



Elen Properties Limited v Gaba Investment (K) Limited (Civil Appeal E160 of 2025) [2025] KEHC 14176 (KLR) (3 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14176 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E160 OF 2025**

G MUTAI, J

OCTOBER 3, 2025

BETWEEN

ELEN PROPERTIES LIMITED APPELLANT

AND

GABA INVESTMENT (K) LIMITED RESPONDENT

RULING

1. In a judgment delivered on 24th January 2025, the Court below found for the plaintiff (now the respondent) and against the defendant (now the appellant). The Court found that Kes.3,077,448.00 was due to the plaintiff on account of the unpaid contractual amount. The plaintiff was awarded the said amount together with interest at court rates from the date of filing of the suit until payment in full. The court also awarded costs.
2. The appellant was aggrieved by the said decision. Vide a notice of motion dated 26th May 2025, it sought to have the execution of the decree of the Court below stayed, pending the hearing of the application interpartes, and also pending the hearing and determination of the appeal it intends to file if the Court grants it leave to appeal out of time.
3. In the grounds in support of the motion as well as in the supporting affidavit sworn by Anthony Waithaka Ndungu, the managing director of the appellant, it was stated that the applicants lost touch with their previous advocates and that they learnt of the judgment when the bank reached out to them on account of a garnishee order nisi that had been served on them. The appellant blamed the non-prosecution of their defence on internal company wrangles. It was contended that the court below was wrong to hear and determine the matter in its absence and that the respondents were due to execute the judgment for Kes.5,338,800.78, which it termed as a colossal amount.



4. The appellant prayed that this court had the power under sections 79G and 95 of the *Civil Procedure Act* to enlarge the time for the filing of the appeal and that it would be in the interest of justice to do so in this case.
5. The draft memorandum of appeal is dated 26th May 2025. It proposes that the appeal be allowed, with the judgment dated 24th January 2025 being set aside, and for the appellant to be awarded the costs of the appeal.
6. The application is opposed. The respondent filed a replying affidavit, sworn by Joel Dan Owino, in which the deponent stated that, contrary to what was averred in the application, the matter was delayed in the court below due to the actions of the appellant, who frustrated the hearing by causing the matter to be adjourned on numerous occasions. Mr Owino deposed that the appellant/applicant's witness, one Margaret Muthoni Ndungu, testified, and that what never happened was her cross-examination. In the deponent's view, the lack of cross-examination was, in fact, prejudicial to the respondent, and not the appellant.
7. The respondent thus urged that the application be dismissed.
8. The appellant/applicant filed a supplementary affidavit sworn on 1st July 2025, vide which reiterated that it wasn't served and that the proposed appeal raised triable issues which ought to be determined on merit.
9. When the application was filed, this Court stayed the execution of the judgment of the Court below and directed that the application be canvassed by way of Written Submissions. I note that both parties complied, and on 3rd July 2025, this Court set down this matter for ruling on 3rd October 2025.
10. The submissions of the appellant are dated 1st July 2025. Vide the said submissions, the appellant/applicant identified the issues for determination as being whether the applicant had met the threshold for enlargement of time to file an appeal, whether the applicant is entitled to a stay of execution, and who should pay costs.
11. It was urged that under section 79G of the *Civil Procedure Act*, the Court had unfettered discretion to the extent of time which could be given upon consideration of the length of delay, reason for the delay, chances of appeal succeeding, and the degree of prejudice the respondent might suffer if the application is granted. It was argued that the delay was not unreasonable, as the applicant learned of the judgment on 23rd May 2025 and filed the memorandum of appeal on 27th May 2025. It sought to blame the delay on internal wrangles in the company. The applicant's counsel submitted that the appeal was arguable because it was denied the right to be heard. It was also submitted that the grant of orders sought wouldn't prejudice the respondent. On the competence of the appellant's counsel, it was submitted that Order 9 Rule 9 of the Civil Procedure Rules did not apply to appeals, as was determined by the Court of Appeal in the case of Tobias M Wafubwa v Bishop Ben Butali [2017]eKLR.
12. The respondent filed 3 sets of submissions dated 1st, 3rd, and 21st July 2025. I shall summarize their contents below.
13. The respondent's counsel submitted that the applicant's application was supported by an affidavit which was not properly attested and that there had been an improper change of advocates which contravened Order 9 Rule 9 of the Civil Procedure Rules.
14. On the substantive point, the respondent counsel denied that the applicant's right to a hearing had been denied, as it was represented by the firm of Okanga & Co. Advocates at all material times and



was served with all hearing notices, and that Margaret Muthoni Ndungu testified in chief but was not cross-examined as the witness was subsequently not available.

15. It was urged that the appeal was not arguable as the finding of the Court below was based on evidence on valuation and payment certificates raised by the quantity surveyor and architect under the express terms of the contract.
16. Counsel for the respondent submitted that no cogent reason for the delay was given, warranting this Court to exercise its discretion in favour of the applicant. Further counsel submitted that the application was only brought after execution was commenced, which evidenced bad faith on the part of the applicant.
17. In the submissions of 3rd July 2025, it was urged that the Court below properly considered the evidence. The proceedings had greatly prejudiced the respondent, who was being prevented from enjoying the fruits of a judgment in favour. It was submitted that the Notice of Motion dated 26th May 2025 lacked merit and should be dismissed. The submissions of 21st July 2025 stated that there was an existing garnishee order and that the whereabouts of the appellant/applicant were presently unknown. The said submissions reiterated that Margaret Muthoni Ndungu did indeed testify before the Court below, although the respondent was unable to cross-examine her due to her unavailability.
18. I have considered the application dated 26th May 2025, the response thereto, and the submissions of the parties. The issues, as I see them, are whether this Court should enlarge the time for filing the appeal, whether a stay of execution pending appeal should be granted, and who should bear the costs of the application.
19. Section 79G of the *Civil Procedure Act* provides that an appeal from the subordinate Court to the High Court shall be filed within 30 days of the date of the decree or order appealed against. The High Court is, however, given discretion to admit an appeal out of time if it is satisfied that there was a good and sufficient cause for not filing the appeal in time.
20. In the case of *Edith Gichunge Koine v Stephen Njagi Thoithi* [2014]eKLR, it was held that:-

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court, including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the Respondent if the application is granted, and whether the matter raises issues of public importance.”
21. Similar holding was made by the Court of Appeal in the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] KECA 201 (KLR), where it was stated as follows:-

“For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.
22. I have read the submissions of the parties. It would appear to me that, contrary to what the appellant/applicant has averred, the matter in the Court below proceeded with its substantial participation. It was



represented by counsel up to and including the time when its managing director, Margaret Ndungu, testified. There is no evidence that Mr Okanga & Co. ceased to represent the company. The explanation given for the delay, therefore, does not appear convincing to me.

23. The ruling of the Court was delivered on 24th January 2025. The applicant took 3 months to file the application. The said period is, in my view, inordinate and inexcusable.
24. Whereas the main concern of the Court is to do justice to the parties before it the discretion is intended to be exercised to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice (See *Shah v Mbogo* [1967] EA 116).
25. In the case of *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR Odunga, J, as he then was, stated that:-

“In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour, and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman v Cumarasamy* [1964] 3 All ER 933; *Savill v Southend Health Authority* [1995] 1 WLR 1254 at 1259.”
26. In my view, the applicant is motivated by a desire to delay the day of reckoning for as long as possible so as not to meet its commitments. I say so, as looking at the draft memorandum of appeal, it does not appear to me to be arguable.
27. In this case, I am unconvinced that there is a case for enlargement of time. The prayer for extension of time is thus dismissed. Having dismissed the said prayer, it follows that the application for a stay pending appeal is also denied.
28. That being so, the notice of motion dated 26th May 2025 is dismissed. The subsisting orders are hereby discharged.
29. Under section 27 of the [Civil Procedure Act](#), costs follow the event. I award the respondent the costs of the application.
30. Orders accordingly.

DATED AND SIGNED AT MOMBASA, THIS 3RD DAY OF OCTOBER 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Musungu, for the Appellant;

Mr Otieno, for the Respondent; and

Arthur - Court Assistant.

