



**Council of County Governors v Kenya Tissue and Transplant Authority & 2 others;
Senate (Interested Party) (Petition E413 of 2022) [2025] KEHC 13141 (KLR)
(Constitutional and Human Rights) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13141 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E413 OF 2022
LN MUGAMBI, J
SEPTEMBER 25, 2025**

BETWEEN

COUNCIL OF COUNTY GOVERNORS PETITIONER

AND

KENYA TISSUE AND TRANSPLANT AUTHORITY 1ST RESPONDENT

CABINET SECRETARY MINISTRY OF HEALTH 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

THE SENATE INTERESTED PARTY

RULING

Introduction

1. By a Notice of Motion application dated 20th July 2023, the Respondents/Applicants herein seek Orders that:
 - i. Spent.
 - ii. The Court be pleased to grant an interim order for stay of execution of the Judgement delivered on 30th June, 2023, pending the hearing and determination of the application.
 - iii. The Court be pleased to grant leave to the Applicant to lodge an Appeal out of time against the Judgement of Justice Lawrence Mugambi delivered on 30th June, 2023 in Nairobi HCPT E413 of 2022.



- iv. The time limited for the Applicants to file and serve the Respondents with the Notice of Appeal be enlarged and/or extended to allow filing and service of the same within such a time as the Court deems fit.
- v. The Notice of Appeal dated 20th July, 2023 annexed herein be considered duly filed and directions for service issued.
- vi. There be no orders as to costs.

Applicants' Case

2. The Applicants through State Counsel, Dan Weche filed their Supporting Affidavit of even date.
3. He avers that this Court in its Judgment dated 30th June 2023, partially allowed the Petition in that despite there being public participation in the matter, there was no resolution in the first place to establish the 1st Respondent.
4. He depones that after release of the Judgment, the same was communicated to the Respondents so as to issue instructions on the way forward and whether an appeal was preferred. He avers that the Respondents being dissatisfied with the Judgment communicated on 20th July 2023 that an appeal be preferred.
5. He avers that this communication was received 5 days after the lapse of the statutory timelines for lodging a notice of appeal. He informs that he prepared the Notice of Appeal promptly on the same day being 20th July 2023.
6. He asserts that that the effect of the Judgment is to halt the operations of the 1st Respondent hence the intended appeal is meritorious and has a likelihood of success. For this reason, he argues that the Respondents should be granted an opportunity to pursue the appeal. Moreover, he contends that if the orders are not granted, the 1st Respondent's operations will be paralyzed and it will suffer irreparable harm.

Petitioner's Case

7. The Petitioner opposed the Applicants' application through the Replying Affidavit sworn on 24th August 2023 by its Chief Executive Officer, Mary Mwiti. She informs that the impugned Judgment was in the Petitioner's favour in respect of the Petition dated 17th August 2022.
8. She stated that the Respondents have come to Court with unclean hands and in bad faith because they never complied with the aforesaid Judgment. She states that the Respondents have continued to implement the impugned Executive Order and the 1st Respondent's usual operations, despite numerous correspondence from the Petitioner.
9. She avers that the Respondents' have not substantiated their claim by adducing evidence in regard to the communication by the 1st Respondent to the 3rd Respondent concerning the Judgment as alleged.
10. Equally, it was claimed that the Applicants have not bothered to explain the inordinate delay. In light of this, she argues that the Respondents have not made out a case to warrant this Court's discretion that allows the filing the notice of appeal out of time.
11. Equally, it is stated that the threshold for grant of a stay of execution has not been met. In that the Respondents have failed to demonstrate that there is an arguable appeal with a likelihood of success and the substantial loss they stand to suffer if the orders are not granted.



12. It is her postulation that allowing the application will have the effect of denying the Petitioner its right to enjoy the fruits of the Judgment as issued in their favour.
13. Likewise, it is argued that upholding the Application will stifle the operations of the County Governments due to allocation and diversion of resources from the County Governments to the Respondents who are unlawfully assuming devolved functions and that the continued operations of the 1st Respondent creates a duplication of functions and expenditures which is not a prudent use of public resources. Considering this, she argued that the Petitioner stands to be extremely prejudiced if the Application is allowed.

Applicants' Submissions

14. The Applicants through Dan Weche filed submissions dated 9th September 2024 where he identified only a single issue, that is: whether the Respondents' Application is merited.
15. Counsel submitted that the delay in filing the Notice of Appeal was reasonable. Counsel relied in Section 79G of the *Civil Procedure Act* which stipulates a 30-day period for filing the appeal. He however pointed out that an appeal may be admitted out of time if the appellant satisfies the Court that he had a good and sufficient cause for not filing the appeal in time.
16. Counsel stated that in this matter the delay was inadvertent, not inordinate. This is because of the late communication that was received from the 2nd Respondent stating that an appeal be preferred from the impugned Judgment. Counsel noted that the delay was extended by a week which is excusable considering the exigencies of their office in terms of its operations and day to day activities.
17. Counsel added that extension of time to file an appeal would not prejudice the Petitioner as the intended appeal raises issues of public importance which appeal is not only arguable but also has a high likelihood of success. On this premise, Counsel stressed that the Application satisfied the parameters set out by the Court of Appeal in *Edith Glchungu Koine v Stephen Njagi Thoithi (2014)eKLR* as follows:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public Importance, amongst others.”
18. Similar dependence was placed in *Phillip Keipto Chemwo/o & another V Augustine Kibende (1986) KLR 495* and *Banco Arabe Espanol V Bank of Uganda [1999] 2 EA 22*.
19. Counsel further emphasized that the Judgment had halted the operations and activities of the 1st Respondent which has since paralyzed all services relating to human cells, tissues and organ transplant through registration and licensing of facilities and establishments dealing with human cells, tissues and organs services as well as maintenance of a registry of transplant services providers, donors and recipients. Counsel submitted that this was problematic as in the recent times there have been numerous cases of organ trafficking and increased mortality rates owing to the lack of regulations governing these live saving products without which the intended recipients end up dying or suffering long term incapacities. On this basis, Counsel argued that the Respondents stand to suffer irreparable loss of protecting the lives of the people of Kenya.



20. On the flipside, Counsel argued that the Petitioner would not suffer any prejudice if the Application is allowed. Counsel relied in *Waljee's (Uganda) Ltd v Ranji Punjabhai Bugerere Tea Estates Ltd* (1971) EA 188, where it was held that:

“No prejudice would be so great that would not be adequately compensated for an award in costs if leave to file an appeal out of time was granted.”

Petitioner's (Respondent in Application) Submissions

21. On 27th June 2025, the Petitioner through its Counsel, Eugene N. Law filed submissions and underscored the issues for determination as: whether the Applicant has come to court with clean hands, whether the Applicant has demonstrated sufficient reason to warrant grant of leave to appeal out of time, whether the Application has met threshold for grant of a stay of execution pending appeal and whether there will be prejudice suffered by the Respondent if the extension is granted.
22. On the first issue, Counsel submitted that the Respondents had approached this Court with unclean hands as they have continued to implement the impugned Executive Order despite the Judgment which pronounced that the same is unconstitutional. Counsel submitted that it is trite law that he who seeks equity must do equity. In this case, it was stressed that the Respondents cannot seek indulgence of this Court while disregarding its authority. Reliance was placed in *Joseph Mwangi Gitundu v Gateway Insurance Co. Ltd* (Civil Suit No.244 of 2007) where it was held that:
- “It is worth to note that, when a party approaches the Court for relief, he must do so with clean hands. The contrary is true about the defendant and its defence.”
23. Counsel relying in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* (SC Application No. 16 of 2014) noted that the Supreme Court guided that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the Court and thus the party has to the burden of satisfying the Court of the same. Counsel submitted that the Respondents' had failed to discharge their burden of proof that the reasons for delay are justified. As such, it is argued that the delay is inordinate and inexcusable.
24. Reliance was placed in *MSA V KMKA* (Civil Application No. E123 of 2024) where it was held that:
- “Inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable.”
25. On the third issue, Counsel submitted that the Respondents had failed to demonstrate a prima facie case with a reasonable chance of success to warrant grant of a stay of execution. Counsel reiterated as stated that health services delivery is the mandate of County Governments yet the 1st Respondent was unlawfully established under the National Government to undertake the function of health services delivery in clear violation of *the Constitution*. Counsel reasoned that such a case has no chance of success at the Appellate level.
26. Counsel noted that it is not only sufficient to establish a prima facie case, one also has to show that the case is potentially arguable as held in *Kevin K.Mwiti V Kenya School of Law* (Constitutional Petition No. 377 of 2015). Counsel further argued that the Respondents would not suffer any loss as the 1st Respondent was already an illegal entity from the onset. Considering this, the Application is adjudged as an abuse of the Court process and an attempt to frustrate the enforcement of the issued Judgment.



27. On the last issue, Counsel submitted that the Judgment affirmed that the impugned Executive Order unlawfully usurps the functions of County governments. In light of this, it was argued that grant of the orders sought would result in the continued illegal usurpation of devolved functions contrary to the principles under Article 6.174 and 187 of *the Constitution*.
28. Reliance was placed in Mohammed Salim t/a Choice Butchery vs Nasserpuria Memon Jamat, Civil Appeal No.20 of 2013 where it was held that:
- “The right to appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgments delivered in its favour. There must be a just cause for depriving the plaintiff of that right.”
29. Consequently, Counsel argued that the Petitioner had a legitimate expectation that the Judgment rendered in its favour would be implemented without unnecessary delay.

Analysis and Determination

30. The twin issues for determination in this Application are:
- Whether this Court should:
- a. Extend the time for the appeal
 - b. Stay the execution of the Judgment of this Court pending the hearing of the intended appeal
31. It is trite law that extension of time to appeal out of time is a discretionary remedy which must be considered judiciously by the Court taking into account all the relevant factors and circumstances. In an application for extension of time, the Court must be satisfied that there are solid grounds in favour of granting such an order. Courts have held that time specification in litigation, especially appeals, is not just a simple procedural requirement but is intended to ensure expeditious justice as proclaimed by Article 159(2)(b) of *the Constitution* of Kenya, which provides that justice shall not be delayed.
32. Some of the key considerations by the Court, include examining the period of the delay and the reasons behind that delay. Further, whether the intended appeal for which extension is required is arguable and not merely frivolous or flippant. Further, the question of prejudice to the respondent should the application be granted.
33. In Nicholas Kiptoo Salat v Independent Electoral & Boundaries Commission and 7 Others (2014) eKLR; the Supreme Court set out the principles for extension of time as follows:
- “...This being the first case in which this Court is called upon to consider the principles for extension of time, we derive 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 party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; Whether there will be any prejudice suffered by the respondents if the extension is granted; 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...”



34. The Respondents deponed that they seek leave to file their Petition out of time because they were not able to lodge the same within the statutory time frame. Counsel explained that the 5-day delay was as a result of delay in receiving further instructions in the matter from the Respondents. It is discernible from the record that he filed this Application alongside the Notice of Appeal once instructions to appeal were received on the same day.
35. As guided by the above Supreme Court decision, the Court has the discretion extend time for lodging an Appeal where there are demonstrable reasons for such extension. In my view, the reason for the 5-day delay has reasonably been explained and is also evident that the instant Application and Notice of Appeal were filed promptly. While the Petitioner objected to the extension of time, it did not persuade this Court that it would suffer prejudice if leave is granted. I am thus inclined to allow the application for extension of time to appeal. The Respondent is thus granted 14 days within which to lodge the appeal failing which, that extension shall lapse.
36. In regard to stay of execution, *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides in Rule 32 as follows:
- 32: Stay pending appeal.
- (1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.
 - (2) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.
 - (3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.
37. The principles for grant of an order of stay of execution pending appeal were considered in *RWW vs EKW* [2019] KEHC 6523 (KLR) where the Court observed as follows:
- “ 8. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
 9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent...”
38. The Court went on to observe as follows:
- “ 10. I have proceeded to determine whether the conditions stipulated for grant of stay have been met. On whether the appellant will suffer substantial loss, I am reminded of the sentiments of Gikonyo J in *James Wangalwa & another v Agnes Naliaka Cheseto Misc Application No 42 of 2011* [2012] eKLR.
- No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial



loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process...

Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”

39. Equally, in *Jamii Bora Bank Limited & another v Samuel Wambugu Ndirangu* [2022] KEHC 1845 (KLR) the Court observed as follows:

“The principles upon which the court may stay the execution of orders... were enunciated in *Butt vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

- 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...”

40. Furthermore, the discretionary nature of this order was expounded on by the Court of Appeal in *Absalom Dova v Tarbo Transporters* [2013] eKLR as cited in *Al-Riaz International Ltd & another vs Munini* (2023) KEHC 22221 (KLR):

“...Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory... This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice. The Court of Appeal in *Absalom Dova v Tarbo Transporters* [2013] eKLR while enunciating this principle stated as follows: -“...The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”



41. For context, this Court in its impugned Judgment dated 30th June 2023- Council of County Governors v Kenya Tissue and Transplant Authority & 2 others; Senate (Interested Party) [2023] KEHC 21046 (KLR) held as follows:

“79. I agree with the submissions of the petitioner that section 80 expressly provides for the Minister to make the policy under the *Health Act* on the matters of organ and transplant facilities. On the other hand, the *State Corporations Act* is non-specific in regard to the subject matter, it is a general statute. The establishment of the 1st respondent under a general statute in disregard of this specific provision under the *Health Act* was ultra vires and unlawful. Parliament expressly provided that policy on the subject matter was to be made under the *Health Act*.

80. The upshot of the foregoing findings is that this petition succeeds.

81. The following reliefs are therefore granted:

1. A declaration is hereby issued that legal notice number 142 of 2022 on the establishment of Kenya Tissue and Transplant Authority Order 22 is unconstitutional for violating articles 6(2), 10, 187 and 189 and also legally defective for being ultra vires section 80 (3) of the *Health Act*.
2. An order of prohibition be and is hereby issued stopping implementation of legal notice number 142 of 2022 establishing the Kenya Tissue & Transplant Authority. This order however does not affect a past action that has already been undertaken by the said authority.
3. Each Party shall bear its own costs.”

42. The Respondents in the Application argued that granting an order of stay of execution is necessary because the 1st Respondent stands to suffer great prejudice as it will be impossible to undertake its operations. The Petitioner countered that the 1st Respondent has been found by this Court to have been unlawfully established and in any case, it is the Petitioner (County Governments) that are being prejudiced by continued existence of an illegally established entity of the National Government that has usurped their mandate to offer health care services which is a mandate of the County Governments.

43. For an order of stay of execution to be granted, one of the conditions to be fulfilled is that the intended appeal must be arguable. This Court, after a full hearing and careful scrutiny of arguments by all the sides was satisfied that the 1st Respondent is an unlawfully established entity. That position still remains.

44. The other significant question to answer is whether substantial loss will be occasioned to the Respondents if the order of stay is not granted. This requires balancing the interest of the Respondents and the Petitioner.

45. While the Respondents argued that the 1st Respondent’s essential operations will ground to a halt, This Court takes the firm view that no prejudice can be occasioned by stopping the operations of an unlawful and unconstitutional body that has been usurping the constitutional mandate of another. An order of stay of execution will only serve to facilitate the furtherance of illegality hence I decline to grant the same.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2025.

.....

L N MUGAMBI

JUDGE

