

KENYA / JUDGMENT

Muthanji & another v Makau & another [2026] KEHC 13653 (KLR)

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COURT

High Court

BEFORE

JN Onyiego

CASE / FILE NUMBER

Miscellaneous Civil Application E046 of 2026

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Muthanji & another v Makau & another (Miscellaneous Civil Application E046 of 2026) [2026] KEHC 13653 (KLR) (18 September 2026) (Ruling) Neutral citation:

[2026] KEHC 13653 (KLR) Republic of Kenya In the High Court at Makueni Miscellaneous Civil Application E046 of 2026 JN Onyiego, J September 18, 2026 Between Stephen Kagoiyo Muthanji 1 st Applicant Peter Mulia Ndonge 2 nd Applicant and Joshua Mbuvi Makau 1 st Respondent Qaswara Traders Limited 2 nd Respondent

Ruling

1. The application for determination is dated 04/05/2026 filed under Certificate of Urgency. It is brought under Sections 1A, 1B, 3 and 3A Section 95 of the Civil Procedure Act (CAP.21), Order 21 Rule 1B, Order 22 rule 22, Order 40 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Articles 159 (2) of the Constitution and all other Enabling Provisions of the Law. It seeks the following orders; a) Spent. b) That this Honorable Court be pleased to grant interim stay of Judgment delivered in TAWA MCCC No. E221 of 2025 by the Honourable Senior Resident Magistrate J.M. Gacheru delivered on 10 th February, 2026, holding the Appellants 100% liable and awarding the 1 st Respondent General Damages of Kshs.350,000.00/=, Special Damages Kshs.5,550.00/= plus costs and interest, pending the hearing and determination of this application. c) That this Honourable Court be pleased to extend time and/or grant leave and/or permission to the Applicants to lodge an appeal out of time against the Judgment and Decree rendered by the Honourable Senior Resident Magistrate J.M. Gacheru delivered on 10 th February, 2026. d) That this Honourable Court be pleased to stay execution of the Judgement delivered in TAWA MCCC No. E221 of 2025 by the Honourable Senior Resident Magistrate J.M. Gacheru on 10 th February, 2026, pending the hearing and determination of the intended appeal. e) That this Honourable Court be pleased to issue any other order and/or direction it deems fit to grant in the circumstances. f) That the costs of this application abide the outcome of the appeal. 2. The application is anchored

on the particulars stated on the face of it and further amplified by a supporting affidavit sworn by Stephen Kagoiyo Muthanji on 4 th day of May 2026 seeking stay of execution in respect of the judgment entered on 10-2-2026 in Tawa MCCC No.E 221 of 2025 where the court assessed special damages at Kshs. 5,550/= and General Damages at Kshs. 350,000/= against the Applicants. 3. That having been dissatisfied with the award of General Damages, the Applicant has opted to file an appeal. That a sum of Kshs. 177,775/= was deposited with the Respondents and that the same should be treated as security. 4. In reply, the Respondents filed a replying affidavit sworn by Dominic Mulyungi on the 3-6-2026 thus deposing that the Applicants have not met the threshold for extension of time nor stay of execution as provided by the relevant provisions. That four months since delivery of judgment is unreasonable delay yet no reason for the delay has been advanced. 5. He averred that the Respondents are entitled to the fruits of their judgment hence the application is a tactic to delay execution. That a casual look of the Memorandum of Appeal reveals that the appeal has no high chances of success. He further averred that the Applicant has not demonstrated any prejudice he is likely to suffer in case the application is not allowed. 6. That the mere fact that the Applicants have deposited a sum of Kshs. 177,775/= does not justify the grant of the orders sought. In the alternative, he sought the order that the full decretal sum be deposited in a joint interest earning account pending the hearing of the appeal. 7. The application was canvassed through written submissions. 8. The Applicants filed submissions dated 2-7-2026 through the firm of KRK Advocates who reiterated the content contained in the affidavit in support. He cited three issues for determination inter alia; whether there was justifiable reason for the delay; whether the appeal raises arguable issues and; whether substantial loss will arise if stay is not granted. 9. He submitted that the delay in filing the appeal in time was occasioned by the change of legal representation from the former Counsel to the current Counsel. That the former Counsel never informed the Applicants of the delivery of judgment in time hence the reason for the delay. That the delay is not unreasonable and that mistake of counsel should not be visited on his client. 10. He contended that the right of appeal is a constitutional right guaranteed under Article 50 of the Constitution . He further contended that the Respondents have not shown any prejudice they will suffer in case the application is allowed. That deviation from and lapses in form and procedures do not go to the jurisdiction of the court nor the root of a dispute which does not occasion any prejudice or miscarriage of justice to the opposite party. In that regard, the Court was referred to the case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & others (2013)e KLR. 11. As regards the question whether, the appeal raises arguable issues, it was submitted that the appeal is challenging only General Damages which is not commensurate to the soft injuries sustained. That the Applicants need only prove one ground of appeal and that an arguable appeal need not be that which must succeed. To support that position, the Court was referred to the case of Kenya Revenue Authority vs Sidney Keitany Changole & 3others (2015)e KLR. 12. Regarding the question of substantial loss, Counsel submitted that the Respondents did not demonstrate by affidavit of means ability to refund the decretal sum if the appeal succeeds. That the amount deposited is sufficient security to support grant of the orders sought. 13. On the other hand, the

Respondents filed submissions dated 6-7-2026 through the firm of Mulyungi and Associates who identified two issues for determination as; whether there is sufficient ground to warrant extension of time and; whether the threshold for grant of stay has been met. 14. Regarding extension of time, Counsel contended that no reason for the delay has been given. That the Court should consider three principles stated in the case of Paul Musili Wambua v Attorney General & 2 others (2015)e KLR as follows; length of the delay; the reason for the delay; the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted, 15. Counsel contended that the delay was inordinate. That the Applicants' current Counsel came on record one month before delivery of the impugned judgment hence change of advocate does not contribute to the delay. 16. As to failure to meet the threshold for stay, it was contended that the conditions set out under Order 42 rule 6 of the Civil Procedure Rules had not been met. It was contended that a successful litigant must enjoy the fruits of his judgment as was encapsulated in the case of Samvir Trustee Ltd v Guardian Bank Ltd Nairobi High court 795 of 1997. Counsel submitted that exercise of discretion is an exception and not a rule. 17. Concerning the issue of loss of substantial loss, it was contended that there is no proof stated that the Respondents will not be able to recover the amount paid should the appeal succeed. In that regard the Court was referred to the case of Kenya Shell Ltd v Kibiru and another CA 97 of 1986. 18. the question of security, it was contended that mere deposition of security does not entitle one to orders of stay. That security must be one which must achieve due performance of the decree.

Analysis and determination.

19. I have considered the application herein together with the submissions tendered by both Counsel. The only issues that germinate for determination are; whether the Applicants have met the threshold for extension of time to appeal out of time and; whether the applicants have met the threshold for stay of execution. 20. The impugned judgment was delivered on 10-2-2026. The instant application was filed on 4-5-2026 translating to 3 months and 26 days. Section 79G of the Civil Procedure Act 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 to the appellant 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." 21. It is now well settled that extension of time or its denial is an exercise of discretion by the court. In *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi*, (Civil Application No. Nai. 255 of 1997) (unreported); the Court of Appeal stated as follows; " It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the

application is granted.” 22. The Applicants stated that the delay in filing the application and the appeal was occasioned by change of legal representation. The Respondents submitted that the current advocates for the Applicants were already on record by the time the judgment was delivered. However, this submission was not stated in the replying affidavit. It is trite that matters of evidence or pleadings cannot be pleaded via submissions. 23. Taking into account the explanation given for the delay, I am persuaded to find that it was possible that such change would possibly have led to the delay of 3 months and 26 days. Considering that this Court has the discretion to issue orders that meets the interest of justice, I do not find such period to be inordinate given the circumstances. For that reason, I will exercise my discretion by enlarging time to enable the Applicants file their Memorandum Appeal within 7 days. 24. Regarding the question whether the Applicants have met the threshold for grant of stay, the Applicants are duty bound to meet the elements under Order 42 rule 6 of the Civil Procedure Rules inter alia; likelihood of suffering substantial loss if the order is not granted; whether the application has been filed timeously and deposition of security for due performance of the decree. In the case of *Njenga -vs- Njeri & 2 Others* (Civil Appeal E125 of 2023) [2023] KEHC 23991 (KLR) (24 October 2023) (Ruling) the Court stated; “ 36. It is the duty of the Applicant in an application for stay of execution to establish that he/she will suffer substantial loss if the orders sought are not granted. In *Machira t/a Machira & Co. Advocates v East African Standard (No 2)* (2002) KLR 63 the Court of Appeal considered as to what amounts to substantial loss and held that; “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.” 25. In the instant case, the Applicants argued that if security were deposited, the Respondents may not be able to refund incase the appeal succeeds. There is no proof that the Respondents are paupers or persons of straw. However, for security purposes and to ensure that the Respondents and the Applicants are all save, the Applicants should deposit the full decretal sum in an interest earning joint account held by counsel representing parties within 30 days of delivery of this judgment. By so doing the risk of not being refunded does not arise. 26. As to whether the application was filed in time, I have already stated that the delay was not unreasonable. As concerns the arguability of the appeal, the same is subject to submission and consideration on appeal now that I have granted time extension. 27. In a nut shell, the application is allowed with orders that; a. The Applicants are granted 7 days to file their Memorandum of Appeal. b. Stay of execution is allowed as prayed on condition that the applicants deposits the full decretal sum in a joint interest earning account held in the parties’ respective advocates within 30 days. c. Costs are awarded to the Respondents. DATED, SIGNED AND

DELIVERED THIS 18 TH DAY OF SEPTEMBER 2026 J.N.ONYIEGO
JUDGE

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