



REPUBLIC OF KENYA



**Madangi v Githua (Land Case Appeal E002 of 2025)
[2025] KEELC 3712 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3712 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
LAND CASE APPEAL E002 OF 2025**

CK YANO, J

MAY 8, 2025

BETWEEN

JAPHETH MUDAVE MADANGI APPELLANT

AND

ANNE WANGUI GITHUA RESPONDENT

RULING

1. By Notice of Motion dated 22nd January, 2025, the Appellant sought the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That there be an extension of time to appeal as against the judgment dated the 14th November, 2024 in Eldoret BPRT Case No. E031 of 2024 – *Japheth Mudave Madangi vs Anne Wangui Githua* and the appeal herein be validated.
 - d. That there be a stay of execution of the judgment of the Tribunal in the Eldoret BPRT Case No. E031 of 2024 – *Japheth Mudave Madangi vs Anne Wangui Githua* pending the hearing and determination of this appeal.
 - e. That the costs of this application be provided for.
2. The application is anchored on the 6 grounds on the body of the application and supported by the affidavit sworn by the Appellant on even date.
3. The appellant avers that he has been a tenant at the demised premises known as Eldoret Municipality/ Block 2/XX9 for over 30 years, wherein he operates a welding business while the respondent is the landlady.



4. He deponed that he pays a monthly rent of Kshs. 1,500/= even though the said tenancy has never been reduced into a written lease agreement.
5. It is his claim that the respondent served him with a notice, seeking to terminate his tenancy and as a result of the said notice, he filed a claim at the Business Premises Rent Tribunal vide Eldoret BPRT Case No. E031 of 2024. The said claim was heard and determined vide a judgment issued on the 14/11/2024.
6. It is further his claim that the judgment in the matter was delivered in his absence as he was not admitted to the virtual platform of the tribunal. He thereafter followed up with the court assistant of the tribunal, who informed him of the determination of the tribunal. That the notices to increase rent and terminate the tenancy were held to be invalid but the rent of the premises was increased from Kshs. 1,500/- to Kshs. 10,000/- effective 1/11/2024. He was however asked to await the signed copy of the judgment for collection.
7. He avers that on 16/1/2025; auctioneers visited the shop and informed him that they had instructions to levy distress for rent arrears and shared with him a copy of the judgment.
8. He thus contends that the reason for the 15 days delay in lodging the appeal, was due to the fact that he did not have a copy of the judgment neither was he informed of the orders issued therein. He thus urged the court to extend the time of appeal.
9. It was further his contention that the grounds of appeal as contained in the memorandum of appeal raise substantial questions for the determination of this court on appeal.
10. On the issue of stay of execution, it is his claim that the respondent is ready to effect the enhanced rent that is the subject of this appeal and if paid, the substratum of the appeal will have been taken away or even move to issue termination notices over rent arrears in the event that the increment is not paid.
11. Consequently, that in the event of termination of the tenancy, he will suffer substantial loss of a business premises that he has had for over 30 years.
12. He further deponed that he moved the court without undue delay upon getting a copy of the judgment and that he is ready and willing to offer security as will be directed by the court. He urged the court to allow the application and grant the orders sought.
13. The application was opposed. The Respondent filed a Replying Affidavit sworn 7th February, 2025. She dismissed the application as being fatally defective and vague. She however admitted that the applicant is her tenant in the premises known as Eldoret/ Municipality/Block 2/ XX9.
14. It is her contention that the application is an afterthought having been made 71 days after the decision of the Tribunal was rendered. She therefore accused the applicant of being guilty of laches and further that the applicant had failed to state his reasons for the delay.
15. In addition, it was her claim that the Memorandum of Appeal dated 22.1.2025 does not raise any prima facie case and as such should be dismissed.
16. In response to the allegations by the applicant at paragraph 4 of the Supporting Affidavit that he pays a monthly rent of Kshs. 1,500/= she asserted that pursuant to the decision by the tribunal of 14.11.2024, the applicant's monthly rent was increased from Kshs. 1,500/= to Kshs. 10,000/=
17. In conclusion, it was her contention that that she stands to be greatly prejudiced if the orders sought are granted and further that the applicant's loss could be easily mitigated by an award of damages. She maintained that it is in the interest of justice that the orders sought are not granted.



18. On 12.2.2025, this court issued directions that the Application be canvassed by way of written submissions. The Applicant filed his submissions dated 7th March, 2025 while the Respondent filed her submissions dated 24th February, 2025.

Analysis and Determination.

19. I have read and considered the Application, the supporting Affidavit, the Replying Affidavit and the rival submissions by both parties and the various authorities cited in support of their respective claims and I have taken the same into account in arriving at my decision. It is my considered opinion that the issues arising for determination are as follows: -

- i. Whether leave should be granted to appeal out of time against the judgment in Eldoret BPRT Case No. E031 of 2024 dated 14.11.2024
- ii. Whether an Order for Stay of Execution should issue against judgment and decree issued on 14th November, 2024 pending the hearing and determination of the intended appeal.
- iii. Whether leave should be granted to appeal out of time against the judgment in Eldoret BPRT Case No. E031 of 2024 dated 14.11.2024;

20. The governing law on enlargement and/or extension of time to file an appeal is section 79G of the [Civil Procedure Act](#) and which provides as follows: -

“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. Section 95 of the [Civil Procedure Act](#) further provides that: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

22. Guided by the above sections as read with section 15(1) of the [Landlord and Tenants \(Shops, Hotels and Catering Establishments\) Act](#) Cp. 301, it is clear that the appeal ought to have been filed within a period of 30 days. Be that as it may, the said sections, give court the powers to enlarge the said timelines where the period had expired and may admit appeals filed out of the 30 days limit period.

23. However, this power is not automatic since an applicant is under a duty to satisfy the court that he has a good and sufficient cause for not filing the appeal on time. What then amounts to a sufficient cause?

24. The Supreme Court in the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR outlined the guiding principles that courts ought to consider in an application for enlarging time to appeal as follows: -

“We derive the following as the under-lying principles that a Court should consider in exercise of such discretion:



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.
 5. The delay should be explained to the satisfaction of the Court;
 6. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 7. Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time”.
25. Guided by the case law, this court seeks to determine whether the applicant has met the principles outlined above and whether he has given a good and sufficient cause for the delay.
 26. It is the applicant’s contention that he was not present when the judgment in the tribunal cause was delivered on 14/11/2024 for the reason that he was unable to log in. That he made efforts to follow up on the decision and was informed by the court assistant of the tribunal that he would be given a signed copy of the said judgment.
 27. The respondent on the other hand has dismissed the application as an afterthought, maintaining that no plausible reason for the delay had been tendered.
 28. I have considered the explanation tendered by the applicant, particularly on his inability to join the virtual session and he was therefore not aware of the terms of the judgment.
 29. I do however note that at paragraph 9 of his affidavit, he deponed that on following up with the court assistant of the tribunal, he was informed of the holding of the tribunal whose effect was to increase rent from Kshs. 1,500/= to Kshs. 10,000/=. From the same, it is clear that he was aware of the terms of the judgment. He did not however state when he was notified of the same.
 30. This court has further had an opportunity to look at the memorandum of appeal dated 22.1.2025 and I must state that the grounds set therein raise arguable points with probability of success.
 31. This court will therefore grant the applicant the benefit of doubt and find that the explanation tendered by the applicant is sufficient in the circumstances.

Whether an Order for Stay of Execution can issue against judgment and decree issued on 14th November, 2024 pending hearing and determination of the intended appeal;

32. It is a settled principle of law that no appeal shall operate as an automatic stay of execution. The purpose of the order of stay of execution is to preserve the substratum of appeal and ensuring that the appeal is not rendered nugatory.
33. Order 42 Rule 6(1) of the *Civil Procedure Rules, 2010* empowers the court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal.



34. Order 42 Rule 6(2) further sets out the grounds to be considered and provides as follows: -
- (2) 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 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.
- (emphasis added)
35. Thus, the three prerequisite conditions to be satisfied to warrant the grant of an Order for Stay of execution are:-
- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- ii. The application is brought without undue delay and;
- iii. 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.
36. The first ground to be established is on substantial loss. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs 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.”
37. The applicant is under a duty to demonstrate the loss he is likely to suffer if the order for stay of execution sought is not granted. An Applicant has to give sufficient cause to enable the court exercise its discretion by granting the orders sought. It is not merely sufficient to state that substantial loss may occasion on the applicant without demonstrating the same. (See *New Stanley Hotel Ltd -vs- Arcade Tobacconist* (1980) KLR 757).
38. In an attempt to demonstrate the substantial loss that he is likely to suffer should execution of the decree proceed, the applicant stated that the respondent will be at liberty to effect the rent increment and in default of payment of the new rent of Kshs. 10,000/=, she may proceed to levy distress for rent or issue a termination notice.
39. He further claims that should termination ensue, then he risks losing his business premises where he has been operating his welding business for over 30 years.
40. The respondent on her part contends that the applicant has not sufficiently demonstrated the nature of the substantial loss the he is likely to suffer. That other than merely stating he will suffer substantial loss, he has not tendered any evidence of the amount he would lose as a result.
41. It is common ground that it is not enough for an applicant to merely state that substantial loss will result or that the appeal will be rendered nugatory. The applicant has explained that he has been renting the demised premise for a period of over 30 years, wherein he conducts his welding business.
42. Even though I acknowledge that the applicant has not adduced any documentary evidence as proof of the earnings that he is likely to lose in the event that the orders for stay is not granted, I have taken into



consideration the circumstances and nature of the claim herein as well as the effect of the judgment of the tribunal.

43. In view of the foregoing, I find and hold that the Applicant has sufficiently demonstrated the substantial loss he is likely to suffer, unless an order for stay of execution is granted.
44. The second ground is on whether the application has been filed without undue delay. The judgment in question was delivered on the 14th November, 2024 while the instant Application was filed on the 22nd January, 2025, 2 months 8 days.
45. There is a contest on the period of delay. The applicant contends that the delay occasioned is only of 15 days, from the time he got a copy of the judgment while the Respondent contends that the delay has been of 71 days from the date of the delivery of the judgment.
46. It is not in dispute that the period between 21st December, 2024 until 13th January, 2025 ought to have been excluded in computing the period of delay. Taking the same into account, it is my considered opinion that time started running from the date of judgment for purposes of computing time. Thus, the application was filed after a period of 45 days. The question that therefore follows is whether the applicant has given a sufficient reason for the delay.
47. The applicant avers that the judgment of the tribunal was rendered in his absence as he was unable to join the virtual platform on the date of the judgment and since he was acting in person, he was not aware of the terms of the judgment. That he made efforts in following up on the decision and was only able to get a copy of the judgment on 16th January, 2025.
48. The respondent dismissed the said averments and maintained that no sufficient reason had been given. That the applicant went to slumber and was awoken when he was served by the respondent hence the instant application.
49. It has been held that a delay of even one day may amount to an inordinate delay where no sufficient and satisfactory explanation has been tendered by an applicant. However, I have taken into account the reason given by the applicant and I find that the same is sufficient. Consequently, I find that there was no inordinate delay in filing the instant application.
50. The final element is on the deposit of security for costs as the court may direct. The amount of security to be deposited ought to be balanced against the interests of both the Applicant and the Respondent. The said amount should be adequate and not be disadvantageous to the party depositing the same; See *Rosengerens Ltd -vs- Safe Deposit Centre Ltd* 919840M 3ALLER 198.
51. The court in the case of *Arun C Sharma Vs Ashana Raikundalia T/A Raikundalia & Co. Advocates and 2 others* (2014) eKLR, held that: -

“The purpose of the security under Order 42 is to guarantee 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 applicant 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 a security for the 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.”
52. The applicant expressed his willingness and readiness to deposit the security for costs as the court may direct. The respondent on the other hand argues that the amount to be deposited as security for costs should be the entire difference of the rent increment from the date of the judgment of the tribunal.



53. In view of the foregoing, I find that the Applicant has satisfied the 3-limb test provided under the *Civil Procedure Rules* to the required standard.
54. In the upshot, I accordingly find that the Notice of Motion Application dated 22nd January, 2025 is merited and is hereby allowed on the following terms: -
- a. Leave be and is hereby granted to file an appeal out of time, and the memorandum of appeal is deemed duly filed subject to payment of the requisite court fees.
 - b. An Order for Stay of Execution of the judgment and decree issued on 14th November, 2024 in Eldoret BPRT case No. E031 of 2024 is hereby issued pending the hearing and determination of the Appeal.
 - c. The Applicant is hereby directed to deposit Kshs. 30, 000/- in court as security for Costs for the due performance of the decree within 30 days from the date of this Ruling.
 - d. Failure to comply with order (c) hereinabove, Order (b) hereinabove shall automatically lapse.
 - e. Costs of the Application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF MAY, 2025.

HON. C. K. YANO

JUDGE

