



**Mbae v Nairobi City County Government; China National Electric Engineering Co (Interested Party) (Environment and Planning Petition 4 of 2023) [2025] KEELC 634 (KLR) (10 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 634 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND PLANNING PETITION 4 OF 2023  
AA OMOLLO, J  
FEBRUARY 10, 2025**

**BETWEEN**

**ADVIN MUTHOMI MBAE ..... PETITIONER**

**AND**

**THE NAIROBI CITY COUNTY GOVERNMENT ..... RESPONDENT**

**AND**

**CHINA NATIONAL ELECTRIC ENGINEERING CO ..... INTERESTED PARTY**

**RULING**

1. The Applicants herein filed a notice of motion dated 11<sup>th</sup> June 2024 under the provisions of section 1A & 3A of the *Civil Procedure Act*, Orders 40, 42 and 21 of the Civil Procedure Rules and article 159 of *the Constitution*. The application is supported by the affidavit of Kelvin Mwenda Gitari sworn on the same date and it seeks for the following orders;
  1. Spent
  2. That this Honourable Court be pleased to issue a temporary Injunction staying the 1<sup>st</sup> Respondent's decision to award NCC/ENV/287/A./3882/2022-2023 to Design, Finance, Build, Operate, maintain and Transfer a WASTE TO ENERGY PROCESSING PLANT AT DANDORA DUMPSITE to m/s CHINA NATIONAL ELECTRIC ENGINEERING COMPANY pending the hearing and determination of the intended appeal.
  3. That in the alternative, this Honourable court be pleased to reinstate and/or extend the injunctive orders of this Honourable court dated 4th September 2023 pending hearing and determination of this application and the appeal.



4. That the Applicant be granted leave to lodge a notice of appeal out time thus the Notice of Appeal annexed herein be deemed as being properly filed.
  5. That this Honorable Court do make such other or further orders as it might deem fit in the circumstances of this case.
  6. That cost of this application be provided for.
2. The motion is also based on the grounds that this court delivered its Judgement on 24<sup>th</sup> April 2024 without notice and in the absence of the parties. That the petitioner only learnt about the Judgement on 24<sup>th</sup> May 2024 when he saw it circulating on social media platforms. The petitioner is dissatisfied with the said decision and wishes to prefer an appeal to the Court of Appeal.
  3. He contended that the time within which to lodge a notice of appeal lapsed although he has since filed and served a notice appeal out of time. He avers that the environment and land court was not sitting on 25<sup>th</sup> April 2024 as there was a notice that all Judges and Deputy Registrars would be attending the Court's Open day and that matters before them would be mentioned on 24<sup>th</sup> April 2024. The Petitioner states that the said notice dated 22<sup>nd</sup> April 2024 only came to the attention of the parties on 25<sup>th</sup> April 2024. That on 26<sup>th</sup> April 2024 the Petitioner sent a representative to the registry to inquire into the status of the matter whereby she was met with a notice to the effect that the Court registries were not operational on 24<sup>th</sup> April 2024 and upon further inquiry informed that the matter would be mentioned on 6<sup>th</sup> June 2024.
  4. That upon checking on the e filing platform, this matter was listed as coming for mention on 6<sup>th</sup> June 2024 thus parties had a good reason to believe that the judgement was yet to be delivered. He stated that on 25<sup>th</sup> May 2024 counsel for the Petitioner noticed a copy of a Judgement purported to be of this Honourable court been making rounds on various social media platforms and upon reaching out to the counsel for the Respondent and Interested party, none of them was aware that the Judgement had been delivered thus casting doubts into the authenticity of the said Judgement.
  5. That the petitioner sent a representative at the court registry and the registry could not confirm whether or not Judgement had been delivered but the matter was listed in the dairy cause list as a mention coming up on 6<sup>th</sup> June 2024. The Petitioner said that his counsel logged in to court on 6<sup>th</sup> June 2024 but the matter was not called thus prompting counsel to make inquiries with the court clerk who informed him that Judgement was long delivered on 24<sup>th</sup> April 2024 and that the matter was wrongly cause listed.
  6. The Petitioner stated that the Governor of Nairobi City County and other representatives are currently making media statements and postings indicating that they are proceeding with the award of the tender and construction of a waste to energy plant that was the subject of the petition and unless stay of execution is granted the Respondent will continue to execute the contract for the tender No. NCC/ENV/287/A./3882/2022-2023 TO Design, Finance, Build, Operate, maintain and Transfer a Waste To Energy Processing Plant At Dandora Dumpsite to m/s China National Electric Engineering Company thus rendering this Appeal Nugatory.
  7. He further stated that unless the stay of execution is grated the Petitioner is like to suffer an irreparable harm as his right to clean and healthy environment stands threatened and the same cannot be reasonably compensated by way of damages. That the value of the tender awarded is Kshs. 47 billion thus, it is not economically sound to commit such a grand sum consisting of public funds in pendency of an appeal that has high chances of success.



## **Respondent Replying affidavit and Interested Party's Response**

8. The Respondent filed a replying affidavit sworn by Edward Kimanzi on 1<sup>st</sup> July 2024 stating that the matter was initially fixed for judgment on 25<sup>th</sup> April 2024 and vide a notice dated 22<sup>nd</sup> April 2024 the court informed all parties that the she would not be sitting on the said 25<sup>th</sup> April and that all matters would be mentioned on 24<sup>th</sup> April 2024. Further, the Applicant has not demonstrated the substantial loss he is likely to suffer if stay of execution is not granted.
9. The Respondent deposed that no public funds are used to fund the project as the same is a public private partnership project fully funded by the Interested Party. They asserted that the Applicant has no arguable Appeal and that he has not offered any security for the due performance.
10. Lastly, the Respondent stated that stay orders cannot issue in respect of negative orders, where the court has not ordered any of the parties to perform any task, since in this Petition, the court merely struck it out.
11. The Interested Party opposed the with what is titled as further replying affidavit sworn by Zhang Sheng, their general manager 20<sup>th</sup> September 2024 stating inter alia that the application has been overtaken by events. That since there was no order of stay of execution, the Respondent and Interested Party have entered into a valid agreement signed, sealed and dated 28<sup>th</sup> August 2024. I did not see the replying affidavit dated 2<sup>nd</sup> July 2024 in the CTS.

## **Submissions.**

12. The Petitioner filed submissions dated 16<sup>th</sup> October 2024 in support of their motion and opened the arguments by reiterating the facts contained the application inter alia; that the judgment in this matter was delivered on a date earlier than the one initially scheduled, without proper notice to the parties involved. He referred to the notice posted on Kenya Law on April 22, 2024, indicating that the matter scheduled for April 25, 2024, would instead be handled on April 24, 2024, no direct communication was made to the parties via email, the E-filing platform, or any other formal means.
13. He argues that the lack of proper notification led to none of the involved counsel being present in court when the judgment was delivered and even as late as May 26, 2024, a month after the judgment, counsel for the petitioner reached out to the opposing parties, only to find that none were aware that the judgment had been issued. That given the significance of this case as a matter of public interest, the Applicant urges the court to recognize the procedural irregularities and grant the petitioner an opportunity to exercise his right of appeal.
14. The Petitioner further submits that he has met the conditions for grant of a temporary injunction stating that whereas he has demonstrated why an injunction pending Appeal should issue, the respondents have not demonstrated any prejudice that they would suffer for the period within which the applicant will prosecute the appeal.
15. In support of his submissions, the Petitioner relied on the case of David Bundi v Timothy Mwenda Muthee [2022] Eklr and quoted Order 51 Rule 10 Civil Procedure Rules which provides that, every order, rule or other statutory provision under or by a virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of failure to comply with this rule and no application shall be defeated on a technicality or for want of form that does not affect the substance of the application.
16. He added that the primary duty of the court is to do justice and that duty cannot be fettered by procedural technicalities. Thus if the stay of execution is not granted, the intended appeal will be



- rendered nugatory as the interested party will continue carrying out the project that the Applicant states is likely to violate or threaten its right to a clean environment.
17. Besides, the Petitioner relies on the case of Raphael Mulinge Muthusi & 2 others v Mary Ndila Nyolo where it was held that this court in the exercise of its appellate jurisdiction has power to grant a temporary injunction pending appeal, where the ends of justice demand so, and where the procedure for instituting an appeal has been complied with.
  18. He further restated the principles for grant of temporary injunction pending appeal as settled in the case of Patricia Njeri & 3 Others vs. National Museum of Kenya [2004] eKLR, as follows;
    - a. “An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.
    - b. The discretion should be refused where it would inflict great hardship than it would avoid.
    - c. The applicant must show that to refuse the injunction would render the appeal nugatory.
    - d. The court should also be guided by the principles in Giella vs. Cassman Brown [1973] EA 358.”
  19. In opposition, the Respondent filed submissions dated 14<sup>th</sup> November 2024 stating that Applicant has not satisfied the conditions set out for grant of stay as outlined in Stanley Kangethe Kinyanjui vs Tony Ketter & Others [2013] eKLR
  20. Further, the Respondent stated that seeking stay has been overtaken by events as the Respondent and the Interested Party executed the subject Contract in August 2024. That granting any stay orders would be in futility.
  21. With regard to whether the Applicant should be granted leave to lodge a notice of appeal out of time, the Respondent placed in reliance to Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, where the Supreme Court outlined the principles governing the exercise of discretion to grant leave or extend time to lodge an appeal, submitted that Applicant waited for 47 unexplained days to file the instant application and the Notice of Appeal.
  22. They stated that Notice of Appeal ought to be filed within 14 days upon delivery of judgment and Applicant’s Advocates were aware of the judgment date because on 22<sup>nd</sup> April 2024 there was a notice to all litigants and Advocates on the judiciary portal that matters coming up coming up on 25<sup>th</sup> April 2024 were rescheduled to 24<sup>th</sup> April 2024 but they failed to appear in court when judgment was delivered.
  23. In support of their argument that the Petitioner has not explained his delay in filing the notice of appeal, the Respondent cited the case of Ecobank Kenya Limited v Meya Agri Traders Limited [2021] eKLR where the supreme court emphasized the need for the Applicant, in an application for extension of time, to satisfactorily declare and explain the whole period of delay to the Court as it had held in the case of County Executive of Kisumu v County Government of Kisumu & 8 others, SC. Civil Appl. No. 3 of 2016; [2017] Eklr.
  24. The Interested Party filed submissions dated 7<sup>th</sup> November 2024 stating that Petitioner and his advocate has not given any substantial or credible reason why they did not attend court on 24<sup>th</sup> April 2024. They contended that the Court became functus officio the moment it delivered the judgment on the 24<sup>th</sup> of April 2024, thus the Petitioner’s prayer for an extension of time to lodge the Notice of Appeal out of time is misplaced and overtaken by events.



25. They further stated that in the absence of any order of stay of execution, the Respondent and Interested party have entered into a valid and binding agreement which signed, sealed and dated 28<sup>th</sup> August 2024. It avers that the Petitioner/Applicant has been furnished with a copy on 20<sup>th</sup> September 2024, contrary to his misleading claims that the same is a guarded secret and has not been brought to his attention.

**Analysis and Determination:**

26. The issue for determination is whether the applicant's prayer for extension of time should be granted and whether orders of temporary injunction pending appeal should be granted as prayed in the application.

27. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR laid down the principles that govern the exercise of discretion in applications for extension of time as follows:

- “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

28. I have considered the Petitioner's motion in light of the above said principles and also in the exercise of this court's discretionary jurisdiction in determining an application for extension of time. In answering the question of whether the applicant has given a satisfactory explanation for the delay in filing the notice of appeal, the explanation given by the applicant is that the judgement was delivered without their knowledge as he did not see the notice posted by the Court.

29. Although doubt is cast on what action the Petitioner did on the due date of judgement and no disclosure is made on who at the Court's registry was contacted that was not able to provide him with full information, I will give the Petitioner the benefit of doubt. The reason for doing so is because my view that 47 days does not amount to inordinate delay and there is no prejudice has been stated by the Respondent and the Interested party to be suffered if the leave is granted.

30. This brings us to the second issue for determination on whether the order of temporary injunction should issue. The impugned judgement dated 24<sup>th</sup> April 2024 struck out the Petition and stated that the Interested party was yet to conduct Environmental Impact Assessment as the contract between it and the Nairobi City County Government was yet to be signed.

31. The Interested Party has annexed a copy of a contract executed between it and the Respondent on 28<sup>th</sup> August, 2024, asserting that the same was signed because there was no order in place preventing them from doing so. Therefore, they argued that with the signing of the said contract, the orders being sought in the present application have been overtaken by events. The order sought to restrain the Respondent from awarding the NCC/ENV/287/A./3882/2022-2023 to Design, Finance, Build,



Operate, maintain and Transfer Waste To Energy Processing Plant At Dandora Dumpsite To M/s China National Electric Engineering Company.

32. My reading of the order is that it is seeking to injunct even the implementation of the Contract that has been signed as it does not want the Designing, the Financing, the Building, Operation, the maintaining and Transfer to take place before his intended appeal is heard and determined. I am therefore not persuaded by the argument that the application has been overtaken by events. Having found so, I will now consider whether the orders of injunction should issue pending his intended appeal.
33. In the Patricia Njeri & 3 Others vs. National Museum of Kenya [2004] eKLR, the court gave the following principles as governing grant of temporary injunction pending appeal;
- a. “An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.
  - b. The discretion should be refused where it would inflict great hardship than it would avoid.
  - c. The applicant must show that to refuse the injunction would render the appeal nugatory.
  - d. The court should also be guided by the principles in Giella vs. Cassman Brown [1973] EA 358.”
34. The Petitioner has submitted that if the orders are not given at this stage, his appeal would be rendered nugatory. I have weighed the rights of both parties and in particular, the question of inflicting hardship than it would avoid and I have concluded that it would serve the interest of justice to grant the orders but on revised terms that this court considers would serve the ends of justice. I state part of the prayer sought to be stopped in terms of awarding the contract is already overtaken by events as there is already a contract in place. Secondly, I am not persuaded that the act of designing and financing that design would render the appeal nugatory.
35. However, the remainder parts of the activities (building, operating and transferring the dumpsite) would be prejudice the appeal. Whether that appeal is flimsy or otherwise is not within the mandate of this court. Taking note that the Petitioner acknowledges that the cost of the project is of a high value, I will grant the temporary order of injunction for limited period of time to allow the Applicant to file his appeal and take any necessary steps before the appellate court.
36. In conclusion, I allow the application on the following terms;
- a. Time is extended for the Petitioner to file and serve a notice of appeal within 7 days of the date of this ruling.
  - b. That this honourable Court do hereby issue an order of temporary Injunction restraining the Respondent and the Interested Party’s decision to to Build, Operate, maintain and Transfer a Waste To Energy Processing Plant At Dandora Dumpsite To M/s China National Electric Engineering Company (NCC/ENV/ 287/A./3882/2022-2023) for a period of Four (4) months from the date of delivery of this ruling.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2025**

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**A. OMOLLO**

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**JUDGE**



