



REPUBLIC OF KENYA



**Njogu & another v Mukhoya (Civil Miscellaneous E052 of 2025)
[2025] KEHC 4772 (KLR) (Civ) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4772 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL MISCELLANEOUS E052 OF 2025
TW CHERERE, J
MARCH 27, 2025**

BETWEEN

SAMWELI NJOGU 1ST APPLICANT

JAMES KIGOTHO 2ND APPLICANT

AND

JULIUS MUKHOYA RESPONDENT

RULING

Introduction

1. By a Notice of Motion dated 25th January 2025, brought under Order 22 Rule 22, Order 42 Rules 4 and 6, and Order 51 Rules 1 and 3 of the [Civil Procedure Rules](#), as well as Sections 3, 3A and 95 of the [Civil Procedure Act](#), the Applicant seeks the following orders:
 1. Leave to appeal the judgment delivered on 27th September 2024 in Milimani CMCC E10562 of 2021;
 2. A stay of execution of the said judgment pending the hearing and determination of the intended appeal.
2. The Motion is supported by an affidavit sworn on 25th January 2025 by Obadiah Magero, advocate for the Applicant, and is premised on the following grounds:
 1. The Applicants are aggrieved by the judgment and intend to appeal;
 2. The intended appeal is arguable with high chances of success;
 3. The Applicants have been served with a proclamation notice;



4. The Applicants might not recover the decretal sum if the appeal succeeds;
5. The Applicants are willing to give security in the form of a bank guarantee.
3. The application is opposed. The Respondent filed a Replying Affidavit sworn on 03rd February 2025 by his advocate Nelson Kaburu Felix, in which he raises the following points:
 1. The Applicants have not explained the four-month delay in bringing the application;
 2. The Respondent is a salaried employee of KK Security, and therefore in a position to refund the decretal sum should the appeal succeed.

Issues for Determination

4. I have considered the application in light of the affidavits on record and annexures thereto. I have identified the issues for determination as:
 1. Whether the Applicant has sufficiently explained the delay in filing the application;
 2. Whether the Applicant has met the conditions for grant of stay of execution pending appeal;
 3. Whether leave to appeal should be granted.

Analysis and Determination

5. It is not in dispute that the judgment was delivered on 27th September 2024, and the application was filed on 25th January 2025, nearly four months later. The explanation for the delay is not clearly set out in the supporting affidavit.
6. Whereas courts have discretion under Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 to enlarge time, the party seeking such indulgence must offer a reasonable and satisfactory explanation. In *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* [2014] eKLR, the Supreme Court held that extension of time is not a right but an equitable remedy that is only available to a deserving party at the discretion of the court.
7. Without a cogent explanation for the delay, the court may decline to grant leave. However, the right to appeal is a constitutional right under Article 50(1) of *the Constitution*, and where no significant prejudice is shown to be occasioned by the delay, courts have leaned in favor of allowing parties to ventilate their grievances on appeal.
8. The applicable provision is Order 42 Rule 6(2) of the *Civil Procedure Rules*, which provides that an order for stay of execution may only be granted where:
 1. The court is satisfied that substantial loss may result unless the order is made;
 2. The application has been made without unreasonable delay; and
 3. Such security as the court orders has been given by the Applicant.
9. On substantial loss, the Applicants assert that they may not recover the decretal sum if the appeal succeeds. The Respondent merely states that he is a salaried employee of KK Security but does not provide proof of income or financial standing to counter the Applicant's apprehension.
10. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR, the Court of Appeal held that once an applicant expresses apprehension that the respondent would be unable to repay the decretal sum, the burden shifts to the respondent to show financial capability.



11. The Applicants have shown a willingness to provide security. In *Gianfranco Manenthi & another v African Merchant Assurance Co. Ltd* [2019] eKLR, the court held that:

“Under this condition, a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security.....”

12. Although the delay of four months is not explained, the court finds that the offer of security and the right of appeal weigh in favor of granting a conditional stay.

13. In light of the foregoing, I make the following orders:

- a. Leave to file an appeal out of time is granted, limited to 14 days from the date of this ruling.
3. Stay of execution of the judgment of the judgment delivered on 27th September 2024 in Milimani CMCC E10562 of 2021 is granted pending the hearing and determination of the intended appeal subject to the Applicants depositing the decretal sum with the court within 30 days from the date of this ruling.
- b. In default of compliance with (a) and (b) above, the stay order shall automatically lapse
- c. Costs of this application shall abide the outcome of the appeal.

DELIVERED AT NAIROBI THIS 27TH DAY OF MARCH 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Mr. Wandere

For Applicant - Mr. Magero for Kimondo Gachoka & Co. Advocates

For Respondent - Mr. Kaburu for Nelson Kaburu & Co. Advocates

