Musila v Mwinzi t/a Mwinzi and Associates Advocates & 2 others (Environment and Land Appeal E259 of 2025) [2026] KEELC 2147 (KLR) (15 April 2026) (Ruling)

Neutral citation: [2026] KEELC 2147 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E259 OF 2025

JG KEMEI, J

APRIL 15, 2026

BETWEEN

DAVID MUSILA ..... APPLICANT

AND

NZUKI MWINZI T/A MWINZI AND ASSOCIATES ADVOCATES .... 1ST RESPONDENT

ANGELINE MBULI MAUNDU T/A MICHANAH GLORY INSURANCE AGENCY ..... 2ND RESPONDENT

BERNARD KAVEKE ..... 3RD RESPONDENT

RULING

(In respect of the Appellant/ Applicant's Application dated 3/12/2025)

1. This determination is in respect of the Appellant's application dated 3/12/2025. The application is expressed to be brought Sections 13(1), 13(4) and 19 of the Environment and *Land Act*, Sections 1A, 1B, 3A, 79G and 95 of the *Civil Procedure Act*, Section 15(1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* and Order 42 Rule 6, Order 50 Rule 6 of the Civil Procedure Rules seeking for orders that;

    a. Pending the hearing and determination of this appeal, a stay of execution be and is hereby issued, staying the execution of the Ruling of the Business Premises Rent Tribunal dated 15/8/2025 in BPRT No. E045 of 2025, together with any consequential orders therein.

    b. The Honourable Court be pleased to extend the time for filing the present appeal and that the Appellant/Applicant's Memorandum of Appeal dated 2/12/2025 be admitted for hearing.

    c. The Ruling and orders given by the Business Premises Rent Tribunal in BPRT No. E045 of 2025 be set aside.

d. The costs of this application abide the outcome of the appeal.

2. The application is premised on the face of it and on the Appellant's affidavit, David Musila, sworn on 3/12/2025. The Appellant contends that he is aggrieved by the Ruling of Hon. Gakuhi Chege in BPRT Case No. E045 of 2025. The impugned Ruling arose from contempt proceedings against him, in which the Tribunal ordered him to pay Kshs. 200,000/= to the Tribunal, Kshs. 300,000/= to the Respondents, and Kshs. 20,000/= as costs of the contempt of Court application within 14 days, failing which he would be liable to arrest and committal to civil jail.

3. The Appellant contends that he has been ordered to pay 20 times the monthly rent payable by the Respondents jointly. He avers that he currently pays Kshs. 13,970/= per month, whereas the 2nd Respondent pays Kshs. 12,700/=.

4. The Appellant argues that the Tribunal lacked jurisdiction to determine an application for contempt of Court, as that jurisdiction is exclusively vested in the High Court and the Court of Appeal. He further contends that there was therefore no justification for the Tribunal to depart from this settled principle of law. He avers that unless a stay of execution is granted, the Respondents may proceed to enforce the penal orders before the determination of the appeal by arresting him and committing him to civil jail, or by attaching his property, thus causing irreparable damage to him.

5. He avers that the appeal was initially filed in the High Court but was later withdrawn, and that the instant appeal was filed. That the interim stay orders issued by the High Court lapsed with the said withdrawal, thus exposing him to imminent arrest. That it is in the interests of justice that the Court grants the orders sought.

The 1st Respondent's Replying Affidavit

6. The application is opposed by the 1st Respondent, Nzuki Mwinzi, through his Replying Affidavit sworn on 28/1/2026. The 1st Respondent contends that the Appellant has not satisfied the conditions for the grant of a stay of execution. He avers that the assertion that the appeal was filed in the High Court is an admission of procedural negligence, and that the Court cannot advise parties on the appropriate forum or jurisdiction; hence, the Appellant cannot benefit from his own mistake.

7. He argues that the application for a stay and extension of time is unmerited, as the Appellant failed to appeal within the statutory timelines and the 14-day window for filing an appeal has long since lapsed. He further argues that the Appellant has not demonstrated what substantial loss he would suffer if execution proceeds, whereas the Respondents have already suffered immense financial loss and damage, as a result of lost business revenue and reputational damage, owing to the Appellant's deliberate disobedience of the Tribunal's lawful orders.

8. Counsel asserts that the Court should balance the interests of all parties; hence, the Respondents should not be further deprived of the fruits of their judgment due to the Appellant's choice to litigate in the wrong forum. He further argues that the Appellant, being a contemnor who has shown open defiance to lawful Court orders, does not deserve the discretionary and equitable relief of stay of execution.

9. The deponent states that the Appellant has only partially complied with the Tribunal's Orders by reopening the Respondents' business premises and has failed to pay the sums as directed. He argues that the appeal does not raise an arguable point of law, as the Tribunal acted within its statutory and inherent powers under Section 12 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (Cap 301) in punishing the Appellant for contempt. He further contends that the assertion of lack

of jurisdiction on the part of the Tribunal is baseless and that it is in the interests of justice that the Tribunal's Orders be upheld and executed without further delay.

The written submissions

10. The Court directed that the application be canvassed by way of written submissions. Both parties complied and filed their respective submissions, each dated 28/1/2026. I must state that the written submissions, together with the numerous Authorities cited and relied upon by the Advocates for the respective parties, form part and parcel of the Record of the Court and, in any event, have been duly considered.

Analysis and Determination

11. I have considered the application and the rival affidavits. The Court is of the opinion that the issues for determination in this matter are: -

    a. Whether leave should be granted to appeal out of time.

    b. Whether an order for stay of execution can issue against the ruling and consequential orders thereto by the Tribunal delivered on 15/8/2025.

    c. Whether the Ruling and orders issued by the Tribunal on 15/8/2025 should be set aside.

Whether leave can be granted to appeal out of time

12. The Application before Court for consideration has been anchored under Section 1A, 1B,3A and 79 G together with Section 95 of the *Civil Procedure Act*, Cap 21 [CPA]. Section 79 G of the *Civil Procedure Act* reads 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 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."

13. Section 95 of the *Civil Procedure Act* reads as follows; -

> " Where any period is fixed or granted by the Court for the doing of any acts prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired"

14. It is clear from Section 95 of the *Civil Procedure Act*, Cap 21, that the extension of time for a party to perform certain acts is a matter for the discretion of the Court.

15. In the case of Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi – Nairobi Civil Application No. 251 of 1997, the Court stated:

> " It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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."

16. The Supreme Court of Kenya in the case of County Executive of Kisumu vs County Government of Kisumu & Others [2017] eKLR while relying on its decision in the case of Nicholas Kiptoo Arap Korir Salat –vs- IEBC & 7 others Application No. 16 of 2014 [2014] eKLR the apex Court stated as follows:

> " 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."

17. Similarly in the case of Nick Salat –vs- Independent Electoral and Boundaries Commission & 7 Others (Application 16 of 2014) [2014] KESC 12 (KLR) state that;

> " ... it is incumbent on the Applicant for an extension of time to provide the Court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default."

18. Further, the Court of Appeal in Vishva Stone Suppliers Company Limited -vs- RSR Stone [2006] Limited [2020] eKLR outlined the guiding principles in such cases inter alia:

> " (viii) The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary power with the only caveat being that there has to be valid and clear reason upon which discretion can be favourably exercised.
>
> (ix) Failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable.
>
> (x) An arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before Court;

(xi) The right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law."

19. The Subordinate Court delivered the impugned Ruling on 15/8/2025. The instant application was filed on 3/12/2025. The appeal ought to have been filed on 15/9/2025, resulting in a delay of about 78 days.

20. The Applicant avers that the delay in filing an appeal arose because the appeal was erroneously filed in the High Court on 21/8/2025. However, upon realising that the High Court lacked jurisdiction to hear and determine the appeal, the Appellant filed a Notice of Withdrawal dated 1/12/2025, and the withdrawal was endorsed on 2/12/2025. The appeal herein was then filed on 3/12/2025.

21. The 1st Respondent contends that filing the appeal in the High Court is an admission of procedural negligence and that the Court cannot advise parties on the appropriate forum or jurisdiction, so the Appellant cannot benefit from his own mistake.

22. Justice F. Gikonyo in the case of Mwangi S. Kimenyi –vs- Attorney General and Another (2014) eKLR correctly observed that what constitutes 'inordinate delay' is dependent on the particular circumstances of each case. He stated that:

> " There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, 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. Caution is, however, advised for Courts not to take the word ''inordinate'' in its dictionary meaning, but to apply it in the sense of excessive as compared to normality.....see the case of Allen –vs- Alfred McAlphine & Sons [1968] 1 All ER 543 where a delay of fourteen (14) years was considered inordinate and inexcusable. But see also the cases of Agip (Kenya) Limited –vs- Highlands Tyres Limited [2001] KLR 630 and Sagoo –vs- Bahari [1990] KLR 456, where delay of eight months and five (5) months respectively was considered not to be inordinate and also ELC Case No. 2058 of 2007 where delay of about 1½ years was considered not to be inordinate."

23. As noted in the cases above, the length of the delay and the reasons for non-compliance with the timelines are important factors in the exercise of the Court's discretion. Inordinate delay will vary from case to case, depending on the circumstances of each case.

24. In the circumstances of this case, the Court finds that the delay was not inordinate. The Appellant promptly filed the appeal and an application for a stay of execution in the High Court on 21/8/2025. Directions in respect of the said application were issued by the High Court on 25/8/2025, fixing the matter for further directions on 18/9/2025. Upon realizing that the appeal had been filed in the wrong Court, the Appellant filed a Notice of Withdrawal dated 1/12/2025. The withdrawal was endorsed on 2/12/2025, and the instant appeal was filed on 3/12/2025. This is a sufficient reason for the delay in filing the appeal herein. It is my finding that the Appellant has sufficiently explained the reasons for the delay.

25. The Court therefore finds in favour of the Applicant. The Applicant's orders for leave to file the Appeal out of time are merited.

Whether an order for stay of execution can issue against the ruling and consequential orders thereto by the Tribunal delivered on 22nd September, 2022

26. Stay of execution pending appeal is a discretionary power bestowed upon this Court by the law. The Court of Appeal in the case of Butt –vs- Rent Restriction Tribunal {1982} KLR 417 gave guidance on how a Court should exercise the said discretion and held that:

> " 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
>
> 2. 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 that appeal Court reverse the Judge's discretion.
>
> 3. 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.
>
> 4. In exercising its discretion to grant or refuse an application for a stay, the Court will consider the special circumstances of the case and its unique requirements. In this case, the special circumstances were that a large amount of rent was in dispute and that the Appellant had an undoubted right of appeal.
>
> 5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

27. The principles upon which a stay of execution pending appeal can be allowed are now well settled, as set out in the authorities of this Court and the superior Courts. Generally, a stay of execution is provided for under Order 42 Rule 6(2) of the Civil Procedure Rules.

28. As for the Applicant having to suffer substantial loss, in the case of Kenya Shell Limited –vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)KAR 1018 the Court of Appeal pronounced itself to the effect that:

> " It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay."

29. The applicants bear the burden of showing the substantial loss they are likely to suffer if no stay is ordered. This recognises that both parties have rights; the Appellants to their Appeal, including the prospect that it will not be rendered nugatory; and the decree holder to the decree, including the full benefits under the decree. In balancing the two competing rights, the Court focuses on their reconciliation, which is not a question of discrimination. {See the case of Absalom Dora –v-Turbo Transporters (2013) (eKLR)}

30. As F. Gikonyo J stated in Geoffrey Muriungi & another v John Rukunga M'imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR and which wisdom I am persuaded with; -

> " ...the undisputed purpose of stay pending appeal is to prevent a successful Appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as ''reducing the successful Appellant into a pious explorer in the judicial process". The said state of affairs is what is referred to as ''substantial loss'' within the jurisprudence in the High Court, or ''rendering the appeal nugatory'' within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal..."

31. Regarding substantial loss, it is not disputed that the Appellant was found in contempt of Court orders and directed to pay a fine of Kshs. 520,000/= within 14 days. In default, the Appellant was to be arrested and committed to civil jail. Clearly, the Applicant stands to suffer substantial loss if the stay is not granted, as his freedom is likely to be curtailed during the pendency of the Appeal.

32. Regarding the second condition, namely whether the Application has been filed without undue delay, the Court has already found that the delay has been sufficiently explained. Accordingly, this Court finds that the Application has been filed without undue delay.

33. Regarding the last condition on the provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulates in mandatory terms that the third condition a party must fulfil to be granted a stay order pending appeal is to furnish security. In the case of Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates & 4 Others (2014) Eklr, the Court held that:

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose."

34. I have read the Tribunal's Ruling in these proceedings. The Appellant was found in contempt and directed to pay a fine or serve civil jail. In my view, if this Court upholds the Tribunal's finding of contempt, any amount payable by the Applicant (if any) shall be a fine payable to the government in the alternative to serving a jail term. Accordingly, the security in this case would not be for the due performance of the decree but a fine payable to the government in the alternative to serving a jail term. It is therefore my finding that a security order is not required in this instance.

35. In the circumstances, the appropriate order is to stay execution of the orders dated 15/8/2025 pending the hearing and determination of the appeal herein.

Whether the Ruling and orders issued by the Tribunal on 15/8/2025 should be set aside

36. The Appellant/Applicant has also sought to have the Tribunal's orders set aside. Given the nature of the orders and the fact that the appeal is yet to be determined, setting them aside would be tantamount to determining the main appeal before the parties have had a chance to prosecute their respective cases.

37. Final orders for disposal

For the above reasons, I will determine the instant application in the following terms:

a. There be stay of execution of the Orders and/or Ruling of the Tribunal by Honourable Gakuhi Chege delivered on 15/8/2025 in E045 of 2025 pending the hearing and determination of this Appeal.

b. The Memorandum of Appeal filed be and is hereby deemed as duly filed subject to payment of the requisite Court fees.

c. The Appellant/Applicant is granted leave to file the record of appeal within 45 days from date of this Ruling.

d. The prayer for setting aside the Ruling of the Tribunal at this point is hereby declined.

e. The costs of this application abide the outcome of the appeal.

38. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF APRIL 2026 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the Presence of:

1. Mr Maina Paul for the Appellant

2. 1st Respondent present in person

3. N/A for 2nd and 3rd Respondents

4. CA – Elizabeth