



Kenya Breweries Limited v Muriithi; Office of the Data Protection Commissioner (Interested Party) (Civil Appeal E267 of 2025) [2025] KEHC 9990 (KLR) (Civ) (11 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9990 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E267 OF 2025

AC MRIMA, J

JULY 11, 2025

BETWEEN

KENYA BREWERIES LIMITED APPELLANT

AND

JOSEPH GATHIRU MURIITHI RESPONDENT

AND

**OFFICE OF THE DATA PROTECTION COMMISSIONER INTERESTED
PARTY**

RULING

1. This is a composite ruling in respect of two Notices of Motion dated 3rd March 2025 and 6th March 2025 respectively and a Notice of Preliminary Objection dated 17th March 2025. The Notices of Motion were both lodged by Kenya Breweries Limited, the Appellant herein whereas the preliminary objection was filed by Joseph Gathiru Muriithi, the Respondent herein.
2. The Notice of Motion dated 3rd March 2025 [hereinafter referred to as 'the first motion'] sought the following orders: -
 1. spent.
 2. That pending the hearing and determination of this Application an order of stay of execution of the determination and all consequential orders of the Data Commissioner delivered in ODPC Complaint No. 1805 of 2024 on 3rd February 2025 be and is hereby issued.



3. That pending the hearing and determination of the appeal an order of stay of execution of the determination and all consequential orders of the data commissioner delivered in ODPC Complaint No. 1805 of 2024 on 3rd February 2025 be and is hereby set aside.
 4. That pending the hearing and determination of this Application an order of stay of execution of the Enforcement issued by the Office of the Data Protection commissioner on 27th February 2025 emanating from ODPC complaint No. 1805 of 2024 be and is hereby issued.
 5. That pending the hearing and determination of this appeal an order of stay of execution of the enforcement notice issued by the office of the Data protection Commissioner on the 27th February 2025 emanating from ODPC Complaint No. 1805 of 2024 be and is hereby issued.
 6. That pending the hearing and determination of this application an order of stay of publication of the determination issued in ODPC Complaint No. 1805 of 2024 by the Office of the Data Protection Commissioner be and is hereby issued.
 7. That pending the hearing and determination of this appeal an order of stay of publication of the determination issued in ODPC Complaint No. 1805 of 2024 by the office of the Data Protection Commissioner be and is hereby issued.
 8. That costs of this application be provided for.
3. In the grounds accompanying the application and the affidavit in support thereof, the Appellant/Applicant stated that it was dissatisfied with the decision of the Data Commissioner where it awarded the Respondent Kshs. 650,000/- for violation of his rights. The Applicant posited that it was apprehensive that should the Data Commissioner actualize the enforcement notice, it would suffer prejudice since it does not know the financial capacity of the Respondent. It also asserted that it has an arguable appeal with a high chance of success and it should be allowed to ventilate the pertinent issues in the appeal. In conclusion, the Applicant urged that allowing the Enforcement Notice to stand will render the substratum of the appeal nugatory.
4. In the Notice of Motion dated 6th March 2025 [hereinafter referred to as ‘the second motion’], the Applicant sought the following reliefs: -
- i. That the Applicant be granted leave to file and serve Memorandum of Appeal out of time against the whole determination and consequential orders of the Data Commissioner delivered in Nairobi on the 3rd Day of February 2025 in ODPC Complaint No. 1805 of 2024.
 - ii. That the time limited for the Applicant to file and serve the Respondent with the Memorandum of Appeal be enlarged or extended to allow the filing and serving of the same within such time as the honourable Court may deem fit.
 - iii. That the Memorandum of Appeal annexed hereto be deemed as duly filed and served.
 - iv. That the costs of and incidental to this Application abide by the result of the intended Appeal.
5. In support of the application, the Applicant posited that the delay in filing the appeal was occasioned by a system issue in the Judiciary e-filing portal. It was its case that the reason for the delay was by unforeseeable circumstance not in its control. In the supporting affidavit, Mr. Cecil Miller, Learned Counsel for the Applicant deposed that upon delivery of determination by the Data Commissioner on 3rd February 2025, his office prepared a Memorandum of Appeal and unsuccessfully uploaded the documents on the Judiciary’s e-filing Portal. To that end, he deposed that they raised the issue with the Deputy Registrar. That by the time they received help, the period within which an appeal was to be



lodged had lapsed by two days, hence, the application to enlarge time. Learned Counsel deposed that the delay was occasioned by factors beyond the Applicant's control.

6. The above was reiterated through a Further Affidavit deposed to by one Karen Mate-Gitonga on 24th April 2025. She stated that the delay of two days cannot be viewed as an abuse of the Court process and asserted that the claim by the Respondent that the application was fatally defective for having been filed three days outside the statutory timelines is wholly misconceived because the law allows for a Court to enlarge timelines. To her, the Memorandum of Appeal was properly annexed and rightfully invoked this Court's discretionary jurisdiction.
7. In the end, Applicant prayed that the two applications be allowed as prayed to accord it an opportunity to ventilate serious issues of law and fact.
8. Joseph Gathiru Muriithi challenged both applications through the Preliminary Objection and his Replying Affidavit. In the objection, the Respondent avowed four grounds which can be summarized as follows: First, that this Court lacks jurisdiction to entertain the appeal since it was filed on 6th March 2025, a period of 3 days out of time contrary to the provisions of section 79G of the Civil Procedure Act. Second, that the Applicant had not sought and obtained leave to extend time to file the appeal as required under Section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules, thus rendering the appeal and accompanying application fatally defective.
9. Third, the Applicant averred that under Section 56(5), Section 64 of the Data Protection Act as read with Regulation 14(1) and 14(3) of the Data Protection (Complaints Handling Procedure enforcement) Regulations, the ODPC is within its powers to provide remedies and the claim that it lacks jurisdiction to issue compensatory relief is unfounded. Lastly, the Respondent urged that it was in the interests of justice that the Court strikes out the appeal and the accompanying applications and have litigation concluded.
10. In the Replying Affidavit, the Respondent deposed that the applications were legally untenable, incurably defective and an abuse of Court process. He reiterated the requirements under Sections 79G and 95 of the Civil Procedure Act. It deposed that the Judiciary's e-filing system has always been operational and numerous practitioners, including his office successfully filed documents on that same day. As such the claim that a system failure prevented them from filing the appeal was misleading and unsubstantiated. Further, he deposed that the quest for stay has been overtaken by events since the determination has already been published and is in the public domain.
11. It was the Respondent's case that the claim by the Applicant that there was an opt-out short code in the message was never raised at the proceedings before the Interested Party and, therefore, cannot be introduced at this stage. The Respondent asserted that the claim was without evidence. The Respondent further claimed that the Applicant voluntarily participated in the proceedings before the Interested Party and never raised any jurisdictional contest and as such, it was estopped from challenging jurisdiction because of an unfavourable decision.
12. In conclusion, the Respondent deposed that the Applicant had not satisfied the conditions for stay and in any event an appeal could not act as stay of execution. The Respondent filed written submissions dated 22nd April 2025 whose contents shall be considered later in this ruling.
13. Having carefully considered the applications, the objection, the response, the written submissions and the decisions referred to, the issues that arise for determination are;
 - i. Whether the Preliminary Objection is properly raised in law.
 - ii. Depending on (i) above, the merits of the Preliminary Objection.



- iii. Depending in (ii) above, whether the Applicant meets the threshold for enlargement of time.
 - iv. Depending on (iii) above, whether an order of stay of execution of the determination and all consequential orders of the Data Commissioner delivered in ODPC Complaint No. 1805 of 2024 on 3rd February 2025 should issue.
14. On the first issue as to whether the objection is properly raised in law, suffice to say that a legally sound preliminary objection must raise pure questions/issues of law capable of disposing of a dispute at once. It is, therefore, incumbent upon a Court to ascertain that issues that would necessitate the calling of evidence are not in the raised through a preliminary objection.
15. The *locus classicus* on preliminary objections is *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd*, (1969) EA 696 where at page 700, the former Court of Appeal for East Africa defined a Preliminary Objection and discussed its applicability as follows: -
- ...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.
- ...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop....
16. In *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd. & 3 Others* (2015) eKLR, the Supreme Court discussed Preliminary Objections as hereunder: -
- ... The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised, the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable preliminary objection on a point of law.
17. In *Omondi v National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, the Court gave the parameters to consider in determining the validity of a preliminary objection. It was observed:
- ...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.
18. Returning to the Preliminary Objection at hand, and as said, it raises four main grounds which have already been reiterated above. A careful consideration of the grounds reveal that none meets the threshold of a valid Preliminary Objection. I say so because in determining any of the grounds, this



Court must interrogate the evidence on record and settle evidential thresholds since the law allows for extension of time as a discretionary remedy. The objection, therefore, fall short of the test.

19. As the first issue has been found in the negative, then that disposes the second issue as well. I will now consider the third issue which is whether the Applicant met the threshold for enlargement of time.
20. Section 79G of the *Civil Procedure Act* provides for the timelines for an appeal to the High Court 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 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. The proviso inherent in Section 79G is the leeway Courts have, otherwise known as ‘discretion’, to either enlarge time or decline to do so. The peculiar circumstance of each case will generally be a guide to that end. The Supreme Court in *Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others* [2014] eKLR articulated the principles applicable in an application for leave to appeal out of time. It observed as follows: -

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.

22. In this matter, the Applicant based the delay solely on the failure by the Judiciary’s e-filing system, to upload the Memorandum of appeal within the prescribed period. It explained that despite the system accepting the documents, it could not upload them. The system only showed that it was in the process of uploading but could not complete the process. On that very same day, the 3rd May 2025, the Applicant’s Counsel wrote to the Deputy Registrar. The Email was referenced; ‘Difficulty in Filing an Appeal’. It enumerated the challenge it was facing and that as of 1951hrs, despite effort, it still was unable to upload the documents. The Applicant sought Court’s intervention. The Court wrote back to the Applicant on 5th May 2025 advising him to contact the ICT Officer. A day later, the Applicant lodged the application herein seeking to enlarge time.



23. From an appreciation of the Applicant's circumstances, it is without doubt that the failure to file the appeal was through none of its fault. As explained, it was a challenge outside its control. The explanation, before the eyes of this Court, is satisfactory.
24. It is also evident that a three-day period is not inordinate as to deprive the Applicant of this Court's favourable exercise of discretion. Finally, the Respondent has not, both in the Replying Affidavit and the submissions illustrated the prejudice he is likely to suffer if this court were to enlarge time. This Court is, therefore, inclined to allow the quest to enlarge time.
25. The Court now turns to the application for a stay of execution under Order 42 Rule 6(2) of the Civil Procedure Rules. The rule provides as follows: -
1. 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 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.
 2. Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 3. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
 4. An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

Notwithstanding anything contained in subrule (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 a subordinate court or tribunal has been complied with
26. Further to the three long-established principles, the Court of Appeal in Butt v Rent Restriction Tribunal embellished the foregoing provision as hereunder: -
- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
 - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.



27. This Court will now consider the applicability of the three principles in this case. On the aspect of delay, it is notable that the application was lodged the same day the thirty-day period lapsed. There was, therefore, no undue delay. As to whether the Applicant will suffer substantial loss, this Court's attention is drawn to the decision in *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 where Hon. Kimaru, J. [as he then was] described articulately what substantial loss is. He observed thus;

.... The word "substantial" cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.

28. The Court of Appeal weighed in on the issue of evidentiary burden in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* (2006) eKLR where the Learned Judges observed as follows: -

... Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.

29. In the grounds in support of the application, the Applicant expressed concern about the ability of the Respondent to refund the decretal sum should it be successful on appeal. No rebuttal or proof, demonstrating that the Respondent was able to refund the decretal sum was tendered. In that regard, this Court finds that the Applicant has satisfied this limb of the conditions.

30. Finally, on the aspect of security for due performance of the decree, the Applicant is duty bound to provide security to forestall a scenario where the Respondent is taken back to the drawing board to execute the fruits of its judgment in instances where the appeal fails. Under this head, the Court engages in a balancing act; not to deny an Appellant the right to get its money back in the event of success and equally important, not to deprive a Respondent the opportunity to conveniently realize its decree where the appeal fails.

31. As to what adequate security is, the Court of Appeal in *Ndubiu Gitabi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 observed that: -

... The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both



parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash.

32. The Applicant did not propose any security. In absence of such commitment, this Court will take the liberty to make a reasonable and adequate assessment. In any event, this Court finds that the prayer for a stay of execution is also merited.
33. On the basis of the foregoing discourse, the following final orders hereby issue: -
- (a) The Notice of Preliminary Objection dated 17th March 2025 is hereby dismissed.
 - (b) The Notice of Motion dated 6th March 2025 is allowed to the extent that the Memorandum of Appeal dated 3rd March 2025 which is already on record be and is hereby deemed to be so properly on record with the leave of this Court.
 - (c) The Notice of Motion dated 3rd March 2025 is allowed. There shall be a stay of execution of the determination of the Interested Party and enforcement thereof on condition that the Applicant deposits the sum of Kshs. 650,000/- [Read: Kenya Shillings Six Hundred and Fifty Thousand Only] in Court within 21 days of this ruling and in default execution to issue.
 - (d) Costs of the applications and the objection shall be in the Appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF JULY, 2025.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Ms Muchocho, Learned Counsel for the Applicant.

Mr. Nyaga, Learned Counsel for the Respondent.

Amina/Abdirazak – Court Assistants.

