



**Mwananchi Credit Limited v Startruck Auctioneers Investment  
Yard Limited (Miscellaneous Application E248 of 2024)  
[2025] KEHC 1022 (KLR) (Commercial and Tax) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1022 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E248 OF 2024  
PM MULWA, J  
FEBRUARY 27, 2025**

**BETWEEN**

**MWANANCHI CREDIT LIMITED ..... APPLICANT**

**AND**

**STARTRUCK AUCTIONEERS INVESTMENT YARD  
LIMITED ..... RESPONDENT**

**RULING**

1. Mwananchi Credit Ltd (the Applicant), through a Notice of Motion application dated 20<sup>th</sup> March 2024, expressed under 1A, 1B, 3A and 79G of the *Civil Procedure Act*, Order 42 Rule 6 of the Civil Procedure Rules, Section 38 of the *Small Claims Court Act* and Rule 30 of the Small Claims Court Rules, seeks stay of execution of the judgment delivered by Hon. J.W. Nasimiyu, RM on 20<sup>th</sup> November 2023, in Nairobi SCCCOMM No. E3998 of 2023. It also seeks leave to file the appeal out of time.
2. The application is premised on the grounds set out on the face of the motion and supported by the affidavits of Sylvia Wanjiru Njoroge, sworn on 20<sup>th</sup> March 2024 and 4<sup>th</sup> July 2024. Ms. Sylvia avers that the Applicant is aggrieved by the judgment of the Adjudicator, entered against the Applicant and in favour of the Respondent for a sum of Kshs. 393,240.00, being unpaid storage charges.
3. The Applicant asserts that it instructed its advocate to file an appeal against the judgment and blames the advocate for failing to act on these instructions within the prescribed timelines. The Applicant is apprehensive that the Respondent will proceed with execution as warrants of attachment have been obtained. It is contended that the appeal is arguable with a likelihood of success.
4. In response, Gerald Mutahi, the Managing Director of StarTruck Auctioneers (Respondent), filed a replying affidavit sworn on 30<sup>th</sup> May 2024. He contends that the instant application is defective



and constitutes an abuse of the court process for failing to comply with Order 9 Rule 9 of the Civil Procedure Rules. He asserts that there is no imminent threat of execution and argues that the application is merely a delaying tactic made in bad faith.

5. Mr. Mutahi claims that the application is incompetent and should be dismissed. That the Applicant has failed to provide valid reasons for the delay in filing the appeal, and he maintains that the Applicant has no intention of settling the decretal amount. Additionally, the Applicant has not demonstrated any irreparable loss that would be suffered, nor has it shown that there is an arguable appeal.
6. Parties canvassed the application by way of written submissions, dated 4<sup>th</sup> July 2024 and 11<sup>th</sup> July 2024 for the Applicant and Respondent respectively.

### **Analysis and determination**

7. I have considered the application, the responses thereto and the submissions and I frame the following issues for determination:

- a. Whether the applicant is entitled to leave to appeal out of time
- b. Whether the applicant is entitled to stay of execution of the judgment pending hearing and determination of the appeal.

8. Enlargement of time is an equitable remedy granted to a party who can demonstrate deserving circumstances (See *Nicholas Kiptoo Korir Arap Salat vs IEBC & 7 others* (2014) eKLR (SCoK)). The purpose of this remedy is to allow a party to seek relief when they are unable to comply with time limits due to reasons that are not attributable to their own fault. However, it is not automatically granted, the party seeking the enlargement of time must satisfy certain conditions.

9. The law governing the enlargement of time is found under Section 79G of the [\*Civil Procedure Act\*](#) which 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 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.”

10. The above section requires an applicant to provide a valid and sufficient cause for the delay in filing the appeal.
11. In the present case, the Applicant attributes the delay to the advocate’s failure to act on the instructions and file the appeal within the prescribed timelines. The applicant urges the court not to hold it accountable for the errors made by its counsel.
12. It is insufficient for a party in litigation to merely blame the advocate on record for every mistake in the conduct of the case. Courts have consistently stressed that parties bear a responsibility to actively engage with and follow up on their cases, even when represented by counsel (as clearly illustrated in *Habo Agencies Limited v. Wilfred Odhiambo Musingo* (2015) eKLR (CoA).
13. Upon reviewing the record, the Applicant has failed to provide any evidence demonstrating efforts made to follow up with the instructed advocate to ascertain the status of the matter. The email dated 1<sup>st</sup> February 2024, sent to Brian Macharia of Mukule Moni & Co. Advocates, merely instructs the



advocate to file an appeal and seek a stay of execution. There is no evidence of any further action or follow-up by the Applicant before the filing of the current application.

14. It is also noteworthy that the instructions to Mukule Moni & Co. Advocates were given significantly after the period for filing the appeal had expired. Judgment in the matter was delivered on 20<sup>th</sup> November 2023, and under Section 79G, the appeal should have been filed by 20<sup>th</sup> December 2023.
15. In my view, it is reasonable to conclude that, after the judgment was delivered, the Applicant went into slumber, and counsel was instructed well beyond the thirty days for filing an appeal. I am therefore not persuaded that the reason advanced by the Applicant - namely, the advocate's failure to act on the instructions - sufficiently justifies the delay. Furthermore, from the time of instructing counsel, there is no evidence provided by the Applicant to show that it followed up with the advocate to ensure the timely filing of the appeal. Instead, the applicant filed this application 47 days later.
16. Accordingly, the Applicant has failed to provide a satisfactory explanation for the delay in filing the intended appeal.
17. An appeal from the Small Claims Court must raise pertinent issues of law, as stipulated in Section 38 of the Small Claims Act. Upon reviewing the draft memorandum of appeal dated 20<sup>th</sup> March 2024, I note that the grounds raised primarily address points of fact rather than law, which limits the potential success of the appeal. In light of this, I am not persuaded that the Applicant has demonstrated sufficient grounds to warrant the enlargement of time.
18. It is well-established that, in an application for a stay of execution pending appeal, the Applicant must demonstrate to the court that the appeal is arguable. Additionally, the applicant must show that, if the stay is denied or if the appeal fails, the execution of the judgment would render the appeal nugatory.
19. The Applicant contends that the appeal has a high probability of success and expresses concern that, without a stay, the respondent will proceed with the execution of the judgment, potentially undermining the appeal should it succeed. On the other hand, the respondent argues that it is entitled to enjoy the fruits of the judgment.
20. Given that the warrants of attachment have already lapsed, I find that the Applicant has not demonstrated an immediate risk of execution. As such, I am not persuaded that there is an immediate threat of execution to justify the granting of a stay of execution.
21. Furthermore, there is no substantive appeal currently pending before the court. In the absence of a clear, arguable appeal, the court is unable to assess the merits of the appeal. I find no legal basis upon which the court can determine the appeal is arguable.
22. Consequently, I find the application dated 20<sup>th</sup> March 2024 is without merit, and the same is dismissed with costs.

**RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27<sup>TH</sup> DAY OF FEBRUARY 2025.**

**PETER M. MULWA**

**JUDGE**

In the presence of:

Ms. Namukuru for Applicant

Ms. Wambua for Respondent



Court Assistant: Carlos

