



Lubulellah & Associates v Gilbi Construction Company Limited (Environment and Land Miscellaneous Application E157 of 2023) [2025] KEELC 4996 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEELC 4996 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E157 OF 2023**

CG MBOGO, J

JULY 3, 2025

BETWEEN

LUBULELLAH & ASSOCIATES ADVOCATE

AND

GILBI CONSTRUCTION COMPANY LIMITED CLIENT

RULING

1. Before me is the chamber summons dated 3rd December, 2024 filed by the client/applicant and it is expressed to be brought under Article 48 of the Constitution, Sections 3A and 63 (e) of the Civil Procedure Act, Rule 11(3) of the Advocates Remuneration Order and Order 42 Rule 6 (2) of the Civil Procedure Rules seeking the following orders: -
 1. That this honourable court be pleased to grant leave to the applicant/ client to file an appeal from the decision and/or ruling and/ or orders of this court delivered on 14th November, 2024, by the Honourable Justice Oguttu Mboya.
 2. That this leave granted do operate as stay of execution and/or further proceedings herein pending the hearing and determination of the intended appeal.
 3. That the costs of this application be provided for.
2. The application is premised on the grounds on its face. The application is supported by the affidavit Harish Gopal Vekaria sworn on even date. The client/applicant deposed that following the ruling delivered on 14th November, 2024, dismissing its application and allowing the respondent's application, the leave of the court is required to appeal against the said decision to the appellate court. Further, it was deposed that it is apprehensive that the advocate/respondent will proceed with execution to its detriment, and that unless stay is granted, the appeal will be rendered an academic exercise.



3. The application was opposed by the replying affidavit of Eugene Lubale Lubulellah, the learned counsel for the advocate/respondent sworn on 5th February, 2025. The advocate/respondent deposed that the application has been filed 21 days after the 14 days period allowed, with no prayer to seek leave to file out of time. The advocate/respondent deposed that while the decision to grant leave is discretionary, the client/applicant has not demonstrated that it has realistic grounds, and prospects of success on appeal. Further, that it does not set the specific findings upon which leave to appeal is sought, and that the application should have been made orally during the delivery of the ruling but the same was not done. Further, that the client/applicant has not shown that it would suffer substantial loss if the stay was not granted.
4. The advocate/respondent deposed that there is no factual or legal basis for the client/applicant's apprehension that the decree holder will not be able to refund the deposit in the unlikely event that the judgment debtor is successful on appeal. It was further deposed that a successful party is entitled to the fruits of his judgment, and that abuse of court process should not be allowed in the guise of a stay of execution.
5. The application was canvassed by way of written submissions. The client/applicant filed its written submissions dated 5th March, 2025 where it raised three issues for determination as follows: -
 - i. Whether the application for seeking leave to appeal was filed out of time.
 - ii. Whether the applicant is entitled to a stay of execution.
 - iii. Who should bear the costs.
6. On the first issue, the client/applicant submitted that the ruling was delivered in its absence, and that an oral application could not be made necessitating this application. On the second issue, the client/applicant submitted that the intended appeal has a sufficient cause and that it is arguable as it raises genuine and weighty issues. Further, that once the advocate/respondent is allowed to proceed with execution, the whole appeal will lack substance, and that in this case, they are more than willing to pay security as the court shall order with reference to the appeal. Reliance was placed in the cases of *Karanja v Green Belt Movement* [2022] KEELRC 14662 (KLR), *MFI Document Solutions Ltd v Paretto Printing Works Limited* [2021] eKLR, and *Kenya Tea Growers Association & Unilever Tea Kenya Ltd v Kenya Plantation and Agricultural Workers Union* [2012] KECA 231 (KLR). On the third issue, the client/ applicant submitted that it has proved that it is entitled to the orders and the costs of this application.
7. The respondent/advocate filed its written submissions dated 21st March, 2025 it raised the following issues for determination: -
 - i. Incompetence of judgment-debtor's application.
 - ii. Inordinate and unexplained delay in bringing the application.
 - iii. Leave to appeal is not a right, but it is discretionary whereby the applicant has to demonstrate that the intended appeal raises issues/grounds of appeal which merit serious judicial consideration.
 - iv. Prayers for stay of execution lack merit or substance.
8. On the first issue, and while relying on the cases of *Trans Nzoia Securities Ltd v Stuardte & another* (Civil Application E040 of 2022) [2024] KECA 109 (KLR) (9 February 2024) (Ruling) and *TG Enterprises Limited v China Gezhoubu Group & another* [2024] KECA 596 (KLR), the advocate/



- respondent submitted that the applicant was obligated to seek and obtain leave of this court to appeal after filing a notice of appeal pursuant to Section 75 of the *Civil Procedure Act* and Order 43(2) of the *Civil Procedure Rules*. Further reliance was placed in the cases of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR, and *Kurii v Shalimar Ltd and the Judicial Commission of Inquiry into the Goldenberg Affair* [2003] KLR 243.
9. On the second issue, the advocate/respondent submitted that the client/applicant ought to have filed the application on or before 28th November, 2024. However, no application or prayer for extension has been made. Reliance was placed in the cases of *Gerphas Alphonse Odhiambo v Felix Adiego* [2006] eKLR, and *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR.
 10. On the third issue, the advocate/respondent submitted that there is no draft memorandum of appeal annexed to the application, and further that the no realistic grounds have been given to demonstrate success on appeal. To further buttress on this issue, the advocate/respondent relied on the cases of *Kenya Shell Limited v Kobil Petroleum Limited* [2006] eKLR, *Sango Bay Estate Ltd & Others v Dredner Bank A.G* [1971] EA 17, and *Machira t/a Machira & Company Advocates v Mwangi & Another* [2002] 2 KLR 391.
 11. On the fourth issue, the advocate/respondent submitted that the client/applicant has not demonstrated sufficient grounds to warrant stay, that it has demonstrated substantial loss and it is silent on the issue of security. The advocate/respondent relied on the cases of *Elena D. Korir v Kenyatta University* [2014] eKLR, *Antoine Ndiaye v Africa Virtual University* [2015] eKLR, *Joseph Gachie T/A Joska Metal Works v Simon Ndeti Muema* [2012] eKLR, *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, *Jabet Mobsen Ali & another v Priscillah Boit & Another* [2014] eKLR and *Kiplagat Kotut v Rose Jebor Kipngok* [2015] eKLR.
 12. I have considered the application, the response and the written submissions filed by the parties. I am of the view that the issue for determination is whether the application has merit. Being dissatisfied with the ruling of this court delivered on 14th November, 2024, the client/applicant intends to appeal to the Court of Appeal and thus seeks the leave of this court to do so. Alongside this prayer, is the prayer for stay of execution pending the outcome of the intended appeal. In support of its application, the client/applicant annexed a copy of the impugned ruling delivered on 14th November, 2024.
 13. It follows therefore that the rules to be followed are anchored in the *Advocates Act*, and the *Civil Procedure Act* and the rules.
 14. Paragraph 11 (3) of the *Advocates (Remuneration) Order* provides, -

“ Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the court of appeal.”
 15. From the above, it is clear that an application for leave ought to be made from this court. However, it does not stipulate whether the same ought to be oral or formal and the time within which to make the said application. However, considering that the nature of this application is where leave ought to be sought, Order 43 Rule 1 (3) gives guidance on the time frame.



16. Order 43 Rule 1 (3) of the *Civil Procedure Rules* provides:

“An applications for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”

17. The client/applicant filed this application 19 days after the ruling was delivered. No leave to extend time to file this application was sought. It thus follows that there is no proper application before the court. Without a proper application, the court is unable to exercise its discretion in the manner urged by the client/applicant.

18. From the above, the chamber summons dated 3rd December, 2024 is hereby struck out. I make no orders as to costs.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 3RD DAY OF JULY, 2025.

HON. MBOGO C.G.

JUDGE

03/07/2025.

In the presence of:

Mr. Benson Agunga - Court assistant

Ms. Lily N. A Ngeresa for the Client/Applicant – present but not responding

No appearance for the Advocate/Respondent

