



Macharia t/a Sky Park Restaurant v Zaverchand Punja Warehouses Ltd (Environment and Land Miscellaneous Case E005 of 2026) [2026] KEELC 1915 (KLR) (6 March 2026) (Ruling)

Neutral citation: [2026] KEELC 1915 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS CASE E005 OF 2026**

A OMBWAYO, J

MARCH 6, 2026

BETWEEN

**HEZEKIEL GACHIGO MACHARIA T/A SKY PARK
RESTAURANT APPLICANT**

AND

ZAVERCHAND PUNJA WAREHOUSES LTD RESPONDENT

RULING

The Application

1. The applicant Hezekiel Gachigo Macharia T/A Sky Park Restaurant has come under Section 79G of the *Civil Procedure Act*, Order 50 Rule 6, Order 42 Rule 6 of the Civil Procedure Rules for orders that this Honourable Court be pleased to grant the Applicant leave to appeal out of time against the ruling/judgment of the Rent Restriction Tribunal delivered on 8th December 2025 in Msa BPRT/E136/2025 and that the annexed Memorandum of Appeal be deemed as duly filed upon payment of the requisite court fees. The orders issued by the Rent Restriction Tribunal on 8th December 2025 be vacated and/or set aside pending the hearing and determination of this Application and the intended appeal. That there be a stay of execution and/or enforcement of the ruling/judgment and orders of the Rent Restriction Tribunal pending the hearing and determination of the intended appeal. Lastly, that the costs of this Application be in the appeal.
2. The application is supported by the Affidavit of the applicant Hezekiel Gachigo Macharia T/A Sky Park Restaurant and on the grounds that the delay in filing the appeal was occasioned by serious illness, namely acute diabetes and hypertension, and medical travel to China for treatment, which constitutes sufficient cause. The delay was neither deliberate nor inordinate.
3. The intended appeal raises serious, arguable issues of law with high chances of success. The Rent Restriction Tribunal lacked pecuniary and statutory jurisdiction, the contractual rent being Kshs.



250,000 per month for a fixed lease term of ten (10) years. The Tribunal therefore acted ultra vires, rendering its proceedings and decision null and void ab initio.

4. The applicant contends that the Tribunal acted without jurisdiction by purporting to vary, amend, or rewrite a binding lease agreement freely entered into by the parties and that the Tribunal unlawfully sanctioned a rent increase contrary to the express terms of the lease and the provisions of the [Rent Restriction Act](#).
5. The Tribunal failed to consider material evidence, including goodwill paid and renovations financed
6. by the Applicant. The rent assessed was arbitrary, excessive, and unsupported by evidence. The Respondent will suffer no prejudice if the orders sought are granted, whereas the Applicant stands to suffer grave injustice if denied. It is in the interest of justice that this Application be allowed.
7. The application is supported by the affidavit of, Hezekiel Gachigo Macharia, the Tenant/Applicant in Mombasa Rent Restriction Tribunal Case No. Msa BPRT/E136/2025. THAT a ruling/judgment was delivered on 8th December 2025, which I am desirous of appealing. The lease the subject of the dispute provided for a monthly rent of Kshs. 250,000 for a fixed term often (10) years and therefore by reason of the rent payable and the duration of the lease, the dispute fell outside the jurisdiction of the Rent Restriction Tribunal. The Tribunal therefore acted without jurisdiction, rendering its proceedings and decision a nullity.
8. The applicant states that he was unable to file the appeal within time as he was suffering from acute diabetes and high blood pressure, which required urgent medical treatment in China for specialized treatment as well he was suffering from acute Lymphatic sarcoma, anemia and Acute High Blood Pressure and Diabetes level II, as evidenced by annexed medical documents marked "HGM-AI " and Passports Marked "HGM-A2."
9. The delay was neither deliberate nor inordinate, and upon recovery he moved with speed to instruct his advocates. The Tribunal unlawfully purported to vary and rewrite a valid lease agreement. The Tribunal sanctioned a rent increase without compliance with Sections 4 and 5 of the [Rent Restriction Act](#).
10. The Tribunal ignored material evidence on goodwill and renovations financed by the applicant and that the Respondent has threatened enforcement through distress for rent. Unless the Tribunal's orders are vacated and a stay granted, enforcement will render the intended appeal nugatory and occasion the applicant substantial and irreparable loss, including closure of my business.
11. The intended appeal is arguable and raises serious jurisdictional issues deserving determination by this Honourable Court and therefore it is just, equitable, and in the interest of justice that the orders sought be granted.

The Reply

12. The respondent vide the affidavit of its director, Atin Shah, states that the application is bad in law and fatally defective. The Business Premises Rent Tribunal rendered a ruling on the 8th of December 2025 in relation to an application dated the 9th of September 2025 filed by the Applicant and another Application filed by the Respondent herein in BPRT 196 of 2025 which was then consolidated with BPRT 136 of 2023 for purposes of determination of both Applications. The applicant sought inter alia an order that the Business Premises Rent Tribunal does review its orders of 30th of April 2025 in respect of rent for the premises and adopt a valuation based on a deputized valuer which report was to factor the Applicant's contributions to the value of the subject premises. Further orders were sought to allow the Applicant to pay rent arrears within 45 days of the Application. The Applicant therefore



- was seeking for review of orders by the Tribunal where the Tribunal assessed the rent payable for the premises which the Applicant occupies where the Tribunal had vide a ruling rendered on 30th of April 2025, assessed rent payable on the premises at Kshs. 540,000 per month.
13. The Tribunal through the said ruling dismissed the Applicant's application for reasons that it failed to meet the legal threshold for a review of orders as set out in the applicable law.
 14. The respondent contends that that the Applicant's claim that the dispute at the Tribunal was about monthly rent for a fixed terms of 10 years is untrue. The Applicant sought for a re-assessment of rent by way of a review and that allegations on the Tribunal's lack of jurisdiction are baseless as the Applicant had participated in the proceedings regarding the Tribunal's assessment of rent and thereafter sought for review to have the rent reassessed, hence the Applicant cannot now claim that the Tribunal lacked jurisdiction.
 15. The Applicant has annexed a visa that shows he entered china on the 11th of November 2025 and left on the 29th of November 2025 while the impugned ruling was rendered on the 8th of December 2025 and therefore failed to demonstrate why he was prevented from filing an appeal.
 16. The respondent contends that the applicant has failed to show that he has an arguable appeal as the issues that he has raised are not issues that were subject of the application before the Tribunal or issues that the Tribunal was invited to determine in its impugned ruling.
 17. The Applicant has defaulted in payment of rent which has accumulated and stood at KSHS. 5,400,000/= plus VAT as at the month of January 2026.
 18. The Tribunal vide the said impugned ruling, other than dismiss the Applicant's Application, also allowed the Respondent's application for permission to levy distress in order to recover rent arrears accrued.
 19. The Landlord has instructed auctioneers to levy distress whom issued the Applicant with a proclamation on the 19th of January 2026 and it is the action for levying distress that has triggered the Applicant to approach this Honorable Court through this application and not a genuine intention to appeal.

Applicant's Written Submissions

20. The applicant submits that he has demonstrated sufficient cause to warrant leave to appeal out of time. Section 79G of the Civil Procedure Act grants this Honourable Court unfettered discretion to admit an appeal out of time where sufficient cause is shown. This discretion is fortified by Order 50 Rule 6 of the Civil Procedure Rules and Article 159(2)(d) of the Constitution, which mandates courts to administer justice without undue regard to procedural technicalities.
21. The applicant cites the case of Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1999] eKLR, where the Court of Appeal held that in considering extension of time, the court must evaluate the length of delay, reason for delay, chances of success, and prejudice to the respondent. The applicant's delay is fully explained by illness and absence from the jurisdiction, the intended appeal raises jurisdictional issues with high chances of success, and no prejudice incapable of compensation has been demonstrated by the Respondent.
22. The applicant further cites the case of Nicholas Kiptoo Arap Korir SaZat v IEBC & 7 Others [2014] eKLR, where the Supreme Court held that extension of time is an equitable remedy available to a deserving party who acts in good faith. The Applicant did not sleep on his rights; upon recovery and return, he moved with dispatch. Equity favours preservation of his right of appeal.



23. The Applicant's illness was acute, life-threatening, and necessitated medical travel abroad, a factor entirely beyond his control. In *Mwangi v Kenya Airways Ltd* [2003] eKLR, the Court accepted illness as sufficient cause where adequately explained and supported. Similarly, in *Gachambi v Githirui* [2019] eKLR, the Court emphasised that where delay is not deliberate or contumelious, courts should lean towards sustaining rather than extinguishing the right of appeal.
24. The applicant further submits that the intended appeal is arguable as raises bona fide issues deserving judicial consideration. The applicant cites the case of *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR, the Court held that an arguable appeal is one that raises even a single bona fide issue of law. The jurisdiction of the Tribunal alone constitutes a weighty, stand- alone issue. The Applicant raises multiple arguable grounds, including ultra vires action and unlawful interference with contractual rights. In *Kenya Commercial Bank Ltd v Nicholas Ombija* [2009] eKLR, the Court held that an arguable appeal is not one that must necessarily succeed.
25. He cites a similarly case of *Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 o Others* [2013] eKLR, where the Court affirmed that jurisdictional challenges are inherently arguable, the Applicant squarely challenges statutory jurisdiction. If the Tribunal lacked jurisdiction, its entire decision collapses, making the appeal profoundly arguable as was held In *Owners of the Motor Vessel "Lillian S" v CaZtex Oil (Kenya) Ltd* [1989] KLR 1, where the Court famously held that jurisdiction is
26. everything and without it a court must down its tools. Jurisdiction of the Rent Restriction Tribunal is strictly circumscribed by the [Rent Restriction Act](#), Cap 296. Tenancies exceeding statutory thresholds in rent and tenure fall outside its mandate. A fixed lease of ten (10) years at Kshs. 250,000 per month is, by law, not a controlled tenancy.
27. He further refers to the case of *Republic v Chairman, Rent Restriction Tribunal ex parte Jotham Mulati Welamondi* [2007] eRLR, where the Court held that any decision rendered without jurisdiction is a nullity. The Tribunal assumed jurisdiction where none existed. Similarly, In *Macfoy v United Africa Co. Ltd* [1961] 3 AZZ ER 1169, it was held that a nullity cannot be cured by subsequent proceedings. The Tribunal's ruling cannot be salvaged by convenience or equity.
28. On whether the applicant will suffer substantial loss and the appeal be rendered nugatory, the applicant relies on Order 42 Rule 6 of the Civil Procedure Rules identifies substantial loss as the cornerstone for stay of execution and the case of *Kenya Shell Ltd v Benjamin Karuga Kibiru* [1986] KLR 410, where the Court held that substantial loss is the most critical consideration. Closure of a livelihood-dependent business constitutes substantial loss.
29. Without stay, there will be nothing left to appeal against as was held in *RWW V EKW* (2019) eKLR, where court emphasized preservation of the subject matter. This position is reiterated In *Mukuma v Abuoga* [1988] KLR 645, where the Court held that stay exists to ensure an appeal is not rendered nugatory. Enforcement would defeat the appeal before it is.

Respondent's Submissions

30. The Respondent challenges the competence of the subject Application on the basis that the same is instituted contrary to Order 6 Rules 5, 6 and 9 of the Civil Procedure Rules 2010. He contends that at the Business Premises Rent Tribunal, the Applicant was represented by the firm of M/S Ndichu Kihanya Associates & Co. Advocates. The Applicant is now apparently being represented by the firm



of S.M Gioche and company Advocates, The current Application is instituted by the firm of S.M Gioche and company Advocates. Order 9 Rule 9 of the Civil Procedure Rules provides that:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- a. Upon an application with notice to all parties;
- b. Upon a consent files between the outgoing advocate and the incoming advocate or party intending to act in person as the case maybe. ”

31. Order 9 Rule 5 further provides that:

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served. The former advocate shall be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal. ”

32. The respondent argues that once judgement is rendered, the Advocate whom represented a party at the trial Court shall be deemed to be the Advocate of record for that party and shall continue being so until a change is formally effected vide an order of the court, which is subject to an application being filed or through a consent between the outgoing advocate and the incoming advocate. In this instant matter, none of the above procedures were followed. In the matter before the Business premises rent Tribunal, judgement was rendered way back on the 30th of April 2025.

33. On whether the court should grant leave to appeal out of time, the respondent submits that the onus is on the applicant to show good and sufficient reasons why it did not file its Appeal in good time in order for the Court to consider whether to allow the Application or not.

34. The leading cause in expounding on the factors to consider in considering an application seeking to file an appeal out of time is *Salat V Independent Electoral And Boundaries Commission & 7 Others* [2014] Kesc 12 (Klr) where it was held that:

“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; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondents if the extension is granted; whether the application has been brought without undue delay; and whether in certain cases... public interest should be a consideration for extending time. ”

35. If a party does not file an appeal within the required time frame, they lose their automatic right to appeal, to be granted another opportunity, and they must provide valid reasons for missing the deadline. If there was nothing preventing them from filing on time, they will not be allowed to appeal late. Additionally, it is unacceptable for someone who missed the deadline without cause to invent false reasons in an attempt to justify the delay.

36. In the instant case, the Applicant has stated that the reason for not filing the appeal timeously was due to sickness. He annexed a discharge summary showing allegedly admitted in a hospital on the 21st



- of October 2025 and discharged on the 24th November 2025. . The respondent argues that in the visa it is indicated that the Applicant entered into the country on the 11th of November 2025 and left on the 29th November 2025. There are no medical records from China attached to show that indeed the Applicant went to China for treatment and did receive treatment. The Applicant has not attached his passport to prove the travels. These are the most important primary documents to prove the Applicant's allegations.
37. The ruling which the Applicant seeks to appeal against was rendered on the 8th of December 2025. What the Applicant has done is that he has attached a summary discharge and a visa whose information are not in sync and left it to the Court to presume that there was genuine illness and that the Applicant left the country because of the illness; and most importantly, these sequence of events prevented the Applicant from filing the appeal timeously. Not a single explanation or demonstration has been proffered.
38. On whether the Applicant has an arguable appeal, the respondent submits that the ruling which the Applicant seeks to appeal against was a ruling primarily on the Applicant's own Application dated the 9th of September 2025 and another application by the Respondent, the Applicant's sought inter alia for an order that the Business premises rent tribunal does review its orders of 30th of April 2025 and adopt a valuation based on a deputised valuer which report should factor the Applicant's contributions to the value of the subject premises. Further orders were sought to allow the Applicant to pay rent arrears within 45 days of the Application. The Applicant therefore was seeking for review of orders by the Tribunal where the Tribunal assessed the rent payable for the premises. The Applicant sought for a fresh valuation and a reassessment of rent. Issues regarding lack of the Tribunal's jurisdiction was not in contention. The Tribunal had adjudged on the rent payable and the Applicant through that Application sought to review that assessment being dissatisfied with how much rent was assessed at. Being issues which were not the subject of the impugned ruling cannot be said to be an arguable point of appeal,
39. The respondent submits that the dispute between the parties was at the Business premises rent Tribunal (BPRT) which is a creature of the [Landlord and Tenant \(Shops, hotels and catering establishments\) Act](#) (Cap 301) Laws of Kenya. The Rent restriction tribunal is a separate tribunal that deals with residential premises established under the [Rent restriction Act](#) (CAP 296) Law of Kenya. Those are two very distinct institutions and laws. The Applicant can therefore not claim that the BPRT contravened the Rent restrictions Act. That cannot be said to an arguable point of appeal. Lastly the respondent submits that the Applicant has contemporaneously with the instant
40. application, moved to the same Tribunal whose ruling he is disputing, to seek for orders to restrain the Respondent from levying distress so as to recover rent arrears. He managed to get temporary restraining orders through the ruling of 8th December 2025, other than disallowing the Applicant's application, the Tribunal also granted the Respondent permission to levy distress in order to recover rent arrears. The Applicant was in arrears of KSHS. 5,400,000/ = as at January 2026 and the same continues to accrue. The Respondent therefore in line with the orders moved to levy distress. The levy of distress is what sprung the Applicant into action, which led to the filing of this application and the application before the Tribunal. The main objective being to abuse the court's processes for purposes of shielding himself from paying rent and from facing the consequences of failure of pay rent. This should not be tolerated and the Court should not allow the law to be used to run way from legal obligations. The further orders sought through the Application are orders to vary or set aside the Tribunal's decision. That cannot be granted as that is tantamount to the Court overturning the Tribunal's decision at this point. Further orders for stay of execution have been sought. The Applicant has not shown or demonstrated the Requirement of Order 42 Rule 6. The same can therefore not be granted.



Analysis and Determination

41. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018] eKLR where it was emphasized that an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others* [2014] eKLR outlined the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:

“The underlying principles a court should consider in exercise of such discretion should include: - a.Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;b.A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;c.Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-by-case basis;d.Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;e.Whether there will be any prejudice suffered by the respondent if the extension is granted;f.Whether the application has been brought without undue delay. Similarly in the case of *Paul Musili Wambua v Attorney General & 2 Others* [2015] eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following: -“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion.

42. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.” -I have considered the submissions on record and to find that the applicant has not demonstrated that the sickness prevented him from filing the appeal. He was discharged on the 24th October 2025 whereas the ruling of the Tribunal was delivered on the 8th of December 2025. The applicant could have gone to China and returned on the 29th November 2025, but this was before the ruling of the tribunal. The applicant has not attached the medical documents of the hospital in China. I do find that the application is not merited and is hereby dismissed.

SIGNED BY/FOR:

HON. JUSTICE ANTONY O. OMBWAYO

**THE JUDICIARY OF KENYA. MOMBASA ENVIRONMENT AND LAND COURT
ENVIRONMENT AND LAND COURT**

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