



Kuria & another v Marshall Holdings Ltd (Environment and Land Miscellaneous Case E024 of 2024) [2025] KEELC 5265 (KLR) (10 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5265 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND MISCELLANEOUS CASE E024 OF 2024**

JM ONYANGO, J

JULY 10, 2025

BETWEEN

DANIEL GITAU KURIA 1ST APPLICANT

BLESSED SHELTERS & PROPERTIES 2ND APPLICANT

AND

MARSHALL HOLDINGS LTD RESPONDENT

RULING

1. This Ruling is in respect of a Notice of Motion application dated 18th May 2024 filed by the 1st and 2nd Applicants pursuant to Section 79 G, Section 1A and 3A of the *Civil Procedure Act*, Order 42 Rule 6 (1) and Order 51 Rule 1 of the Civil Procedure Rules 2010, Cap 21 of the Laws of Kenya. In the said application, the Applicant seeks the following orders:
 1. Spent.
 2. Spent.
 3. That the honourable court be pleased to issue an order barring the Respondent from disposing, dealing or in any way interfering with all that parcel of land known as Title No. Ruiru East Block 1/5348 pending the hearing and determination of this Application and the intended appeal.
 4. That the honourable court be pleased to grant the Applicants leave to appeal out of time against the Judgment delivered by Hon. Joseph Were (CM) on 12th April 2024.
 5. That the honourable court be pleased to issue an order for stay of execution of the Judgment entered and delivered herein against the Applicants on 12th April 2024 pending the hearing and determination of the intended appeal.



6. That the costs of this Application be provided for.
2. The Application is supported by grounds on the face of it and by the Supporting Affidavit sworn by Daniel Gitau Kuria (1st Applicant) on his behalf and on behalf of the 2nd Applicant, on 18th May, 2024. The 1st Applicant avers that on 12th April 2024, the trial court in ELC Cause No. E055 of 2021 delivered Judgment against the Applicants, ordering specific performance and directing them to transfer the land known as Title No. Ruiru East Block 1/5348 (suit property) to the Respondent and to pay Kshs. 300,000 as damages for breach of contract.
3. It is his position that they had instructed an advocate to defend them in the suit at the trial court, but the said advocate ceased acting for them without informing them, thus rendering the suit undefended for the most part until the Judgment was delivered. The 1st Applicant contends that they were not aware that Judgment in the trial suit had been entered on 12th April 2024 due to the failure of their previous advocates to inform them, but being aggrieved by the said Judgment, they now seek to file an appeal out of time. The 1st Applicant further contends that the mistakes of their previous advocates should not be meted out to them.
4. He states that the delay in filing the appeal is not inordinate given that they have filed this application only nine (9) days after the expiry of the period within which to file the appeal. He further states that they have an arguable appeal and that they will suffer serious prejudice if the application is not heard expeditiously.
5. He depones that the suit property has already been transferred to the Respondent in execution of the impugned Judgment. He is apprehensive that the Respondent might dispose of the suit property, rendering this appeal nugatory. He urges this court to grant the orders sought.
6. The Respondent opposed the Application through the Replying Affidavit sworn by its director, Gladys Masaa Mwanzia on 7th October 2024. It is her position that this application is misconceived, vexatious, an afterthought and an abuse of the court process because it does not meet the threshold for the grant of stay of execution pending appeal. She depones that the Applicants were duly informed by their previous advocate on record of his intention to cease acting for them through an application dated 26th September 2023.
7. She states that the trial court mentioned the matter several times to allow the Applicants to defend the said application or acquire fresh representation, which was never done. She contends that the Applicants' assertion that the lower court case proceeded without due representation is untrue, given that their previous advocate on record went the extra mile and filed an Affidavit of Service to prove service of the application to cease acting. She further contends that contrary to the assertions made by the Applicants in paragraph 6 of their supporting affidavit, the entry of the Judgment in the trial court was not adverse because the Applicants did file and serve a Defence and Witness Statement.
8. She states that the Applicants have not given a plausible or reasonable explanation for the delay in lodging the appeal, given that they were duly served with the application to cease acting, hearing notices and Judgment notices. She further states that the delay in filing the appeal cannot be blamed on the Applicants' previous advocate on record because they did their part. She urged this court to dismiss the application and award costs to the Respondent.
9. The Application was canvassed by way of Written Submissions. The Applicants filed Written Submissions dated 7th April 2025, while the Respondent filed Written Submissions dated 20th June 2025.



10. Having perused the Application, the Replying Affidavit, and the parties' Written Submissions, the following key issues emerge for determination:
 - i. Whether the court should grant the Applicants leave to file an appeal out of time against the Judgment dated 12th April 2024.
 - ii. Whether the court should grant an order of injunction pending the hearing and determination of the Appeal.
 - iii. Whether the court should issue an order for stay of execution of the Judgment entered on 12th April 2024 pending the hearing and determination of this Appeal.

Analysis and Determination

Whether the court should grant the Applicants leave to file an appeal out of time against the Judgment dated 12th April 2024.

11. 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.”

12. It is clear that the court has a wide discretion to extend time within which to file an appeal although the discretion must be exercised judiciously. In the case of the County Executive of Kisumu v County Government of Kisumu and 8 Others [2017] eKLR the Supreme Court of Kenya held as follows:

“(23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicolas Salat case to which all the parties herein have relied upon. The Court delineated the following as the under-lying principles that a Court should consider in exercise of such discretion:

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;

- a. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- b. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- c. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;



- d. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- e. 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.”

13. In the present case, the Applicants intend to appeal against the Judgment of the trial court delivered on 12th April 2024. They have explained that they were not aware of the date of delivery of the Judgment because their previous advocates on record failed to inform them of the date or that they had ceased acting for them. They have further contended that there was no inordinate delay in filing this application, given that it was filed nine (9) days after the statutory period for filing an appeal.
14. Since the period of delay is not inordinate, and the Applicant’s advocates had ceased acting for them, I will give the Applicants the benefit of the doubt and assume that they were indeed not aware of the Judgment date. I therefore grant the Applicants leave to file the appeal out of time.

Whether the court should grant an order of injunction pending the hearing and determination of the Appeal.

15. The Applicants have sought an order barring the Respondent from disposing, dealing or in any way interfering with all that parcel of land known as Title No. Ruiru East Block 1/5348 pending the hearing and determination of the intended appeal. The nature of the order sought is an injunction. Order 42 Rule 6 of the Civil Procedure Rules, 2010 provides thus: -

“(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate Court or tribunal has been complied with.”

16. It is clear that the court has the discretion to grant an injunction pending appeal if it is satisfied that the appeal has been properly filed. The said discretion must be exercised judicially on the basis of law and relevant affidavit evidence. In the case of Patricia Njeri & Others vs National Museums of Kenya (2004 eKLR), the court identified the following principles that should guide the court in considering such an application. These are:
 1. An order of injunction pending appeal is discretionary and will not be granted where the appeal is frivolous.
 2. The discretion should be refused where it would inflict greater hardship than it would avoid.
 3. The applicant must show that if the injunction is not granted, the appeal will be rendered nugatory.
 4. The Court should be guided by the principles set out in the case of Giella vs Cassman Brown Ltd [1973] E.A 358.



17. Further, in *Charter House Bank Limited vs Central Bank of Kenya & Others C.A Civil Application No. 200 of 2006* (2007 e K.L.R.), the Court of Appeal held that:
- “The principles upon which this Court exercises its unfettered discretion to grant a stay of execution, stay of proceedings or an order of injunction are settled. The applicant should satisfy the Court that the appeal or intended appeal is not frivolous, that is to say, that the appeal or intended appeal is arguable and, secondly, that unless the application is granted the results of the appeal, if successful would be rendered nugatory. The purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful, from being rendered nugatory”.
18. In the case of *Giella vs. Cassman Brown* [1973] EA 358, the court stated the conditions for grant of interlocutory injunctions as follows;
- “The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience.”
19. A prima facie case was defined in the case of *Mrao Limited vs. First American Bank of Kenya & 2 Others* [2003] eKLR as follows;
- “A prima facie case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”
20. In the instant case, the Applicants are yet to file an appeal but have annexed a draft Memorandum of Appeal in this application, setting out various grounds upon which they fault the decision of the trial court. They have also annexed a copy of the impugned Judgment.
21. From the Judgment, it emerges that the Respondent sued the Applicants in the trial court seeking inter alia specific performance of a contract for the transfer of the suit property. The trial court delivered Judgment against the Applicants on 12th April 2024, ordering specific performance and directing them to transfer the suit property to the Respondent and to pay Kshs 300,000 as damages for breach of contract.
22. The Applicants are aggrieved by the said Judgment and have faulted the learned trial magistrate for finding that they had been paid the full purchase price for the suit property, yet no evidence to corroborate that fact was adduced. They have further faulted the learned trial magistrate for declaring that they had breached the contract between the parties when in fact, it was the Respondent who was in breach. Due to the foregoing, this court is convinced that the Applicants have demonstrated a prima facie case and that the intended Appeal is not frivolous.
23. On whether irreparable harm would be occasioned to the Applicants if the injunction is not granted, the court takes cognizance of the fact that the Applicants stated that the suit property had already been transferred to the Respondent in execution of the impugned Judgment. The Applicants contended that they were apprehensive that the Respondent might dispose of the suit property, rendering this



appeal nugatory. However, the Applicants have not demonstrated the irreparable harm they are likely to suffer if the said order is not granted. In view of the foregoing, I find no need to consider the third limb espoused in the case of *Giella vs Cassman Brown* (supra).

Whether the court should issue an order of stay of execution of the Judgment entered on 12th April 2024 pending the hearing and determination of this Appeal.

24. The Applicants have also sought an order of stay of execution pending appeal. However, by their own admission, they state that the suit property has already been registered in the name of the Respondent in execution of the decree. The only part that would remain for execution is the payment of Kshs 300,000 as damages for breach of contract.

25. The law on stay of proceedings is provided under Order 42 Rule 6 of the Civil Procedure Rules which provides that;

“(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 order set aside.”

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the Applicants 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 Applicants”.

26. The principles that a court must consider in an application for stay of proceedings were set out in the case of *Global Tours and Travels Limited Nairobi Winding Up Cause No. 43 of 2000* cited in *Kenya Power & Lighting Company Ltd vs Esther Wanjiru Wokabi 2014 eKLR*, where the court stated as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. The sole question is whether it is the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.



27. The Applicants have neither demonstrated the substantial loss they are likely to suffer nor offered any security for the due performance of the decree. I find that the Applicants have not met the threshold to warrant the exercise of the discretion in their favour to grant a stay of execution.
28. The application dated 18th May 2024 is therefore partly allowed in the following terms:
- a. Leave is hereby granted to the Applicants to file an appeal out of time against the Judgment delivered by Hon. Joseph Were (CM) on 12th April 2024 within the next 21 days, failure to which this order shall automatically be set aside.
 - b. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF JULY 2025.

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J. M ONYANGO

JUDGE

In the presence of:

Miss Kabiru for the Applicant

Miss Chania for the Respondent

Court Assistant: Hinga

