



Olal v Jay Jay Holdings Limited (Environment and Land Miscellaneous Application E051 of 2025) [2025] KEELC 5407 (KLR) (21 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5407 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E051 OF 2025**

CG MBOGO, J

JULY 21, 2025

BETWEEN

ERASTUS OCHIENG OLAL APPLICANT

AND

JAY JAY HOLDINGS LIMITED RESPONDENT

RULING

1. Before me is the notice of motion dated 6th March, 2025 filed by the applicant herein and it is expressed to be brought under Order 42 Rule 6 of the [Civil Procedure Rules](#) and Sections 3A, 75, 78 and 79G of the [Civil Procedure Act](#) seeking the following orders:-
 1. Spent.
 2. That the honourable court be pleased to issue a mandatory injunction compelling the respondent and or its agents and or servants and or employees and or representatives to restore, reinstate and or return the appellant into ownership and or possession and or occupation of the two-bedroom flat no. G7 situated on the 3rd floor of block G flat/apartment known as Jay Jay apartments in Lukysammar Estate, Nairobi pending the hearing and determination of this application.
 3. That the honourable court be pleased to issue a mandatory injunction compelling the respondent and or its agents and or servants and or employees and or representatives to restore, reinstate and or return the appellant into ownership and or possession and or occupation of the two-bedroom flat no. G7 situated on the 3rd floor of block G flat/apartment known as Jay Jay apartments in Lukysammar Estate, Nairobi pending the hearing and determination of the intended appeal.
 4. That pending the hearing and determination of the intended appeal against the judgment and decree in *Nairobi MCELC Number 362 of 2023* dated 27th August 2024 the honourable court



be pleased to issue a temporary injunction to restrain the respondent and or its agents and or servants and or employees and or representatives from letting and or leasing and or charging, selling, transferring, alienating or in any manner whatsoever interfering with the plaintiff's investment, ownership and possession and or occupation of a two bedroom flat number G7 situated on the 3rd floor of block G flat/ apartment known as Jay Jay apartments in lukysammar estate, Nairobi.

5. That the honourable court be pleased to grant leave to the applicant to file an appeal against the judgment and decision in *Nairobi MCELC Number 362 of 2023* dated 27th August, 2024 out of time.
6. That costs of this application be borne by the respondent.
2. The application is premised on the grounds inter alia that the subordinate court entered judgment against the applicant on 27th August, 2024, and being dissatisfied with the decision, he filed an appeal which was erroneously directed to the Civil Division of the High Court in the e filing system.
3. The application was supported by the affidavit of the applicant sworn on even date. The applicant deposed that in a ruling delivered on 27th February, 2025, the High Court struck out his appeal for want of jurisdiction. The applicant deposed that without his approval or that of his advocate, the respondent extracted a decree, and violently evicted him from the suit property, and that the auctioneer purportedly instructed to carry out the eviction did not issue him with any notification contrary to the provisions of the *Auctioneers Act*. He deposed that the respondent has now threatened to let out the premises or sell the same to permanently lock him out after receiving more than Kshs. 4,000,000/-.
4. The applicant deposed that the delay in filing the intended appeal is not deliberate on his part but an error on the e filing system. Further, that the intended appeal is arguable and raises serious issues of investment and interpretation of contracts entered into by the parties. Further, it was deposed that it is just that the respondent is ordered to reinstate him into the suit property as he has no alternative housing having already purchased the same, and that unless an injunction is issued, the respondent will proceed to dispose the suit property.
5. The application was opposed by the replying affidavit of Javaid Iqbal Khan, the managing director of the respondent sworn on 25th March, 2025. The respondent deposed that the application is premised on blatant falsehoods and material non-disclosure having breached the express provisions of the sale agreement. The respondent deposed that judgment was entered on 27th August 2024, and eviction effected on 15th October, 2024 after the applicant refused to vacate the property as ordered by the court.
6. The respondent deposed that the appeal is not arguable to warrant the grant of the orders sought, and that the application has been overtaken by events in execution of the decree, and that the suit property is leased and currently occupied by a third party who is not part of these proceedings. The respondent deposed that this court has no jurisdiction to grant mandatory injunction, and further that since 27th August, 2024 no record of appeal has been filed. He deposed that the delay is inordinate, and that the application is intended to unnecessarily keep parties in court for a long time.
7. The respondent deposed that in the unlikely event that leave sought is granted, they pray that a sum of KShs. 10,399,905 be deposited in a joint interest earning account.
8. The application was canvassed by way of written submissions. The applicant filed his written submissions dated 19th May, 2025 where he raised the following issues for determination:-
 - i. Whether the applicant should be granted leave to file the memorandum of appeal out of time.



- ii. Whether the respondent will suffer any prejudice.
 - iii. Whether the intended appeal is arguable.
 - iv. Whether a mandatory injunction should be issued.
9. On the first issue, the applicant submitted that following the ruling delivered on 27th February, 2025, he filed the instant application, and that pursuant to the provisions of Section 79 G of the Civil Procedure Act, this court has powers to allow for filing of appeal out of time. Further, he submitted that the delay in filing the appeal was on account of erroneous filing in the e filing system. He argued that the same was filed within a reasonable time. To buttress on this issue, the applicant relied on the cases of Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited, Civil Application No. 55 of 2020, Gerald Kitbu Muchanje v Catherine Muthoni Ngare & another [2020] eKLR, and Edith Gichungu Koine v Stephen Njagi Thoitthi [2014] eKLR.
 10. On the second and third issues, the applicant submitted that the respondent has not shown the prejudice likely to be suffered in the event that he is allowed to file the appeal out of time. He relied on the case of Naomi Wangechi Gitonga & 3 Others v Independent Electoral & Boundaries Commission & 17 Others [2018] eKLR. The applicant further submitted that the draft memorandum raises arguable grounds, which shall be demonstrated in the hearing of the appeal. Reliance was placed in the case of Nairobi HCCC Civil Appeal No. 141 of 2019 County Government of Migori v Hope Self Help Group, and Garissa HCCC No. Civil Appeal E013 of 2023, In the Matter of the Estate of Bare Adan Mohamed (Deceased) Balugo Adan Mubumed (Suing as the administrator of the estate of Bare Adan Mohamed) Abdirahman Adan Mohamed v Madow Dakat Takoy & 2 Others.
 11. On the fourth issue, the applicant submitted on the clauses contained in the agreement dated 30th March, 2015 and further relied on the cases of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, Gusii Walimu Investment Company Limited v Mwalimu Hotel Kisii Limited CA Civil Appeal No. 160 of 1995, Kisii HCCC No. 37 of 2015 Benerdette Magoma Yakabaria v Bonareri Asiago & 2 Others, and Giella v Cassman Brown & Co. Ltd [1973] EA 358.
 12. The respondent filed its written submissions dated 20th May, 2025. While relying on the case of Omar Shurie v Marian Rashe Yafar (Civil Application No. 107 of 2020) UR, the respondent submitted that the appeal is not arguable pursuant to the mandatory terms of the agreement, and that the arrears in rent remain unpaid and have accumulated. The respondent further submitted that there is inordinate delay, and that the applicant was made aware of the incompetence of the appeal in the High Court on 19th September, 2024 but elected to pursue the appeal in the High Court. It was submitted that no explanation has been given as to why the applicant failed to lodge the appeal at that time. To buttress on this issue, the respondent relied on the cases of Gitau & another v Mwangi (Environment and Land Appeal E002 of 2024) [2024] KEELC 5678 (KLR) (31 July 2024) (Ruling), Bartilol & 3 others v Bartilol & another (Civil Application 001 of 2024) [2024] KECA 607 (KLR) (24 May 2024) (Ruling), and Mukora v Mukora & 3 others (Environment and Land Miscellaneous Application E004 of 2024) [2024] KEELC 5687 (KLR) (25 July 2024) (Ruling).
 13. The respondent further submitted that judgment and decree have been executed and the premises occupied by a third party. Further, that the high threshold required for a mandatory injunction which seeks stay of execution in the circumstances of this case has not been met. Reliance was placed in the cases of Nation Media Group & 2 others v John Harun Mwau [2014] eKLR, Embu County Government v University of Embu (Environment & Land Case 4 of 2021) [2022] KEELC 15529 (KLR) (6 December 2022) (Ruling), Avistia SRO Limited v Njenga & 8 others (Civil Appeal (Application)



E621 of 2023) [2024] KECA 1210 (KLR) (20 September 2024) (Ruling) and *Mugambi v Mramba* (Environment & Land Case 38 of 2020) [2022] KEELC 3113 (KLR) (27 June 2022) (Ruling).

14. In conclusion, the respondent submitted that the applicant has not offered any security which is a mandatory condition for the grant of the orders sought and without it, the application should not be allowed.
15. I have considered the application, the reply thereof and the written submissions filed by the parties. I am of the view that the issue for determination is whether the application has merit.
16. Being dissatisfied with the judgment delivered on 27th August, 2024 by Hon. S. A Opande (PM) in in *MCELC No. E362 of 2023*, the applicant moved the High Court in a bid to overturn the said decision. While at it the respondent extracted the decree and enforced the same which included eviction of the applicant from the suit property. The High Court struck out the matter for want of jurisdiction vide a ruling delivered on 27th February, 2025. The applicant now wants this court to issue an order of mandatory injunction restoring him back to the suit property pending the hearing and determination of this appeal. From the application and the replying affidavit, both parties vehemently argued for and against the terms of the agreement, in support of their case. In the case of *Kenya Breweries Limited & another v Washington O. Okeyo* [2002] KECA 284 (KLR), the court stated thus: -

“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 *Halsbury’s Laws of England* 4th Edn. para 948 which reads:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application”.

Also in *Locabail International Finance Ltd. V. Agroexport and others* [1986] 1 ALL ER 901 at pg. 901 it was stated:- “A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

The principles of law enunciated by these decisions have received full approval by the courts within our jurisdiction. See the cases of *Belle Maison Limited v Yaya Towers Limited* H.C.C.C. 2225 of 1992, per Bosire, J. (as he then was) and *The Ripples Limited vs. Kamau Mucuha* H.C.C.C. No. 4522 1992 per Mwera, J. Mr. Onsando Osiemo, for the appellant, has submitted that the learned Judge ought not to have granted a mandatory injunction against the second appellant and thereby compelling him to release the vehicle at the interlocutory stage as no exceptional circumstances existed, and moreover, the respondent was indebted to the second appellant, a fact not disputed by the respondent.



The respondent did not dispute his obligation to the second appellant and the fact that the loan owed to it is serviced and channeled through the first appellant. The obvious resultant effect, therefore, of the mandatory injunction granted by the superior court is to relieve the respondent of his obligation to pay his just debt. He should not be allowed to steal a match by avoiding his just obligations. Moreover, it would certainly be inequitable. It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party. In the circumstances, we think that there was nothing to justify the grant of a mandatory injunction on the interlocutory application that fell for consideration before the learned Judge and in that respect the learned Judge erred in granting it.”

17. For the court to grant a mandatory injunction, there ought to exist exceptional circumstances that warrant the grant of these orders. The respondent conducted a process as a result of judgment delivered in the case before the trial court. Whether the execution procedure followed due process or not, is not an issue that can be termed as exceptional in the circumstance. The applicant did not find it necessary to seek stay of execution pending the appeal as that would be most ideal in the circumstance. In my analysis, I find no reason to grant an order of mandatory injunction.

18. The applicant also sought for leave to file out of time. Section 79G of the Civil Procedure Act provides 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.”

19. In the case of Thuita Mwangi v Kenya Airways Ltd [2003] KECA 201 (KLR), the Court of Appeal stated as follows: -

“For instance in Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported), the court expressed itself thus:-

“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.”

20. From the above, it is clear that the decision to enlarge time to file an appeal out of time is discretionary. However, certain factors including the period for delay, the reasons for the delay and the prejudice to be suffered among other factors ought to be considered. In this case, the applicant filed the memorandum of appeal dated 25th September, 2024 albeit in the wrong court. The impugned judgment was delivered on 27th August, 2024. The reasons for the delay was attributed to the wrong filing at the filing system which I must state, the party to be blame would be the applicant and not the court as it is a function



initiated by a party. However, I would admit that human is to err and, in this case, the applicant was intent on appealing against the decision of the subordinate court.

21. The draft memorandum of appeal annexed to the application is in my view arguable. Its success or failure can only be determined once the same is heard. However, a plain reading of the same would invite the court to delve into issues which the applicant deems the court did not properly address itself to.
22. Having said the above, the notice of motion dated 6th March, 2025 partially succeeds to the following extent:-
 - i. The applicant is granted leave to file an appeal out of time against the judgment delivered on 27th August, 2024 in *Nairobi MCELC Number 362 of 2023*.
 - ii. The respondent to ensure compliance with Order 9 Rule 9 of the Civil Procedure if need be.
 - iii. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 21ST DAY OF JULY, 2025.

HON. MBOGO C.G.

JUDGE

21/07/2025.

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Mirie for the Respondent

No appearance for the Appellant

