



REPUBLIC OF KENYA



**Kibiro & another v Musila (Civil Miscellaneous E172 of 2025)
[2024] KEHC 17001 (KLR) (Civ) (27 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 17001 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL MISCELLANEOUS E172 OF 2025
TW CHERERE, J
MARCH 27, 2024**

BETWEEN

JOHN KIBIRO 1ST APPLICANT

AMOS NDUNGU 2ND APPLICANT

AND

FRANCIS MUSILA RESPONDENT

RULING

1. Before the Court is a Notice of Motion dated 17th February 2025 brought under Order 22 Rule 22, Order 42 Rules 4, 6 and 7, Order 51 Rules 1 and 3 of the Civil Procedure Rules, and Sections 3, 3A and 79G of the Civil Procedure Act. The Applicants seek:
 1. Stay of execution of the judgment delivered on 30th October 2024 in Milimani CMCC No. E8220 of 2021, pending the hearing and determination of the intended appeal; and
 2. Leave to secure the decretal sum by way of court deposit.
2. The application is supported by the affidavit of Magero Obadiah, advocate for the Applicant, sworn on 17th February 2025 in which he reiterates the grounds on the face of the application.
3. The Respondent opposes the application through a Replying Affidavit sworn on 12th March 2025 which he avers that:
 1. The Applicant has not met the threshold for grant of an order of stay of execution pending appeal.
 2. The application is designed to deny him the fruits of his judgment



3. The Applicant has not offered security

Issues for Determination

4. I have considered the application in light of the affidavits on record and the only issue for determination is whether the absence of an application for leave to appeal out of time under Section 79G renders the application incompetent.
5. Order 42 Rule 6(2) of the Civil Procedure Rules provides:

“No order for stay of execution shall be made under sub rule (1) unless—

 - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and
 - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
6. Section 79G of the *Civil Procedure Act* stipulates:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days... 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.”

Analysis

7. The impugned judgment was delivered on 30th October 2024. The present application was filed on 17th February 2025, more than three months later. The Applicant admits the delay but has not sought an order for leave to appeal out of time as required under Section 79G.
8. Although the Court is empowered to grant stay of execution pending an intended appeal, the Applicant’s failure to seek leave to appeal out of time renders the present application procedurally untenable.
9. I therefore find that it would be an exercise in futility to proceed to consider whether the Applicant has satisfied the threshold for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules given that an order of stay of execution pending appeal cannot be granted in respect of an appeal that the Applicant has neither filed nor sought leave to file out of time, as required by law.
10. Accordingly, the notice of motion dated 17th February 2025 is dismissed with costs to the Respondent.

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. Orina for Musili Mbiti & Associates Advocates

