



REPUBLIC OF KENYA



**Khushi Motors Limited v Nuve (Civil Appeal E011 of 2025)
[2025] KEHC 12294 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12294 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E011 OF 2025**

**F WANGARI, J
JULY 31, 2025**

BETWEEN

KHUSHI MOTORS LIMITED APPELLANT

AND

SIMON MBONDO NUVE RESPONDENT

RULING

1. The Appellant filed a Notice of Motion application dated 06/01/2025 under Certificate of Urgency pursuant to Section 1, 1A, 1B, 3, 3A and 63 of the [Civil Procedure Act](#), Order 40 Rule 1, Order 22 Rule 6, 7, 13 and 22, Order 51 Rule 1 and 3 of the Civil Procedure Rules, and all other enabling provisions of the law.
2. The Applicant seeks for orders;
 - a. That this court be pleased to grant leave to file and serve the appeal against the Judgment delivered on 01/09/2022 out of time,
 - b. That this court makes an order for stay of execution of the Judgment pending hearing and determination of the appeal.
 - c. That costs of this application be bound by the outcome of the appeal.
 - d. That this court makes any other order that it may deem fit and just to grant.
3. The application is supported by the annexed affidavit of Sahale Faris sworn on 06/01/2025 and on grounds that the Appellant was never served with summons and pleadings as required by law and that the ex parte Judgment dated 01/09/2022 was entered without proper service. That this resulted in the Appellant being denied an opportunity to respond to the Respondent's claim, thus depriving the Appellant a fair hearing as guaranteed under Article 50 of [the Constitution](#).



4. Further, that the Appellant was not notified of the mention dates for the Applicant's application dated 03/11/2022, which application was listed on multiple occasions including 28/06/2023, 29/06/2023, 06/09/2023, 21/11/2023, 14/02/2024, and 11/03/2024, without any notice being issued to the Appellant.
5. That on 11/03/2024, the Appellant's application was dismissed despite the court listing the matter for mention to confirm the filing of a response. That the dismissal occurred without due notice and the Appellant was not afforded an opportunity to be heard before dismissal.
6. The Applicant stated that they made efforts to have the matter addressed, and that through its new advocates, they filed an application dated 26/03/2024 in good faith and in line with the constitutional right to access justice and legal representation. That the Appellant thus sought to set aside the ex parte Judgment and has consistently sought avenues to resolve the matter.
7. The Applicant stated that they demonstrated sufficient cause for setting aside the ex parte judgment, including lack of service and procedural irregularities, through the application dated 26/03/2024. That however, the application was dismissed on 13/12/2024 which dismissal has further exacerbated the Appellant's situation, as it deprives the Appellant the opportunity to present its defence in the matter.
8. The Applicant stated that they are at the risk of suffering substantial and irreparable loss should execution of the Judgment proceed. That this would have serious consequences on the Applicant's business including reputation harm, loss of business, impact on clients, creditors, and employees, and potentially irreversible damage to the Appellant's financial standing.
9. That the Applicant's ability to continue operating will be severely hampered if execution is not stayed. That the appeal raises significant and arguable grounds with a high likelihood of success and that the issues raised merit judicial consideration.
10. The Applicant averred that the balance of convenience favours granting a stay of execution pending appeal. That execution of the judgment would result in irreversible damage to the Appellant, its business and employees. That it is in the interest of justice that the stay is granted to preserve the status quo until the appeal is heard and determined.
11. The Applicant stated that they are willing to comply with any reasonable conditions, including issuing a bank guarantee or any other order that this court may deem fit to ensure that the Respondent's interests are safeguarded during pendency of the appeal.
12. The Respondent in opposition filed a Replying Affidavit sworn on 12/01/2025 that the Applicant started paying the decretal sum and cannot stay a Judgment where part payment has been made. That judgment of the lower court was delivered in 2022 and the Applicant is barred by the doctrine of laches from setting aside the Judgment about 3 years later.
13. The Respondent stated that litigation must come to an end and that the application before this court is an abuse of the court process aimed at denying him fruits of the Judgment. That the Applicant has not produced any evidence showing that the Respondent has commenced the process of execution.
14. The Respondent deponed that the Applicant has filed multiple applications in the lower court seeking stay and that the applications filed are dated 03/11/2022, 18/03/2024, 24/03/2024, 26/03/2024, and 06/01/2025. The application ought to be dismissed with costs.
15. The application was canvassed by way of written submissions.



Submissions

16. The Applicant in their submissions dated 05/03/2025 stated that Order 42 Rule 6 of the Civil Procedure Rules outlines the three requirements to be satisfied by an applicant seeking an order of stay which includes substantial loss, the application being made without unreasonable delay and the provision of security for due performance of the decree. The Applicant submitted that they have satisfied all the legal requirements for grant of stay, and that stay of execution should be granted to preserve the substratum of the appeal and prevent it from being rendered nugatory.
17. On whether the Appellant has satisfied the requirement for leave to appeal out of time, the Appellant cited Section 79G of the *Civil Procedure Act* which allows appeal to be filed within 30 days from the date of the decree or order, and which grants the court discretionary powers to admit appeals out of time when sufficient cause has been demonstrated.
18. The Appellant acknowledged that there has been a delay in filing the appeal but the delay is not inordinate. The Appellant stated that courts have held that a short delay that is satisfactorily explained should not prevent a party from exercising their right of appeal. This was the position in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231 and *Thuita Mwangi v Kenya Airways Ltd* (2003) eKLR.
19. The Appellant submitted on the arguable grounds of appeal that the Memorandum of Appeal has outlined triable issues including the alleged misapplication of the law and misrepresentation of material facts. That the issues are weighty and capable of substantially altering the outcome of the dispute if adjudicated on appeal.
20. Reliance was placed on the case of *Kenya Shell Ltd v Kibiru & Another* (1986) eKLR. Additionally, the Appellant stated that the Respondent will not suffer prejudice that cannot be adequately remedied by reasonable conditions imposed by the court such as provision of security for the due performance of decree as was held by the court in *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 Others* (2020) eKLR.
21. On whether costs of the application should be awarded to the claimant, the Applicant submitted that costs follow cause or event as was held in the case of *Reid, Hewitt & Co. v Joseph*, AIR 1981 Cal 717 and *Myres v Defries* (1880) 5 Ex D 180, as referenced in *DGM v EWG* (2021) eKLR. That the award of costs is not rigidly predefined but within the discretionary purview of the court. That in exercising this discretion, courts must not only consider the outcome of the case but circumstances surrounding it as held in the case of *Morgan Air Cargo Limited v Evrest Enterprises Limited* (2014) eKLR.
22. The Respondent filed submissions dated 10/04/2025 and argued that Order 17 of the Civil Procedure Rules provides that a suit that is not prosecuted for over one year should be dismissed. That the Applicant's application was pending for 2 years when the Respondent moved court for re-issuance of warrants for attachment. The Respondent relied on the holding in the case of *Charo v Mwashetani & 3 Others* (2014) eKLR.
23. The Respondent submitted that the Applicant has been misusing court orders on the basis that the court issued stay orders on 09/09/2022 which the Applicant used to stop the Respondent from executing the judgment. That upon lapse of the orders, the Applicant filed other applications seeking similar orders. The Respondent reiterated the position in *Total Kenya Limited v Emmanuel Ndithya* (2021) eKLR which cited with approval the observation in *Machira t/a Machira & Co. Advocates v East African Standard (No 2)* [2002] KLR 63 and *RWW v EKW* (2019) eKLR.



24. The Respondent argued that the applicant has not met the threshold for grant of stay of execution as it has not shown how it shall stand to suffer substantial loss. That on the contrary, the Respondent has not enjoyed fruits of the judgment despite obtaining judgment of the court about 4 years ago. The cases cited by the Respondent to support the position are *Owade & another v Njoroge* (Civil Appeal E005 of 2022) [2022] KEHC 10715 (KLR) (9 June 2022) (Ruling) and *Lavington Security Limited, Hildegard Ndelut v Letkina Diaries Ltd & Another*.
25. This court has considered the Notice of Motion application, supporting affidavit, the Replying Affidavit and submissions by the parties. The issues for determination are: -
 - a. Whether the application has merits
 - b. What orders on costs should issue
26. This is an application being made almost 3 years after the Judgment in issue was entered. The Applicant had filed an application dated 03/11/2022 seeking to set aside the ex parte judgment. From its own admission, the matter was mentioned multiple times until 11/03/2024 when the application was dismissed. The Applicants blames the said dismissal for lack of notification of dates.
27. Even after the application was dismissed, it has taken the Applicant almost one year to file this application. I find that the Applicant was totally indolent in following up the matter and this court shall not aid its indolence. Determination on whether there ought to be stay of execution or appeal being filed out of time would be just but an academic exercise.
28. Further, it has been stated that part of the decretal sum has already been paid by the Applicant. The Applicant states that the payment was made out of duress. It has been stated that duress occurs when a party is under the improper pressure from the other party to make a certain decision or act in a certain way not consistent with free will.
29. In *John Mburu v Consolidated Bank of Kenya* [2018] eKLR, the Court of Appeal the Privy Council decision in *Pao & Others v Lau Yiu & Another* [1979] 3 ALL E.R. 65, which addressed the issue of duress as follows: -

“...Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree...that in a contractual situation commercial pressure is not enough. There must be present some fact on which could in law be regarded as a coercion of his will, so as to vitiate his consent.....In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it...”
30. The Applicant has not shown the action taken if indeed there was coercion, let alone the proof of the existence of the said coercion. Considering the indolence on the part of the Applicant, and no proof of coercion in payment towards the settlement of the decretal sum, I find that this application is just but an abuse of the court process and is hereby dismissed with costs to the Respondent.

Determination

31. The upshot of the foregoing is that the following orders do issue: -
 - a. The Notice of Motion application dated 06/01/2025 lacks merits and is hereby dismissed.



b. Costs awarded to the Respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 31ST DAY OF JULY, 2025.

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HON. F. WANGARI

JUDGE

In the presence of;

Mr. Ndiku Advocate h/b for Ms. Sega Advocate for the Applicant

Mr. Yose Advocate for the Respondent

Ms. Norah, Court Assistant

