

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELCL MISC NO. E068 OF 2025

PATRICK MUSYOKA KING'OO.....
APPLICANT

VERSUS

MWAURA NYAMBURA

(Estate of Nyambura Kinyanjui Kinoo)

.....RESPONDENT

RULING

1. By a notice of motion dated 27.05.2025 the applicant sought an extension of time to file his intended appeal out of time. The second order sought was a stay of execution of the judgment of the Business Premises Rent Tribunal (*the Tribunal*) dated 06.10.2023 pending the hearing and determination of the intended appeal. The third prayer was an order for costs of the application to be provided for.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the applicant, Patrick Musyoka King'oo, on even date and his further affidavit sworn on 01.07.2025. The applicant pleaded that his earlier application dated 14.11.2023 for similar orders was struck out by the High Court on jurisdictional grounds on

15.05.2025 thereby necessitating the instant application. It was his case that he was still a tenant in the demised premises and that there was a risk of execution of the tribunal's judgment in the absence of a stay of execution pending appeal.

3. The respondent filed a replying affidavit sworn by James Mwaura Nyambura on 13.06.2025 in opposition to the application. It was pleaded that the application was baseless and an abuse of the court process. It was contended that the applicant had filed a similar application before the High Court which was struck out hence the instant application was a second bite at the cherry.
4. It was also the respondent's case that the applicant had failed to pay his rent for a long time and was in heavy rent arrears amounting to Kshs.630,000/=. In his further affidavit, the applicant conceded that he owned Kshs. 400,000/= only and disputed the balance.
5. When the application was listed for directions it was directed that it shall be canvassed through written submissions only. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the applicant filed written submissions dated 03.07.2025 whereas the respondent's submissions were dated 07.07.2025.

6. The court has considered the notice of motion dated 27.05.2025, the replying affidavit in opposition thereto as well as the applicant's further affidavit. The court is of the view that the following are the key issues which arise for determination herein;

a) *Whether the applicant is entitled to an extension of the time to lodge his intended appeal out of time.*

b) *Whether the applicant has made out a case for the grant of a stay pending appeal.*

c) *Who shall bear the costs of the application.*

7. Section 79G of the Civil Procedure Act (Cap 21) on extension of time for lodging an appeal states 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 to the appellant 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.”

8. The factors to be considered in such applications were summarized in the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi [1999] 2EA 231* as follows;

“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."

9. The material on record shows that the Tribunal delivered its decision on 06.10.2023 whereas the applicant lodged his earlier application for extension of time on or about 14.11.2023. The initial delay was just slightly over one month and the explanation for the delay was that the applicant obtained a copy of the Tribunal's decision late hence he was unable to lodge an appeal within the prescribed period.
10. The court finds that the delay of about one month was not inordinate and the explanation for the delay is reasonable. The court notes that the parties were litigating before the High Court until 15.05.2025 when the first application was struck out. It is also evident that upon such striking out the applicant moved the court expeditiously by filing the instant application on or about 27.05.2025. The court finds that the delay of about 2 weeks was not inordinate since some time was required to draw and engross the second application for filing. The court does not find that the

respondent has suffered any prejudice which cannot be compensated by an award of costs. As such, the court is inclined to grant the applicant an extension of time within which to lodge his appeal subject to payment of the undisputed rent arrears.

11. The court has considered the issue of stay pending appeal. The material on record shows that the applicant is still in possession of the demised premises on which he has been operating his business. The judgment of the Tribunal allowed the termination of his tenancy and consequent eviction. The court is satisfied that the application for stay was filed without inordinate delay and that he stands to suffer substantial loss in the absence of a stay. In the event, the court is inclined to order a stay of execution of the judgement of the Tribunal subject to the applicant depositing the disputed amount of Kshs. 230,000 in court.
12. On the issue of costs, the court is of the view that the applicant is liable to bear costs of the application since he is the one who sought the indulgence of the court after failing to lodge his intended appeal within the prescribed period. As such, the expenses incurred by the respondent to defend the applicant ought to be borne by the applicant.

13. The upshot of the foregoing is that the court finds and holds that the applicant has made out a case for the grant of the orders sought in the application. Consequently, the notice of motion dated 27.05.2025 is hereby allowed in the following terms;

a) Leave is hereby granted to the applicant to lodge his intended appeal out of time subject to his payment of the undisputed rent arrears in the sum of Kshs.400,000/= within 21 days from the date hereof in default of which the leave shall lapse.

b) There shall be a stay of execution of the judgment of the Tribunal in Mombasa Tribunal Case No. E016 of 2021 pending the hearing and determination of the intended appeal subject to the applicant depositing the disputed amount of Kshs 230,000/= in court within 21 days from the date hereof, in default of which the stay shall lapse.

c) The respondent is hereby awarded costs of the application to be borne by the applicant.

d) Mention on 24.02.2026 for further orders or directions.

Orders accordingly.

Ruling dated and signed at Mombasa and delivered virtually via Microsoft Teams on this **13th day of November, 2025.**

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**Y. M. ANGIMA
JUDGE**

In the presence

Gillian - Court Assistant

No appearance for the applicant

Mr. Muhuni for the respondent

ORIGINAL