



**Gitari (Suing as the Legal Representative of the Estate of the Late Felix Gitari Mbiuki) v
Laban & another (Cause E957 of 2022) [2025] KEELRC 2249 (KLR) (25 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2249 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E957 OF 2022**

**SC RUTTO, J
JULY 25, 2025**

BETWEEN

**CHARLES MUTEMBEI GITARI (SUING AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF THE LATE FELIX GITARI MBIUKI) APPLICANT**

AND

**JOSEPH LABAN (AKA JL) MUTISYA 1ST RESPONDENT
MACHAKOS COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT**

RULING

1. This Ruling is with respect to the Notice of Motion dated 25th November 2024 filed by the Claimant/Applicant herein. Through the Notice of Motion, the Applicant seeks the following orders:
 1. That this Honourable Court be pleased to stay its Ruling (No.1) delivered on 31st July 2023 and its Order dated 31st July 2023.
 2. Spent.
 3. That the suit and any further proceedings in the Employment and Labour Relations Court at Nairobi, Cause No. E957 of 2022 be stayed pending the hearing and determination of the appeal filed at the Court of Appeal being COACA/E906/2024 (*Charles Mutembei Gitari v County Assembly of Machakos*).
 4. That the costs of this application be provided for.
 5. That any other order be made as this Honorable Court shall deem fit to grant.
2. The Application is based on the grounds on its face thereof and supported by an Affidavit sworn by Charles Mutembei Gitari on 25th November 2024.



3. Grounds in support of the Application are that on 31st July 2023, the Court vide its Ruling, disallowed the Applicant's Notice of Preliminary Objection dated 8th March 2023, which raised substantive issues of jurisdiction. The Applicant being aggrieved and dissatisfied with the Ruling delivered, filed a Notice of Appeal dated 14th August 2023.
4. Before the appeal could be lodged, Felix Gitari Mbiuki, who was the Claimant in the matter, passed away on 18th July 2023. This resulted in his estate undergoing the probate process, which took a long time, as the deceased died intestate. His eldest son, Charles Mutembei Gitari, was substituted to be the Claimant in this matter on behalf of his late father through an application dated 15th July 2024, which was allowed by the Court.
5. It is further averred by Mr. Mutembei that he has preferred an Appeal against the Ruling of 31st July 2023, vide a Memorandum of Appeal dated 19th November 2024 and filed before the Court of Appeal of Nairobi and assigned the case number COACA/E906/2024 (*Charles Mutembei Gitari v County Assembly of Machakos*).
6. Mr. Mutembei further deposes that he is advised by his Advocate on record, whose advice he verily believes to be true, that the Appeal raises serious issues of jurisdiction. That if the proceedings in this Court are not stayed, his Appeal will be rendered nugatory and he will suffer irreparable loss and damage.
7. The Application is opposed vide a Replying Affidavit sworn by Denis Mutui on 9th December 2024. Mr. Mutui, who has described himself as the Clerk of the 2nd Respondent, avers that the Application is misconceived, unmerited and an abuse of the court process. He is advised by his Advocates on record that the Applicant's assertion that this Court lacks jurisdiction is unfounded as the claim arises from an employment relationship governed by Section 12 of the *Employment and Labour Relations Court Act*.
8. That the issue of jurisdiction was conclusively dealt with by this Court in its Ruling delivered on 31st July 2023 and the Applicant has not demonstrated any error warranting the intervention sought.
9. Mr. Mutui further deposes that the Claimant's averment that the ongoing proceedings would render the appeal nugatory is speculative and unfounded. In his view, the Applicant has not demonstrated any irreparable harm or prejudice that cannot be remedied should the appeal succeed.
10. That the Respondent stands to suffer prejudice if the proceedings in this matter are stayed, as it has already experienced considerable delay due to the procedural issues raised by the Applicant. That the grant of an order of stay will lead to a prolonged litigation resulting in additional legal costs and delays that prejudice the Respondent.

Submissions

11. Pursuant to the directions issued by the Court on 27th March 2025, the Application was canvassed by way of written submissions. Both parties complied and the Court has given due consideration to the said submissions.

Analysis and Determination

12. The singular issue that stands out for determination by the Court is whether the Applicant has met the threshold for the grant of an order of stay of proceedings pending the determination of his Appeal.



13. The Court’s jurisdiction to stay proceedings pending appeal is derived from both Order 42 Rule 6 (1) of the [Civil Procedure Rules](#) which stipulates as follows:

“(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.”

14. As can be discerned from Order 42 Rule 6(1), a party seeking a stay of proceedings pending appeal should fulfill the following conditions: demonstration of substantial loss; application has been filed without unreasonable delay and provision of such security as the court orders for the due performance of such decree or order.

15. It is trite law that whether or not to issue an order for stay of proceedings is a matter of the court’s discretion exercised after due consideration of the merits of the case and the likely effect on the ends of justice. Such was the determination by Ringera J (as he then was) in the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000, in which he stated as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

16. In the present case, the Applicant contends that his Appeal against the Court’s Ruling delivered on 31st July 2023 raises substantive issues of jurisdiction. It is the Applicant’s submission that he has proved that he has an arguable appeal.



17. On the other hand, the Respondent has argued that this Court has jurisdiction to determine the Counterclaim as the mortgage in question arose directly from the Claimant's employment and was granted pursuant to a circular by the Salaries and Remuneration Commission.
18. As was held in the Case of *Athuman Nusura Juma v Afwa Mohamed Ramadhan*, 2016] eKLR, the question as to whether the intended appeal by an applicant has merits or not is not an issue to be determined by a court when dealing with an application of this nature but by the court dealing with the merits of the appeal.
19. In view of the fact that the Applicant's Appeal is with respect to a Ruling emanating from this Court, it follows that the issues raised in the Memorandum of Appeal touching on the jurisdiction of this Court to hear and determine the Respondent's Counterclaim can only be determined by the Court of Appeal. Therefore, this Court cannot determine whether the appeal preferred by the Claimant has merit.
20. The Applicant has further argued that the intended appeal shall be rendered nugatory unless an order of stay is granted. It is the Applicant's position that if the Court proceeds to determine the Counterclaim before the Appeal is dispensed with, the Claimant's estate stands to lose their home situated on Title No Karingani/Gitareni/2155.
21. On the Respondent's part, it has been submitted that the Applicant's fears are premature and purely speculative as the Counterclaim has not been heard, let alone determined. That it would be inappropriate to assume that the outcome will lead to the sale of the mortgaged property.
22. As it stands, the matter herein is yet to proceed for hearing. Therefore, it cannot be said at this point with certainty that the Counterclaim will be determined in favour of the Respondent, thus exposing the estate of Felix Gitari Mbiuki to the loss of the property which is the subject of the Counterclaim.
23. It is this Court's respectful view that the Applicant's argument is founded on mere apprehension without foundation. Indeed, none of the parties can tell with certainty how the court will determine the Counterclaim or, for that matter, the entire suit.
24. In any event, should the Court determine the Counterclaim in favour of the Respondent upon hearing the case on its merits, the Applicant still has a right of appeal as the determination by this Court is not final.
25. In an application to stay proceedings, the court is required to exercise judicial discretion in the interest of justice. In the present case, the Court is alive to the fact that the stay of proceedings would delay the expeditious disposal of this suit, which was filed close to three (3) years ago.
26. As such, the Court is not persuaded that it would be in the best interests of justice if the proceedings are stayed. Such an order is likely to delay the disposal of the matter to the disadvantage of both parties.
27. In light of the foregoing, the Court finds the Application dated 25th November 2024 to be without merit and consequently, is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2025.

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STELLA RUTTO

JUDGE

In the presence of:



Ms. Mbiti instructed by Mr. Ngwele for the Claimant/Applicant

Mr. Muuo for the Respondent

Millicent Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

