



**Shinehome International (K) Company Limited & another v Van
Harvest Enterprises Company Limited & another (Civil Appeal
E944 of 2024) [2025] KEHC 1202 (KLR) (Civ) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1202 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E944 OF 2024

LP KASSAN, J

FEBRUARY 27, 2025

BETWEEN

**SHINEHOME INTERNATIONAL (K) COMPANY LIMITED 1ST APPELLANT
STEPHEN NJUGUNA MUGO 2ND APPELLANT**

AND

**VAN HARVEST ENTERPRISES COMPANY LIMITED 1ST RESPONDENT
ZHANG SHIFEI 2ND RESPONDENT**

RULING

1. Before this court is a Notice of Motion dated 13.08.2024 brought under Order 21 Rule 1B, Order 22 Rule 22, Order 40 Rules 6, and Order 51 Rules 1 of the Civil Procedure Rules, Article 159 (2) (a) and (d) Constitution of Kenya, Sections 1A, 1B, 3A and 95 of the [Civil Procedure Act](#) and all enabling provisions of the law wherein the Applicant seeks orders to wit:
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to grant the Applicant leave to file an appeal out of time;
 - d. That this Honourable Court be pleased to grant interim stay of judgment delivered on 18th August 2023 by Honourable B. M. Cheloti in Milimani CMCC No. E2455 of 2021 pending the hearing and determination of this Application and the appeal herein.
 - e. That the costs of this application abide the outcome of the intended appeal.



2. The said application is premised on the grounds on its face and further supported by the affidavit sworn by the 2nd Appellant/Applicant. The Applicant's case is judgment was delivered on 28th July 2023, for Kenya Shillings 1,394,240.00, with costs and interest. The Appellant filed a Memorandum of Appeal on 15th August 2024. The Appellant will suffer substantial business loss if a stay is not granted. The Respondent intends to execute the stated judgment. The appeal raises arguable issues with a high chance of success. It is in the interest of justice and fairness that a stay of execution be granted pending the Appeal. Substantial loss may result if a stay of execution is not granted. The appeal has a reasonable chance of success and execution will render the Appeal nugatory. There has been no delay in bringing this application. The Applicant/Appellant is willing to abide by any conditions the court may impose. It is in the interest of justice that the orders sought be granted and the Applicant be allowed to argue its Appeal. No prejudice will be occasioned upon the Respondents if the orders sought are granted.
3. The Application is opposed by the Respondent vide a replying affidavit sworn on 23.09.2024 by the Respondent. He deponed that the Appellants allegedly misled the court into issuing ex-parte orders on 29th August 2024. Failure to Disclose Information: The Appellants did not disclose that they were represented by Isinta & Company Advocates in the trial court and were aware of the judgment since 28th July 2023. They also allegedly neglected to act on the judgment, including settling the decretal amount, despite demands since 26th March 2024. Defective Appeal: Advice from Mr. Mark Kotonya suggests the appeal is fatally defective because leave should have been sought before filing the appeal. Delay: The application for stay of judgment was filed more than five years after the judgment, with unexplained and unreasonable delay. Rights of Decree Holder: The Respondents, as the Decree Holder, are entitled to execute the judgment, including through garnishee orders. Lack of Good Faith: The Appellants have not demonstrated good faith and have unreasonably delayed filing the application, making them undeserving of the Court's indulgence. No Justification for Delay: The Applicant has not justified the delay in filing the appeal to warrant the Court's indulgence. A conditional stay order was granted, requiring a deposit of Kshs. 700,000.00 within 5 days from 29th August 2024, but it was allegedly not complied with. The payment was made on 4th October, more than a month after the deadline. Potential for Miscarriage of Justice: Granting the orders sought by the Applicant would cause great injustice and prejudice to the Respondents by delaying the recovery of the judgment. The Respondents have been waiting for payment for over five years. Delaying Tactics: The Appellants are allegedly seeking to delay justice, and the Court has a legal duty to ensure the Respondents' rights are not disregarded or abused. No Prejudice to Applicant: The Applicant has not demonstrated that it would suffer prejudice if the stay orders are not granted. Hardship to Respondent: Granting a stay would cause hardship to the Respondent, outweighing any suffering the Applicant might undergo. Mala Fide Application: The Application is an attempt to deny the Respondents the fruits of justice and is therefore mala fide. Application as an Afterthought: The Application was filed more than one year after the judgment to frustrate the Respondents' efforts to benefit from the Court's Judgment. Insufficient Security: The Applicants have not provided sufficient security for the Court's decree. Abuse of Court Process: The Applicant's Application lacks merit, abuses the court process, and should be dismissed with costs.
4. The application was canvassed by way of written submissions.

Applicant's submissions

5. The Applicant submitted that denying the orders sought would render their appeal futile, violating constitutional rights. They invoke Article 159 (2) (d) of *the Constitution*, asserting that courts should not be unduly bound by procedural technicalities. They also cite Article 25 and 50, arguing for the right to a fair trial and the exhaustion of all legal avenues, including appeals. Legal Principles: The



Appellants rely on Section 3A of the *Civil Procedure Act*, which grants the court inherent powers to ensure justice. They also invoke Sections 1A and 1B of the *Civil Procedure Act*, urging the court to prioritise a just determination of the dispute over technicalities. Conditions for Stay of Execution: The Appellants state they meet the conditions for a stay of execution under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. They argue they have demonstrated sufficient cause, risk of substantial loss if the stay is not granted, and willingness to provide security. They cite the case of *Butt vs Rent Restriction Tribunal* to support the principles for granting a stay. Delay: The Appellants contend that the application was filed without undue delay, immediately after they became aware of the judgment. Security: The Appellants state they complied with the court's direction to deposit Kshs. 700,000/= as security. Prejudice: The Appellants argue that the Respondent will not be prejudiced by the granting of a stay. They also contend that failure to grant a stay would render the appeal meaningless and cause them prejudice. Respondent's Conduct: The Appellants note that the Respondent's affidavit does not adequately address the stay of execution. Balancing Rights: The Appellants argue that the Respondent's right to enjoy the fruits of the judgment should be balanced against the Appellants' right to appeal and a fair hearing under Article 50 of *the Constitution*. Costs: The Appellants request that the costs of the application be awarded to them, citing Section 27 of the *Civil Procedure Act*. Orders Sought: The Appellants request the court to allow the appeal out of time and issue a stay of execution to prevent parallel proceedings and ensure justice.

Respondent's submissions

6. The Respondent submitted that the application.
7. I have considered the Application, responses and the submissions filed herein. The main facts relating to the Application herein are not in dispute. These include the existence of the judgment in Nairobi CMCC No. E1949 of 2020 delivered on 27.07.2023 in favour of the Respondents.
8. The issues for determination herein are
 - i. Whether the Applicant herein should be granted leave to appeal out of time against the judgment in Nairobi CMCC No. E1949 of 2020?
 - ii. Who should bear the costs?
9. Section 79G of the *Civil Procedure Act* provides that the appeals from the subordinate court to the High Court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. It provides:

“Every appeal from a subordinate court to high court should be filed within a period of thirty days from the date of the decree or order appealed against, From such period any time the lower court may certify as having been requisite of a copy of the or order. Provided that an appeal may be admitted out of time if the appellant satisfied the court that he had good and sufficient cause for the filing of the appeal in time.”
10. It allows for the extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.
11. The court in exercise of its discretion is supposed to take into account the length of the 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 and whether the matter raises issues of public importance. (See Court of Appeal in *Edith Gichungu Koine-vs-Stephen Njagi Thoithi (2014) eKLR*).



12. In addition, Section 95 of the *Civil Procedure Act* grants to the court the “discretion, from time to time, to enlarge” any time fixed for the doing of any act under the Act. See also, Order 50 Rule 6 of the Civil Procedure Rules. Thus it is incumbent upon the Applicant to satisfy the court that it had good and sufficient cause for not filing the appeal in time, and is deserving of the court’s discretion.
13. The judgment in the primary suit Nairobi CMCC No. E1949 of 2020, was delivered on 28.07.2023. The judgment in the matter had been slated for delivery on 27.01.2023. On the said date, the court was not sitting as it was indisposed. The judgment was scheduled to be delivered on notice. There is no indication that parties were given notice of the judgment date of 28.07.2023. Although the application has been brought over a year later, the explanation is that the Applicant was not aware of the judgment date. In light of this, the delay in bring the application herein although inordinate is with reason.
14. The reason for the delay given by the Applicant was that the court did not issue parties with a judgment notice. In *Andrew Kiplagat Chemaringo-vs-Paul Kipkorir Kibet (2018) eKLR*, the court held:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
15. Herein the delay was occasioned by the lower court not issuing parties with the judgment notice. This can’t be attributed in any way to the either party.
16. As to whether the Respondent will suffer any prejudice, this has to be weighed against a party’s constitutional right to be heard (See Court of Appeal case *Vishva Stone Suppliers Company Limited-vs-RSR Stone (2006) Limited (2020) eKLR.*). The Applicant deposed that the Respondent will not suffer any prejudice if the orders of leave are granted. The Applicant has expressed his chances of appeal succeeding. The Respondent’s deposition as to the prejudice he will suffer cannot dislodge the clear prejudice the Applicant stands to suffer. Further, security for costs has been deposited in court.
17. Where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in his favour and especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way. The discretion of the court must always be exercised judiciously. The Applicant having expressed his intentions to be heard by this court on appeal, it is my considered view that he ought to be given an opportunity to pursue the appeal.
18. For the above reasons, the Applicant has satisfied the conditions for grant of leave to appeal out of time.
19. Taking all relevant factors into consideration, I do order that;

That the appeal herein as filed is hereby admitted out of time and is deemed as duly filed and served within the statutory period. The costs of this Application will be in the cause.
20. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF FEBRUARY 2025.

L. KASSAN

JUDGE

In the presence of: -

No appearance for Applicant

Sila holding brief Katonya for Respondent



Carol - Court Assistant

