Muriuki v Muthama (Environment and Land Miscellaneous Application E057 of 2025) [2026] KEELC 636 (KLR) (4 February 2026) (Ruling)

Neutral citation: [2026] KEELC 636 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E057 OF 2025

JO MBOYA, J

FEBRUARY 4, 2026

BETWEEN

EMILIO MURIITHI MURIUKI ..... APPLICANT

AND

JOSEPH MUTHURI MUTHAMA ..... RESPONDENT

RULING

1. Before me is the Notice of Motion Application dated 08.12.2025; brought pursuant to the provisions of Sections 1A, 1B, 3A and 79G of the *Civil Procedure Act*; Section 15 [1] of the Landlord and Tenant [shops, hotels and catering establishment] Act; and Order 42 Rule 6 of the Civil Procedure Rules and wherein the Applicant has sought the following reliefs:

    i. That this application be certified as urgent and heard ex-parte in the first instance.

    ii. That the applicant be granted leave to appeal out of time against the orders to the Honourable Patrick Kitur issued on the 28th April in Meru BPRT case No. E023 of 2025 [Joseph Murithii Muriuki].

    iii. That upon grant of the leave to appeal out of time, the memorandum of Appeal be deemed as duly filed upon payment of the requisite fees.

    iv. That the Honourable court be please to grant an order of stay of execution of the orders issued on 28th April, 2025 in Meru BPRT case no. E023 of 2026 [Joseph Muthuri Muthamia Versus Emilio Murithii Muriuki] pending the hearing and determination of this application inter-parties.

    v. That the Honourable court be pleased to grant an order of stay of execution of the orders issued on 28th April 20205 in Meru BPRT case number E023 of 2025 [Joseph Muthuri Muthamia

Versus Emilio Murithii Muriuki] pending the hearing and determination of the Applicant's intended appeal.

vi. That costs be provided for.

2. The instant application is premised on various grounds which have been highlighted in the body thereof. In particular, the applicant has contended that same entered into a lease/tenancy agreement with the respondent; the tenancy agreement related to and concerned business premises; the respondent purported to have issued and served a notice to terminate tenancy; the notice to terminate tenancy was however, never served; the respondent moved to the business premises rent tribunal and procured orders; the orders were obtained exparte; and the applicant is now exposed to eviction.

3. Additionally, the applicant has posited that upon coming to know of the orders of the tribunal issued on the 28/04/2025, same mounted an application before the tribunal; the application was heard and disposed of vide ruling delivered on 18.11.2025; the application was dismissed.

4. Arising from the dismissal of the application vide ruling delivered on 18.11.2025, the applicant contends that same is exposed to eviction; the applicant now seeks to procure leave to appeal against the orders made on 28.04.2025. Consequently, the applicant posits that a basis has been laid to warrant the grant of leave to appeal out of time. The court has been implored to grant leave to appeal and to decree stay of execution pending the filing of [sic] the intended appeal.

5. The application is supported by the affidavit Emilio Muriithii Muriuki [the applicant] sworn on even date and wherein the deponent has reiterated the grounds contained in the body of the application. Moreover, the deponent has annexed assorted documents including a copy of the order issued by the tribunal on the 28.04.2025; copy of the application that was dismissed vide ruling delivered on the 18.11.2025; and a copy the draft memorandum of appeal.

6. The application under reference was duly served upon the respondent. In addition, an affidavit of service has been filed. Nevertheless, the respondent herein has neither filed nor served any response to the application. In any event, learned counsel for the respondent conceded that same had not filed any response.

7. The application came up for hearing on the 04.02.2026, whereupon the court directed that the application be heard and disposed of way of oral submissions. Moreover, the court directed that the respondent shall be at liberty to respond to the application, albeit on issues/points of law only.

8. Learned counsel for the applicant adopted the grounds at the foot of the application; reiterated the contents of the supporting affidavit and thereafter highlighted four [4] issues for consideration. Firstly, learned has submitted that the application was duly served upon the respondent and an affidavit of service has been duly filed. Nevertheless, it was contended that despite service, the respondent has neither filed a replying affidavit nor grounds of opposition to the subject application.

9. Arising from the fact that the respondent has neither filed nor served any response, learned counsel for the applicant submitted that the application is therefore unopposed and hence same ought to be allowed. To this end, the court was invited to treat the application as unopposed and thereafter automatically grant the orders sought.

10. Secondly, learned counsel for the applicant has submitted that the respondent herein took out the notice to terminate the tenancy and thereafter purported to have served same. However, it was submitted that the applicant was never served and hence the orders that were obtained before the tribunal were obtained without service. In this regard, it was submitted that the orders now sought to be appealed against were irregular, unlawful and illegal.

11. Thirdly, learned counsel for the applicant has submitted that the applicant lodged an application seeking to set aside the exparte orders issued on the 28.04.2025, but the application under reference was dismissed. To this end, it was posited that the application is now exposed to eviction on the basis of illegal orders. In this regard, it has been contended that the intended appeal has overwhelming chances of success.

12. Lastly, learned counsel for the applicant has submitted that the applicant has duly explained the delay pertaining to the failure to file the intended appeal within time. In particular, it has been submitted that the applicant was not aware of the impugned order[s] in the first instance. Moreover, it has been submitted that upon the applicant learning of the impugned orders, same [applicant] instructed an advocate to file an appeal but same failed to do so.

13. On the other hand, learned counsel has submitted that the applicant herein also proceeded to and filed an application for review of the exparte orders of the tribunal. Furthermore, it has been contended that by the time the application for review was heard and disposed of, the time for filing an appeal against the exparte orders had lapsed.

14. In the premises, the counsel has submitted that the applicant has duly accounted for the delay and thus the applicant is deserving of the equitable discretion of the court. Furthermore, learned counsel for the applicant invited the attention of the court to paragraph 9 of the supporting affidavit as the basis for the exercise of discretion.

15. Responding to a question from court as to whether a failure to file a response to the application denotes that the application must be allowed, learned counsel contended that where an application is not opposed, then the court is duty bound to grant the prayers sought. If I heard the learned counsel correctly, same posited that where an application is not opposed the applicant is automatically entitled to the reliefs sought.

16. As pertains to whether, the court has jurisdiction to grant an order of stay of execution pending the filing of an intended appeal, learned counsel submitted that the court has the requisite jurisdiction. However, learned counsel for the applicant was at pains to internalize the provisions of Order 42 Rules 6[1] of the Civil Procedure Rules, which speak to the existence of an appeal before the court can engage with an application for stay.

17. Next was the issue as to whether this court can grant leave to appeal against an order which has since been subsumed vide a subsequent order, namely; the ruling of 18.11.2025. To this end, learned counsel contended that the original orders, which were the subject of the review application, remain in existence and thus same are appealable. Simply put, learned counsel posited that where an application for review was mounted and thereafter dismissed, the applicant can choose to revert back to the original orders and prefer an appeal.

18. The last issue that was raised with learned counsel for applicant touched on and concerned whether leave to appeal does issue as a matter of right or whether the applicant must lay a basis for grant of such leave. In answer to this question, learned counsel submitted that leave is not a right of a party. Furthermore, learned counsel submitted that the applicant has indeed accounted for the delay and thus established a basis to warrant the grant of leave to appeal.

19. Flowing from the foregoing, learned counsel for the applicant invited the court to find and hold that the factual deposition[s] by the applicant have not been controverted and thus the court should proceed to exercise its discretion in favour of the applicant. Simply put, learned counsel posited that the application is merited.

20. Learned counsel for the respondent appropriated the leave granted by the court to respond to issues of law and submitted that even where and application has not been opposed, the court is still enjoined to review the application and consider the applicable law. In particular, learned counsel submitted that the court retains a discretion.

21. Secondly, learned counsel for the respondent submitted that the court has no jurisdiction to grant an order of stay pending an appeal or an intended appeal, where no appeal has been filed. For good measure, Learned counsel for the respondent has posited that the provisions of order 42 rule 6[1] of the civil procedure rules envisage the existence of an appeal beforehand before this court can engage with an application for stay of Execution pending the hearing of the Appeal.

22. Lastly, learned counsel for the respondent has submitted that the applicant has neither accounted for nor explained the delay to file the subject application timeously. Moreover, it has been submitted that no basis has been deponed to in the affidavit.

23. Arising from the foregoing, learned counsel for the respondent has implored the court to find and hold that the application beforehand is meritless and thus deserves to be dismissed.

24. Having reviewed the application; the supporting affidavit thereto and upon taking into account the oral submissions by/on behalf of the parties, I come to the conclusion that the determination of the subject application turns on four [4] key issues. The issues are: Whether an application which has not been opposed must be automatically allowed by the court or otherwise; whether the court has jurisdiction to grant an order of stay of execution pending an appeal or an intended appeal or otherwise; whether the court can grant leave to appeal against an order of the tribunal which was the subject of a previous application for review and which application was dismissed; and whether the applicant has established a basis to warrant the grant of leave to appeal [if at all].

25. Regarding the first issue, it is important to observe that where a party is served with an application, it behooves the adverse party, in this case, the respondent to file the requisite responses thereto. Suffice it to state that it is at the discretion of the respondent to choose whether to file a replying affidavit; grounds of opposition; or notice of preliminary objection. Furthermore, there is no gainsaying that the respondent can choose to file all of the aforementioned documents. [See the provisions of Order 51 Rule 14 And 15 of the Civil Procedure Rules]

26. However, where the respondent fails to file a response, the fact that the respondent has not responded to the application does not automatically mean that the respondent has no right of audience before the court. On the contrary, such a respondent will be at liberty to address and canvass points of law. In any event, it suffices to state that a court of law cannot deny a respondent a right of audience on the face of Article 50 [1] of *the Constitution* 2010.

27. Additionally, it is important to highlight that where an application has not been responded to, it does not mean that such application must automatically succeed. For good measure, a court of law is still enjoined to consider the application; review the law and to apply its mind to the issues in play. Notably, the court still retains the discretion whether to allow or dismiss the application subject to the applicable law.

28. In the case Konchellah v Sunkuli & 2 others [2018] KESC 58 (KLR) the Supreme Court [the apex Court] considered a similar situation and rendered itself thus:

    10. "Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of cause grant the sought orders. It behooves the Court to be satisfied that

prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter.We see no such jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this Court."

29. In my humble view, the submissions by learned counsel for the applicant that the where an application is not opposed, such an application must automatically be allowed, is based on misapprehension of the law. Simply put, the contention is clearly misconceived.

30. The next issue for consideration is whether the court is seized of jurisdiction to grant an order of stay of execution pending an appeal or intended appeal where no appeal has been filed. Learned for the applicant conceded that same has not filed an appeal as of yet. Moreover, it was submitted that the applicant is before the court seeking inter alia, leave to file an appeal.

31. Despite the fact the no appeal has been filed, learned counsel for applicant contended that the court is still seized of jurisdiction to grant an order of stay of execution [sic] pending the filing of the intended appeal.

32. It is imperative to highlight that this Honourable Court can grant an order of stay of execution only in accordance with the provisions of Order 42 Rule 6[1] And [2] of The Civil Procedure Rules. Instructively, the said provisions highlight the existence of an appeal, which becomes the foundation [fulcrum] upon which the application for stay is mounted.

33. For ease of reference, it is important to reproduce the provisions of order 42 rule 6 [1] and [2] of the Civil Procedure Rules [supra]:

34. Same are reproduced as hereunder

    1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

    (2) 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. [Emphasis Supplied].

35. My understanding of the foregoing provisions is to the effect that no appeal or second appeal shall operate as an order of stay. Nevertheless, the court appeal from or court appealed to, is bestowed with

discretion to grant an order of stay pending appeal subject to sufficient cause being shown and provided that the applicant has demonstrated a likelihood of substantial loss occurring.

36. It is important to point out that the existence of an appeal is a critical ingredient and same provides the foundation upon which the application for stay of execution is to be entertained. Be that as it may, it is important to clarify that the for purposes of an appeal to the court of appeal a notice of appeal is deemed to constitute an appeal. [See order 42 rule 6 [4] of the civil procedure rules.]

37. Nevertheless, it is instructive to underscore that before this court, there is nothing called or termed as an intended appeal. For good measure, there is either an appeal that has been mounted in accordance with the provision of order 42 rule 1 of the civil procedure rules, as read together with Section 79G of the *Civil Procedure Act*; or Nothing.

38. To my mind, the applicant herein has no appeal and hence same cannot approach this court in an endeavor to procure an order of stay of execution pending the hearing of [sic] a non-existent appeal. Simply put, the application by the applicant has been mounted in vacuum.

39. I beg to reiterate that this court can only engage with an application for stay of execution pending appeal within the appeal itself and not otherwise. This position was highlighted by the court of appeal in the case of Equity Bank Limited v West Link Mbo Limited [2013] KECA 320 [KLR] where the court [per Githinji , JA] stated thus:

> As a general principle of law an appeal being a totally distinct proceeding from the original or appellate proceedings appealed from, the institution of an appeal does not operate as a bar to execution of a sentence in criminal matters or execution of decree, in civil matters unless otherwise expressly so provided. Order 42 Rule 6 (1) C.P. Rules restates that principle and proceeds to give the court appealed from jurisdiction to grant a stay of execution in case of an appeal That Rule provides in part:-
>
> 6 (1)
>
> "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused, by the court appealed from, the court to which, such an appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just ,....."

Rule 6 (4) of Order 42 provides:

> " 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."

40. The Court of Appeal proceeded further [per Kiage JA] and stated as hereunder:

> Having carefully read the said Ruling, I find myself fortified post facto, in the reasoning I have followed and the conclusions I have reached hereinabove. I will only state that the Supreme Court's emphatic declaration of its jurisdiction to hear and grant orders of stay of execution pending appeal casts our own jurisdiction, which is spelt out more clearly and expressly in the Statute and Rules, well beyond successful disputation. Without rehashing what the Supreme Court had to say on the matter, I find the following passages and eventual holdings to be germane and worthy of reproduction;

> "...the Court, in its exercise of discretion, may consider the convenience of interlocutory orders within the context of the appeal itself. Interlocutory reliefs, in this respect, may be apposite by ensuring that the appeal is not rendered nugatory and this not only serves the cause of fairness in dispute settlement, but also ensures that the ultimate decision of the court bears the intended constitutional authority." [emphasis added]

41. Simply put, the jurisdiction to entertain or adjudicate upon an application for stay can only be engaged with within the context of the existing appeal itself. It cannot be engaged with where there is no appeal or notice of appeal, for purposes of the court of appeal.

42. Next is the issue of the whether this court has jurisdiction to grant leave to appeal against an order issued by the tribunal and which was the subject of an application for review; and which application for review has been dismissed. To start with, it is important to underscore that the applicant herein was aggrieved by the orders of the tribunal rendered on the 28.04.2025 and thereafter same filed the application dated 08.05.2025 seeking inter allia review of the impugned orders.

43. The applicant posits that the application dated 08.05.2025 was indeed heard and thereafter determined vide ruling rendered on the 18.11.2025 and whereby the application was dismissed. Suffices it to state that the applicant herein chose to and indeed exercised his right of review in accordance with the provisions of Section 12 of the Landlord and Tenant [Shops, Hotels, Catering Establishments] Act and order 45 of the Civil procedure rules.

44. The question that does arise and which begs an answer is whether a party who has since exercised his/her right of review as against a particular order/decree can ex post facto seek to mount an appeal subsequent to the dismissal of the application for review?

45. The answer to this question is found in the holding of Court of Appeal in the case of Paul Misori Orago v City Council of Nairobi [2017] KECA 645 (KLR) where the court stated thus:

> But can a party who has unsuccessfully pursued review of judgment be allowed to lodge an appeal against same judgment? We think not and it is indeed undesirable Instead, should he be unhappy with the outcome of the review, the recourse available to him is an appeal against the ruling on review (see Ryce Motors Limited v Jonathan Kiprono Ruto & Another [2016] eKLR; which cemented the proposition that an appeal may lie against a ruling on review. As a result, and in view of the judgment herein having been reviewed, the appellant's right of appeal against the judgment was extinguished or spent.

46. I am afraid that where a party has previously exercised the right of review, same cannot thereafter seek to appeal against the same order or decree, which was the subject of review. It behooves a party to choose whether to pursue review or an appeal. Instructively, a party cannot pursue both and any endeavor to do so constitutes an abuse of the due process of the court.

47. Without belaboring the point, I come to the conclusion that this court is divested of the requisite jurisdiction to engage with the application for leave to file an appeal against the orders of the tribunal issued on the 28.04.2025. In this regard, the application is premature, misconceived and stillborn.

48. Turning to the last issue, namely; whether the applicant has established a basis to warrant the grant of leave to appeal out of time or otherwise, I beg to highlight the position that leave to appeal does not issue as of right. Moreover, a person who seeks the exercise of discretion in his/her favour is obligated to explain the reasons for delay; accounts for the duration of delay; and demonstrate that the intended appeal [for which leave is sought] is prima facie arguable.

49. Regarding the subject matter, I am afraid that the applicant herein has neither accounted for the delay between the 28.04.2025 and the 08.12.2025 when the subject application was filed. The duration under reference amounts to more than eight months. The duration is not only unreasonable but inordinate. To this end, it suffice[s] to invoke the doctrine of Laches.

50. The law as pertains to exercise of discretion to extend time for filing an appeal, [if any] is now well settled. The Supreme Court in the case of County Executive Of Kisumu V County Government Of Kisumu & 8 OtherS [2017] KESC 16 (KLR): highlighted the applicable principles thus:

> "It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as:the under-lying principles that a Court should consider in exercise of such discretion:
>
> 1. 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;
> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
> 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
> 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
> 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
> 6. Whether the application has been brought without undue delay; and
> 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

51. To my mind, the applicant herein has not accounted for the delay. Moreover, the contents of the supporting affidavit comprise of an unsubstantiated averments. Same are devoid of any probative value and hence unhelpful. Furthermore, there is no gainsaying that the intended appeal [for which leave is sought] shall be dead before arrival. It will therefore be an act in futility; and vanity to grant leave to appeal in the first place.

Final Disposition

52. Flowing from the analysis in the body of the ruling, it must have become apparent that the application beforehand is misconceived, premature, legally untenable and stillborn. Same is therefore a sure candidate for dismissal.

53. In the upshot, the final orders that commend themselves to the court are as hereunder:

    i. The Application dated 08.12.2025 be and is hereby dismissed.

    ii. Each party shall bear own costs of application.

54. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 04TH DAY OF FEBRUARY, 2026

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Hussein – Court Assistant

Ms. Mukami for the Applicant

Ms. Mkarye for Respondent