



**Gonzalez v Ngatia & another (Environment and Land Miscellaneous Application E014 of 2024) [2025] KEELC 5856 (KLR) (28 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 5856 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E014 OF 2024  
LL NAIKUNI, J  
MAY 28, 2025**

**BETWEEN**

**BRUNO GONZALEZ ..... APPLICANT**

**AND**

**FRANCIS GITHINJI NGATIA ..... 1<sup>ST</sup> RESPONDENT**

**KENNETH NDUMBI NJOROGE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**I. Introduction**

1. What is before the Honourable Court for its determination is the Notice of Motion application dated 25<sup>th</sup> November 2024. It was filed by Bruno Manuel Gonzalez, the Appellant/Applicant against the Defendant/Respondent herein.
2. The said application was brought pursuant to the provisions of Sections 3A and 79G of the *Civil Procedure Act*, Cap. 21, Order 42 Rules 6 (1) and Order 50 Rule 6 of the *Civil Procedure Rules, 2010*.
3. Upon service and in response to the application, the Respondents filed a Replying Affidavit sworn by the Respondent herein. The Honourable Court shall be dealing with the said replies in depth at a later stage of this Ruling hereof.

**II. The Appellant/Applicant's Case**

4. The Appellant/Applicant sought for the following orders:-
  - a. Spent.



- b. That the Honourable Court be pleased to grant the applicant an extension of time to file an appeal against the above named judgement of the Learned Senior Principal Magistrate SPM Omido J.M delivered on 5<sup>th</sup> October 2022.
  - c. That there be a temporary stay of execution of judgement dated 5<sup>th</sup> October 2022 and/or decree issued on 19<sup>th</sup> October 2022 in this matter - CM ELC No E065 of 2021, *Francis Githinji Ngatia & Kenneth Ndumbi Njoroge - Versus - Bruno Gonzalez* pending the hearing and determination of this application
  - d. That there be a temporary stay of execution of judgement dated 5<sup>th</sup> October 2022 and/or decree issued on 19<sup>th</sup> October 2022 in this matter - CM ELC No E065 of 2021, *Francis Githinji Ngatia & Kenneth Ndumbi Njoroge - Versus - Bruno Gonzalez* pending the hearing and determination of the intended appeal
  - e. That such order as to costs as may appear to be just be made on the application
5. The application was premised upon the grounds, testimonial facts and the averments of the fourteen (14) Paragraphed Supporting Affidavit of Bruno Manuel Gonzalez and the seven (7) annexures marked as “B – 1 to 7” annexed thereto. He averred as follows that: -
- a. He was the Applicant/Appellant herein with full competence and authority to swear this Affidavit herein.
  - b. He was the registered owner of plot Kwale/Diani Complex/205 jointly owned with one Ilaria Manunza and which property they had enjoyed exclusive possession of since acquisition.
  - c. On 5<sup>th</sup> October 2022, the Lower Court delivered the Judgement in favour of the Respondents.
  - d. Pursuant to the delivery of the Judgement/Decree issued by the Lower Court on 5<sup>th</sup> October, 2022, the Respondents had commenced execution thereof and were breaking the wall fence.
  - e. On 27<sup>th</sup> November, 2024, their Caretaker alerted them of the commotion taking place on the suit property by some agents who claimed to be having a Court Order authorising them to enter it and cause execution.
  - f. Unless the court intervenes and issues a stay order of the Judgement, the Applicant was at real imminent risk of being evicted and suffering huge loss by damage to the suit property which would render the appeal nugatory.
  - g. The Applicant/Appellant provided a detailed chronology of events of the matter leading to the filing of this application.
  - h. The delay in filing the application that was before court had been occasioned by the fact that a previous application had been filed in the lower court whose ruling was rendered on 17<sup>th</sup> October 2024 and part of which asked for the applicant to seek the instant orders before this court.
  - i. The Applicant denied any knowledge of Kwale CM ELC No E065 of 2021 and questioned the authenticity of the affidavit of service of one Samuel Musyoka who alleged to have served the Applicant.
  - j. The court was urged to stay execution as sought and to afford the applicant the chance to argue his appeal.



### III. The responses by the Respondents

6. The application was opposed through filing of by a Replying Affidavit sworn by the 2<sup>nd</sup> Respondent, Kenneth Ndumbi Njoroge. He outlined the following that: -
  - a. Together with the 1<sup>st</sup> Respondent they were the registered owners of the suit property herein.
  - b. The property was bought from its previous owner Ali Salim Ngozi on 19<sup>th</sup> January 2021 and were registered as owners on 1<sup>st</sup> February 2021.
  - c. The Respondents while filing MCELC No E065 of 2021 and delivery of its Judgement, were not aware of ELC Civil Suit No 86 of 2021 [formerly Mombasa ELC No 355 of 2017] as they had not been served.
  - d. They served the pleadings in MCELC No E065 of 2021 on the Appellant/Applicant who failed to file a response to the same. The Respondents averred that due process was then followed in obtaining the default Judgement/Decree against the Appellant/Applicant.
  - e. The Appellant/Applicant then filed an application dated 3<sup>rd</sup> March 2023 and sought for orders of stay of the Judgement and Decree but the same was dismissed with costs.
  - f. The Respondents sought that the instant application is dismissed in order for their proprietary rights over the suit property to be protected.

### IV. The Supplementary Affidavit by the Applicant/Appellant.

7. In response to the averments raised in the responses by the Respondents, with the leave of Court, the Applicant filed a five (5) Paragraphed Supplementary Affidavit dated 13<sup>th</sup> December 2024 further to his affidavit dated 25<sup>th</sup> November, 2024.
8. The Appellant averred that he had been informed by his advocate on record that the Lower Court suit being – “CM ELC No E065 of 2021 *Francis Githinji Ngatia & Another - Versus - Bruno Gonzalez*” lacked pecuniary jurisdiction to deal with the suit property as at the time of filing the suit, the property was valued at more than a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/=) and currently valued at a sum of Kenya Shillings Twenty Two Million (Kshs. 22, 000, 000/=).
9. The Lower Court having lacked the jurisdiction to deal with the suit, the whole proceedings and judgement together with the decree were thus a nullity as had been captured in the draft defence and copy of the Memorandum of Appeal.

### V. Submissions

10. On February 17<sup>th</sup>, 2025, while in the presence of all the Counsels for the Applicant and Respondents herein, the Honourable Court directed parties to canvass the matter by way of written submissions. Unfortunately, at the time of writing this ruling, only the Appellant/Applicant had complied with the said order. Nonetheless, upon the lapse of the stipulated timeline, Court has decided to render its ruling to be delivered on 28<sup>th</sup> May, 2025 from an earlier date of 8<sup>th</sup> April, 2025 accordingly.

### VI. The Written Submissions by the Appellant/Applicant.

11. The law firm of Sachdeva, Nabhan & Saleh Advocates filed submissions dated 17<sup>th</sup> March 2025 on behalf of the Appellant/Applicant. Mr. Noor Advocate commenced his submission by stating that the application subject of this ruling was made based on the following grounds:-



- a. No Summons to Enter Appearance and other pleadings were served on the Defendant which resulted in the default Judgement being entered against the Defendant.
  - b. The Lower Court lacked the pecuniary jurisdiction to determine the matter considering the value of the property at the time the suit was filed was a sum of Kenya Shillings Twenty One Million (Kshs. 21,000,000/-).
12. The Learned Counsel submitted that at the time of filing the instant application, the Respondents had already invaded the suit property and were bringing down the wall fence. That an application for stay was made before the lower court but the same was denied on grounds that such orders were fit to be made by the ELC Court hence the main gist of the application was before court.
  13. The Learned Counsel averred that on the issue of pecuniary jurisdiction and stated that at the time of filing the suit before the lower court, the value of the suit property was way over a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-). Reference was made to the valuation report prepared by the Valuation firm trading in the name and style of Musyoki & Associates Valuation agents dated 28<sup>th</sup> November 2024 and which indicated the value of the property to be a sum of Kenya Shillings Twenty Million Five Hundred Thousand (Kshs. 20,500,000/=) as at 2021 and the current market price being Kenya Shillings Twenty Two Million (Kshs. 22,000,000/=).
  14. The Learned Counsel asserted that the provision of Section 7 (1) of the *Magistrates Court Act*, the pecuniary jurisdiction of a Senior Resident Magistrate is a sum of Kenya Shillings Seven Million (Kshs. 7, 000, 000.00/=) and as such the Lower Court never had the requisite jurisdiction to handle the dispute. That the Lower Court in purporting to act in the matter acted out of its jurisdiction and the Judgement rendered and the decree are thus a nullity. The Court was referred to the draft Memorandum of Appeal which raised the issue of jurisdiction.
  15. The Appellant/Applicant further submitted on the issue of "Res sub - judice". It was submitted that the suit before the Lower Court ELC No 65 of 2021 was Res Subjudice as there was a similar suit before the court designated as Kwale ELC No 68 of 2021.
  16. This notwithstanding, the Respondents proceeded to file another suit and obtained ex - parte Judgement against the Appellant herein. It was stated that the Respondents cannot feign ignorance of the fact that a suit had been filed way before they instituted their suit as evidenced in the court's ruling in ELC 68 of 2021 dated 10<sup>th</sup> October 2024.
  17. On service of summons it was submitted that the Applicant was never properly served with summons in the subordinate court. That the alleged service was effected upon the caretaker and not the Applicant as alleged. That under the provisions of Order 5 Rule 8 (1) of the *Civil Procedure Rules, 2010* service was to be effected upon the Defendant in person unless he had a known appointed agent which was not the case in the instant suit.
  18. Thus, the Court was urged to allow the application as prayed.

## VII. Analysis and determination

19. This Court has keenly considered all the issues raised in the Notice of Motion application dated 25<sup>th</sup> November 2024, the Supporting affidavit and the Replying Affidavit by the Respondents herein, the Supplementary Affidavit, the Written Submissions the cited authorities by the Applicant, the relevant provision of *the Constitution* of Kenya, 2010 and statutes.
20. In order to arrive at an informed, just, fair and reasonable decision, the Court has framed the following three (3) issues for its determination. These are: -



- a. Whether the court should exercise its discretion to grant the Applicant leave to file his appeal out of time;
- b. Whether the Applicant has met the prerequisite for grant of stay of execution pending appeal;
- c. Who will bear the costs of the application

**Issue No. a). Whether the court should exercise its discretion to grant the Applicant leave to file his appeal out of time;**

21. Under this Sub - heading, the Honourable Court will endeavour to deliberate on the main substrata being granting of leave to prefer an appeal out of time or rather the enlargement of time. The pith and substance embodied in this application is governed under the provision of the Section 79G of the *Civil Procedure Act*, Cap. 21. It provides guidelines in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the *Civil Procedure Act*, Cap. 21 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”.

22. It is clear from the wording of above provision of Law, for the Honourable Court to consider extension of time, the Applicant must satisfy the court that they have good and sufficient cause for filing the appeal out of time. See the case of “Diplack Kenya Limited – Versus - William Muthama Kitonyi [2018] eKLR” where it was stated that an Applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

23. It is also noteworthy based on the phrase used under the provisions of Section 79G of the *Civil Procedure Act* is “an appeal may be admitted out of time”, it is a discretionary in nature. Therefore, it means that an appeal may indeed be admitted out of time on a case to case basis. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In the case of “Mugo & Others – Versus - Wanjiru & Anor [1970] EA 482” the court stated as follows: -

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”

24. Additionally, the Supreme Court in the case of “Nicholas Kiptoo Korir Arap Salat – Versus - IEBC and 7 Others [2014] eKLR” enunciated the principles applicable in an application for leave to appeal out of time. The court stated “inter alia” that: -

“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.
25. The above principles were further elucidated by the Court of Appeal in the case of: “Thuita Mwangi – Versus - Kenya Airways Limited [2003] eKLR”. They include the following:
- i. The period of delay;
  - ii. The reason for the delay;
  - iii. The arguability of the appeal;
  - iv. The degree of prejudice which could be suffered by the if Respondent the extension is granted;
  - v. The importance of compliance with time limits to the particular litigation or issue; and
  - vi. The effect if any on the administration of justice or public interest if any is involved.
26. On arguability of an appeal, the Western Cape High Court of South Africa expressed itself on the same in the case of “Menziwa – Versus - Ndokwana and Others (20872/2021) [2023] ZAWCHC 294 (22 November 2023)” as follows:-
- “It is trite that where an application for condonation is made, the Applicant should set forth briefly and succinctly such essential information as may enable the court to assess the Applicant’s prospects of success. The prospects of success are generally important, although not a decisive consideration. The court is bound to assess an Applicant’s prospects of success as one of the factors relevant to the exercise of its discretion unless the cumulative effect of the other pertinent factors in the case is such as to render the application for condonation obviously unworthy of consideration”.
27. I have critically looked at the filed Memorandum of Appeal. From the said appeal, it is noted that there are three - fold issues which have been vigorously contested. These are, firstly, the issue of service of the Summons to Enter Appearance and the pleadings upon the Appellant. Secondly, the one on the pecuniary jurisdiction of the lower court that rendered the Judgement herein. Thirdly, the Appellant has further raised issues of “res sub – judice”. All these three (3) issues, I opine are all pertinent issues. Undoubtedly, the appeal in my opinion is an arguable one.
28. For these reasons, I am inclined to allow the Applicant leave to file his intended appeal noting that one (1) month is not inordinate and unreasonable delay. Having filed the application for extension of time contemporaneously with the Memorandum of appeal, I am of the opinion that the court can within its discretion enlarge time before embarking on the appeal. It is imperative that the appeal cannot be heard until time is enlarged and the delay having been explained, the court will then have to enlarge time.



29. On the second issue for determination. The conditions which a party must establish in order for the court to order stay of execution are provided for under the provision of Order 42 Rule 6 (2) Civil Procedure Rules, 2010. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -
1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
  2. 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 1<sup>st</sup> 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.
30. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
- a. Substantial loss may result to him/her unless the order is made;
  - b. The application has been made without unreasonable delay; and
  - c. The Applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
31. Legally speaking, the purpose and objective of the order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not defeated. In the case of: - “Consolidated Marine - Versus - Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)”, the Court held that: -
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
32. The first ground to be established is whether substantial loss may result to the Applicant unless stay of execution is granted. What amounts to substantial loss was expressed by the Court of Appeal in the case of “Mukuma – Versus - Abuoga (1988) KLR 645” where their Lordships stated that:
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
33. Further, Substantial loss was clearly explained in the case of “James Wangalwa & Another – Versus - Agnes Naliaka Cheseto [2012] eKLR”: -
- “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’.

**Issue No. b). Whether the Applicant has met the prerequisite for grant of stay of execution pending appeal;**

34. Having clearly brought out all the legal parameters as pertaining the matter in this application, now the Honourable Court will proceed to apply them according to the instant case. The Judgement was delivered on 5<sup>th</sup> October 2024 while the present application was filed on 25<sup>th</sup> November 2024, one (1) month thereafter. The Appellant has submitted that the delay in filing the instant application before this court was occasioned that a similar application had been filed before the lower court and the court rendered its ruling on 17<sup>th</sup> October 2024. That the Appellant was awaiting the outcome of the lower court and hence the delay in filing the instant application.
35. From the brief history of this matter, both the Applicant and the Respondents herein have title deeds to the suit property. However, the Applicant states that he is currently in occupation of the property, that when the judgement by the lower court was rendered, the respondents immediately started pulling down the wall fence to the suit property. That the said action was bound to cause them loss.
36. I do not wish to belabour much on the judgement, however in the event that the appeal overturns what has been granted by the lower court, then the Applicant would have indeed suffered loss in the event that demolition of their property takes place. It is safe to therefore grant the orders sought pending the hearing and determination of the appeal. I find that the issue of substantial loss has been proved.
37. The instant application was filed on 25<sup>th</sup> November 2024 which was 1 month after the judgement of this court. I find that the same has been filed within a reasonable period of time.
38. On the issue of security for costs, the purpose and essence of deposit of security was discussed in the case of “Arun C Sharma – Versus - Ashana Raikundalia t/a Rairundalia & Co. Advocates, Nrb Misc. Civil Application No. 802 Of 2010”, where the court stated:-

‘The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor...Civil process is quite different because in civil process the Judgment is like a debt hence the Applicants become and are Judgment debtors in relation to the Respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.’

39. The overriding objectives of the *Civil Procedure Act* and the Rules are to enhance the dispensation of justice. The application herein is premised upon the provisions of the act and the rules, the court is therefore enjoined to consider the wider context and purpose of the same in applying the provisions thereof. For avoidance of doubt, I will reproduce the relevant citations as here below;

Section 1A of the *Civil Procedure Act* provides that

- 1) The overriding objective of the Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of Civil Disputes governed by this Act



- 2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub section 1.

Section 1B of the [Civil Procedure Act](#) explains some of the aims of the overriding objectives as:

- a) the just determination of the proceedings;
- b) the efficient disposal of the business of the Court;
- c) the efficient use of the available judicial and administrative resources;
- d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties and
- e) the use of suitable technology.

40. The Applicant has not made any proposal as to what they intend to deposit as security for costs. The court will take it upon itself to render a decision on the same. All in all, the rest of the components to be satisfied in securing a stay of execution pending appeal have been met.

#### **Issue No. c). Who will bear the costs of the Application.**

41. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award that ap arty is granted at the conclusion of legal action and proceedings in any litigation. The proviso of the provision of Section 27 ( 1 ) of the [Civil Procedure Act](#), Cap. 21 holds that costs follow the events. By event it means the outcome and/or result of the legal action whatsoever.
42. In the instant case, taking that the application by the Appellant/Applicant has been successful, they will be entitled to costs.

#### **IV. Conclusion & Findings**

43. Consequently, upon conducting an indepth analysis to the delineted issues herein, the Honourable Court holds that the Applicant/Appellant has been able to establish its case and therefore it proceeds to make the following orders:-
- a. That the Notice of Motion application dated 25<sup>th</sup> November 2025 be and is hereby allowed in the following terms: -
  - b. That Leave be and is hereby granted to the Applicant to file appeal out of time against the Judgment delivered in “CM ELC No E065 of 2021 Francis Githinji Ngatia & Kenneth Ndumbi Njoroge - Versus - Bruno Gonzalez.
  - c. That the Applicant to file and serve his Memorandum of Appeal within fourteen (14) days hereof and compile the Record of Appeal within 21 days from this date.
  - d. That execution of the Judgment/decre in “CM ELC No E065 of 2021 Francis Githinji Ngatia & Kenneth Ndumbi Njoroge - Versus - Bruno Gonzalez is hereby stayed pending the hearing and determination of the appeal.
  - e. That an order made herein for the Appellant/Applicant to deposit a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) in a joint Escrow bank account of a reputable commercial institution in the names of both M/s. Sachdeva, Nadhan & Swaleh and M/s. Chimera, Kamotho & Company Advocates within fourty five (45) days from this date hereof.



- f. That in default of complying with order number (e) above, the orders staying execution shall automatically lapse and the Respondents shall be at liberty to execute.
- i. That for expediency sake, there be a mention on 30<sup>th</sup> July, 2025 for purposes of:
  - i). Ascertaining compliance of these orders.
  - ii). Admission of the Appeal.
  - iii). Taking direction under the provision of Section 79B of the Civil Procedure Act, Cap. 21 and Orders 42 Rules 11, 13 and 16 of the Civil Procedure Rules, 2010.
- g. That the costs of the application to be granted upon the Appellant/Applicant herein.

It is ordered accordingly.

**RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 28<sup>TH</sup> DAY OF MAY 2025**

.....  
**HON. MR. JUSTICE L.L NAIKUNI,**  
**ENVIRONMENT & LAND COURT**  
**AT**  
**KWALE.**

Ruling delivered in the presence of: -

Mr. Daniel Disii, the Court Assistant.

Mr. Isika Advocate holding brief for Mr. Noor Advocate for the Appellant/Applicant.

No appearance for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.

