

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC APPEAL NO. E035 OF 2025**

**JOHN NJOROGE MURAGE ..... APPELLANT/ APPLICANT**

**VERSUS**

**HARRISON GICHARU NG'ANG'A .....**

**RESPONDENT**

**RULING**

1. What is before me for determination is the Appellant's Notice of Motion dated 6<sup>th</sup> March 2025 seeking the following orders:

a) *Spent*

b) *Pending the hearing and determination of this application and the main appeal, the Honourable court be pleased to issue an order setting aside the ruling and consequential orders made on 27.02.2025 in the Magistrate's court at Thika (Hon. Yusuf Barasa Mukhula, SRM) in Thika CM ELC Case No. 7 of 2018).*

c) *Pending the hearing and determination of this application and the main appeal, the Honourable court be pleased to issue an order staying the proceedings in the Magistrate's court at Thika in Thika CM ELC Case No. 7 of 2018.*

d) *Pending the hearing and determination of this application and the main appeal, the Honourable court be pleased to issue an order staying the proceedings of*

*27.11.24 in the Magistrate's court at Thika in Thika CM ELC Case No. 7 of 2018.*

*e) Pending the hearing and determination of this application and the main appeal, an order do issue granting leave to the Appellant/Applicant for the documents filed on 2<sup>nd</sup> June 2023 being the Certificate of Lease and the Draft Map to be relied on at the trial.*

*f) Costs of this application be provided for.*

2. The application is anchored on the grounds set out on the face of the Notice of Motion and the Appellant's supporting affidavit sworn on 6<sup>th</sup> March 2025.
3. The gist of the application is that on 27.02.25 the trial magistrate delivered a ruling in Thika CMELC Case No. 78 of 2028 in which he dismissed the Applicant's application seeking to set aside the proceedings of 27.11.24 due a mistake on the face of the record. The application also sought leave for the documents filed on 2.6.23 being the Certificate of Lease and the draft map to be relied on at the trial.
4. The Applicant deposes that in his ruling the learned trial magistrate failed to appreciate the fact that the Applicant had filed his documents on 2.6.23 but when the matter came up for hearing, his documents could not be traced in the court file. He termed this an error apparent on the face of the record.

5. The Applicant further avers that the learned trial magistrate failed to appreciate that learned counsel for the Respondent had been served with the said documents on 2.6.23 through his email address, a fact he alleged was concealed during the hearing. He annexed a copy of the correspondence email to the said counsel.
6. He added that the trial learned magistrate issued adverse orders which were final in nature without according him a right to be heard and proceeded to give directions on the filing of written submissions. He is therefore apprehensive that if the orders are not set aside, his constitutional rights will be violated and an adverse judgement will be rendered against him.
7. The application was opposed by the Respondent through his Replying affidavit sworn on the 11<sup>th</sup> March 2025. He avers that on 24.5.23 the Applicant was granted leave to file further documents within 14 days failing which the said documents would be disregarded.
8. It is the Respondent's position that although the Applicant alleges to have filed his documents on 2.6.23, he has failed to demonstrate that he paid for them. He is of the view that forwarding documents to the court's email address without paying for them does not amount filing them.
9. The Respondent further deposes that the Applicant fully participated in the proceedings until he closed his case and that the application

was filed as an afterthought in order to delay the finalization of the case. He urged the court to dismiss the application with costs.

10. In response to the Replying Affidavit, the Applicant filed a Supplementary Affidavit sworn on 7<sup>th</sup> May 2025 in which he clarifies that he was not required to pay any fees when he filed the further documents on 2.6.23 as the Registry never raised any fee.
11. He also pointed out that counsel for the Respondent failed to disclose to the court that he had been served with the said documents and he should not be allowed to benefit from his concealment of material facts.
12. He contended that a court ought to have all relevant information or materials placed before it so that it can make an informed and fair decision.
13. The application was canvassed by way of written submissions and both parties complied by filing their submissions which I have considered in arriving at my decision.

### **ANALYSIS AND DETERMINATION**

14. The main issue for determination is whether the orders made by the trial magistrate on 27.2.25 ought to be set aside and whether the proceedings in Thika CMELC Case No. 78 of 2018 should be stayed pending the hearing and determination of the appeal herein.

15. Learned counsel for the Applicant has submitted that by failing to consider the documents filed by the Applicant on 2.6.23, the Applicant was condemned unheard. He relied on the case of **Equity Bank Limited v Wafukho & another (20240 KEHC 11927 (KLR))** where the court relied on the case of **Shailesh Patel Energy Company of East Africa v Kessels Engineering Works Pvt Limited & 2 Others (2014) KEHC 3551 (KLR)** and **Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission, Ishmael Hashimi, Mathew Kipeme Lempurke (2013) KECA 282 (KLR)** where the court held that expunging the Appellant's witness statements and documents without considering the reason for the delay in filing the same would impede his right to a fair hearing.
16. Counsel argued that failing to consider the Applicant's documents would amount to a violation of his right to a fair hearing which is guaranteed under Article 50 of the Constitution. He termed expunging the said documents from the record an error on the face of the record and submitted that the court had the power to review its decision under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.
17. With regard to the issue of stay of proceedings, counsel relied on the case of **Global Tours and Travels limited Nairobi HC Winding Up Cause No. 43 of 2000** for the proposition that the court ought

to weigh the pros and cons of granting or not granting an application for stay of proceedings.

18. On the other hand, learned for the Respondent submitted that the Applicant had failed to demonstrate that he paid for the additional documents he filed in court via email. It was his submission that section 96 of the Civil Procedure Act gives the court power to allow late payment of court fees for any document filed. He relied on the case of **Mombasa Cement Ltd v Speaker of the National Assembly & Another (20180 eKLR** where the court struck out the suit for failure to pay the requisite court filing fees.
19. With regard to review, counsel submitted that the application has not met the threshold for review on the ground that there is an error apparent on the face of the record. He faulted the Applicant for failing to annex a copy of the order appealed from. He was of the view that the Applicant was seeking to reopen the application for fresh hearing which would delay the matter further. He relied on the case of **Evan Bwire v Andrew Aginda Civil Appeal No. 147 of 2006** cited in the case of **Stephen Githua Kimani v Nancy Wanjira Wariungi T/A Providence Auctioneers (2016) eKLR** where the Court of Appeal held that an application for review could only be allowed on strong grounds particularly if its effect was to reopen the application or case afresh.

20. It was counsel's conclusion that the Applicant had not demonstrated sufficient grounds to warrant a review either on the grounds that there was an error apparent on the face of the record or that there was discovery of a new and important matter.
21. The gist of the Applicant's appeal is for the court to determine whether the trial magistrate erred in disallowing the documents filed by the Applicant on 2.6.23.
22. By asking this court to set aside or review those orders, the court is being invited to determine the appeal at an interlocutory stage, which means that there would be nothing left for the court to determine in the appeal. On that ground alone, I disallow the prayer for setting aside of the orders issued on 27.2.25.
23. Turning to the question of stay of proceedings, it is trite that the court has a discretion to stay proceedings although the discretion must be exercised judiciously within the confines of the law and established principles.
24. The principles for stay of proceedings pending appeal were set out in the case of ***William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others [2019] eKLR as follows:***

- a. *“First, there must be an appeal pending before the higher Court;*
- b. *Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;*
- c. *Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;*
- d. *Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;*
- e. *Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and*
- f. *Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay”.*

25. Further in the case of the case of **Global Tours and Travel Limited, Nairobi HC Winding Up Cause No. 43 of 2000**, the court held that:

*“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”*

26. In the instant case, the Applicant has complained that the documents filed on 2.6.23 were disallowed by the court despite the fact that they were filed on time. He argues that in the absence of these crucial documents, he is likely to suffer serious prejudice as adverse orders may be made against him.
27. When the suit in the lower court came up for hearing on 27.1.24 counsel for the Applicant made an oral application to file and serve additional documents. The court disallowed the application on the grounds that the Applicant had been granted leave to file his

documents within 14 days on 24.5.23 but he failed to do so. The Applicant then filed an application dated 5.12.24 to set aside the orders of 27.11.24 but on 27.2.25 the court delivered a ruling dismissing the Applicant's application.

28. What emerges is that the documents sought to be relied on by the Applicant had been filed in court via an email sent to the court but no filing fees was paid as the court did not notify the Applicant's counsel of the same. Furthermore, when the matter came up for hearing on 27.11.24 the said documents were missing from the court file.
29. The Applicant has faulted the trial court for disallowing the documents filed by the Applicant. The Applicants has argued that the said documents will assist the court arrive at an informed and just decision and locking them out would be tantamount to condemning the Applicant unheard.
30. It would appear that the documents were forwarded to court through the court's email address but the Applicant's counsel was never notified of the filing fees payable. Additionally, when the matter came up for hearing the said documents could not be traced in the court file. From the above explanation, the Applicant was not wholly to blame for the turn of events and his appeal is therefore arguable. Allowing the case in the lower court to proceed by having the parties file their final submissions would render the appeal nugatory. I note

that this application was filed expeditiously after the dismissal of the application by the lower court.

31. For the above reasons, I am persuaded that this is one of the instances where

the justice of the case dictates that the proceeding of the lower court be stayed pending the hearing and determination of the appeal.

32. Consequently, the application is granted and the proceedings in Thika CMELC Case No. 78 of 2018 are hereby stayed pending the hearing and determination of the appeal herein. In order to expedite the appeal, the Record of Appeal shall be filed within 30 days.

33. The costs of the application shall abide the outcome of the appeal.

**Dated, signed and delivered virtually at Thika this 16th day of October 2025.**

.....  
**J. M ONYANGO**  
**JUDGE**

**In the presence of:**

1. Mwabu for Mr Abdullahi for the Appellant
2. No appearance for the Respondent

Court Assistant: Hinga

ORIGINAL