



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISC APP NO. E151 OF 2025

PAULINE KATANU PAUL.....1st
APPLICANT
GABRIEL MUTHIANI.....2ND
APPLICANT

VERSUS

ROSALIA NDINDA MATEI
STELLA MUKULU MUTUA
MATHEW KIMEU MUTUA (Suing as the
personal representatives of the estate
of **FIDELIS MUTUA KIMEU.....RESPONDEN**
TS

RULING

1.This ruling relates to the Applicant's Notice of Motion dated 8/05/2025 seeking the following orders;

"a. Spent

b. Spent

c. The Honourable Court be pleased to grant a stay of execution of the judgment and/or decree delivered on 28th March 2025 for Kshs

2,633,100/= together with costs and interests pending hearing and determination of the intended appeal.

d. The Honourable Court be pleased to grant leave to the Applicant to file an appeal out of time from the judgment and decree by Hon. Silas Kemei (CM) delivered 28th March 2025 in Mavoko MCCC No E507 of 2024; Rosalia Ndinda ,Stella Mukulu Mutua and Mathew Kimeu Mutua (Suing as the personal representatives of the estate of Fidelis Mutua Kimeu vs Pauline Katanu Paul and Gabriel Muthiani

e. In addition to prayer 4 above, the annexed Memorandum of Appeal be allowed.

f. The costs of this application be in the cause.”

2. The application is opposed by the Replying affidavit of the 1st Rosalia Ndinda Matei who stated that 30 days stay of execution was granted on 28/3/2025 and that they did not file any appeal or take any action towards filing one neither did they give the reason why they did not consult the insurer. Therefore, the delay was for 30 days and not 10 days as alleged by the Applicant. The court was urged to dismiss the application as it was brought in bad faith, is an abuse of the court process and is an attempt to deny and/or frustrate the ends of justice.

3.The application was to be canvassed by way of written submissions as per the order dated 24/06/2025 however there were no submissions on the CTS or in the physical file as at the time of writing the ruling.

Analysis and determination.

4. The issues for determination are;

- i. Whether the Applicant should be granted leave to file the Memorandum of Appeal out of time and whether the memorandum filed should be deemed as properly filed.***
- ii. Whether stay of execution of the Judgment/Decree should be granted.***

5.Leave to file an appeal out of time is governed by **Section 79G of the Civil Procedure Act** which states:

“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 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."

6. This court is also guided by the conditions set out by the Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat vs IEBC and 7 Others**, SC Application NO 16 of 2014[2014] eKLR where it was stated;

"The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;***
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;***
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;***
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;***
- f. Whether the application has been brought without undue delay."***

7. In this case, judgment was delivered on 28th March 2025 and the current application is dated on 8th May 2025, which is

about 40 days from the date the judgment was delivered. Given that an appeal should be filed within thirty days there was a delay of only ten days which in my considered view is not inordinate. Leave to extend the period for filing the appeal is therefore granted.

8. On the prayer for stay of execution, such a stay can only issue where there is an appeal as the order is granted pending hearing and determination of the appeal. In this case there is no appeal as yet as it is trite, that an appeal filed out of time without leave is irregular- **see the case of County Executive of Kisumu v County Government of Kisumu & 8 others, SC Civil Appeal NO 3 OF 2016; [2017] eKLR** and hence the memo of appeal herein is for striking out as it was filed before leave was granted. Consequently, as there is no appeal, a stay of execution cannot issue and that limb of the application is accordingly dismissed.

9. This application therefore succeeds only to the extent that leave to file an appeal out of time is granted. The appeal shall be filed within thirty days of this ruling failing which the leave shall lapse.

10. The applicant shall bear the costs of the application.

Orders accordingly.

Ruling signed, dated and delivered virtually on this 27th day of November 2025.

E. N. MAINA

JUDGE

IN PRESENCE OF:

Ms Odera for the Applicant.

Ms Mwangangi for the Respondent.

Geoffrey Court Assistant.

ORIGINAL