudice to the Respondent against the potential loss to the Applicant, which in this case is irreparable since it is a hospital facility serving a marginalized population. There is on record evidence of warrants of attachment of movable property by *Fantasy Auctioneers*. It would likely target essential medical equipment whose effect is to strip the Applicant of life-saving infrastructure. Such damage in this Court's view would cause damage that cannot be compensated by monetary terms and would adversely affect innocent patients. Differently put, the potential loss of life-saving infrastructure outweighs the Respondent's immediate interest in recovering the debt through auction, especially where the Applicant has raised a triable issue regarding the amount already paid.
35. Applying the liberal construction encouraged in ***Wachira Karani -vs- Bildad Wachira*** (2016) eKLR, a decision relied upon by the Applicant to advance substantial justice, this Court finds that the Applicant has laid a sufficient, *albeit* delayed, basis for the Court's intervention on the basis that it will suffer substantial unless the order is issued.

c) Security:

36. Neither party submitted on this limb. However, this Court will be guided by the Court of Appeal in the case of ***Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 others*** [2014] eKLR to as far as possible, strike a fair balance between the Applicant's right to appeal and the Respondent's right to be

accorded protection from starting all-over in recovering its decretal sum in the event the appeal fails.

Disposition:

37. As I come to the end of this ruling, I wish to apologize to the parties for the late delivery of this decision. 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.
38. For the reasons stated above, this Court find that the Notice of Motion dated 14th August 2023 deserves this Court's favourable exercise of discretion. As such, the following final orders hereby issue: -

[a] Leave is hereby granted to the Appellant/Applicant to file and serve a Record of Appeal together with written submissions within 30 days of this order.

[b] An Order staying the execution of the judgment dated 1st July 2022 and all consequential orders is hereby granted pending the hearing and determination of the appeal on condition that the Applicant deposits the sum of Kshs. 1,000,000/- [One Million Only] in Court within 30 days of this order.

[c] In the event of default in [a] and/or [b] above, the stay orders in force shall automatically stand discharged and set-aside and the Respondent will be at liberty to levy execution.

[d] In view of the circumstances of the case, the Applicant shall pay the Respondent throw-away costs assessed at Kshs. 25,000/= within 30 days failure to which execution to issue.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **15th** day of **May, 2026**.

A.C. MRIMA
JUDGE

Ruling virtually delivered in the presence of:

Mr. Kamau, Learned Counsel for the Appellant.

No appearance for the Respondent.

Amina - Court Assistant.