



**Mutava v Gatimu & another (Environment and Land Appeal
E025 of 2022) [2023] KEELC 18915 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 18915 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E025 OF 2022
A KANIARU, J
MARCH 23, 2023**

BETWEEN

JOSEPH MUINDE MUTAVA APPELLANT

AND

ESTHER WAMUNYU GATIMU 1ST RESPONDENT

ELIUD MACHARIA NDUMBI 2ND RESPONDENT

RULING

1. The application for determination before me is a motion on notice dated 9/9/2022 and filed on 21/9/2022. It is expressed to be brought under Sections 1A, 1B, 3, 3A, and 79(G) of the *Civil Procedure Act* (Cap 21) Laws of Kenya, Order 42 Rule 6 and order 50 Rule 6, of *Civil Procedure Rules*, 2010, and all other enabling provisions of the Law. The application or motion came with six (6) prayers but prayers 1 and 2 were for consideration at the *ex parte* stage and are therefore moot. The prayers for consideration are therefore four (4) – prayers 3, 4, 5 and 6 – and they are as follows:

Prayer 3: That pending the hearing and determination of the intended appeal herein, there be a stay of proceeding *in Siakago MCL & E No. 37 of 2021* pursuant to the court ruling made by Honourable Nyongesa Wasike (PM) delivered on 7/7/22.

Prayer 4: That this honourable court be pleased to enlarge time within which to file the memorandum of appeal and upon such enlargement the annexed draft memorandum of appeal be deemed as properly filed.

Prayer 5: That the court be pleased to issue any other orders it may deem appropriate in the circumstances.

Prayer 6: That costs of this application be provided for.



2. The application is anchored on the grounds, inter alia, that the applicant was aggrieved by the lower court ruling delivered on 7/9/2022 and desired to appeal but the memorandum of appeal was not prepared on time; that this court has powers to enlarge time for filing an appeal; that unless the stay sought is granted the applicant stands to suffer prejudice; and that it is in the interests of justice and fairness to grant the orders sought.
3. The application came with a supporting affidavit in which the background, history, and/or antecedents surrounding the dispute between the parties were explicated.
4. The application was responded to via a replying affidavit dated 30/9/2022 and filed on 3/10/2022. It was termed as incompetent, bad in law, full of misdirections and half truths in a bid to hoodwink the court.

The respondents said they are owners of Land parcel No. Mbeere/Wachoro/432 and that they are not parties to the appeal in Nyeri which the applicant mentioned as the basis for his application for stay in the lower court.

5. The respondents also deposed that their parcel of land is not one which is the subject of that appeal. According to the respondents, this application is meant to buy time as the stay sought for should not even have been asked for in lower court. The intended appeal was also said to be wanting in merits.
6. The reply by the respondents elicited the filing of a further affidavit by the applicant. In the affidavit, it was pointed out that the parcel of land in dispute in the lower court is also one of the parcels of land which are the subject of the appeal filed at the court of Appeal in Nyeri. The applicant also deposed that he lives on the land and he might be rendered homeless if the orders he is seeking are not granted.
7. The application was canvassed by way of written submissions. The applicants submissions were filed on 13/2/23. According to the applicant, the court is required to determine whether the lower court proceedings should be stayed and whether the time to file the appeal should be enlarged or extended.
8. On enlargement of time, the applicant invoked Section 79 (G) of *Civil Procedure Act* as the statutory basis for extending or enlarging time. He then cited and quoted the case of *Silas Kanyolu Mwatha vs Jospine Kavive James* [2021] eKLR where the case of *Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] KLR – SCK was cited for various propositions including the following:
 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 the basis to the satisfaction of the court.
 3. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis.
 4. Whether there is a good reason for the delay, which ought to be explained to the satisfaction of the court.
 5. Whether there would be any prejudices suffered by the respondents if the extension was granted; and,
 6. Whether the application has been brought without undue delay.
9. Further reliance was placed on the case of *Paul Wanjohi Mathenge vs Duncan Gichane Mathenge* [2013] eKLR where the court of appeal broadly expressed itself in similar terms and cited various cases



- on the issue including *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi*: Civil Appl. No. 255 of 1997, Nairobi (unreported).
10. Ultimately, the court was told that the applicant filed this case on 22/9/2022 while the appeal should have been lodged on 7/8/2022 with the delay being attributed to failure or inability to get proceedings on time. The delay was said to be beyond the applicant's control, and thus excusable.
 11. The applicant then shifted focus to the issue of stay of proceedings. On this, order 46 Rule 6(1) of Civil Procedure Rules was cited and the applicant then submitted that the power to stay proceedings is essentially discretionary. Being so, it has to be exercised judiciously, with the court being required to consider whether it serves the interests of justice to stay the proceedings. For persuasion and/or guidance, the cases of *Lucy Waitthera Kimanja & 2 others v John Waiganjo Gichuri* [2015] eKLR, *PORT Florence Community Health Care v Crown Health Care Limited* [2022] eKLR, *UAP Insurance Company Limited Ltd v Michael John Beckett* [2004] , *Niazons (K) Ltd v China Road and Bridge Corporation (Kenya)* [2001] eKLR and *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR, among others, were cited and even quoted in some instances.
 12. This court was ultimately asked to allow the application as the proceedings in this court might be rendered nugatory if the lower court matter proceeds.
 13. The respondents submissions were filed on 13/12/2022. The submission's first focus is on the issue of whether the proceedings in the lower court should be stayed. There should be no such stay, it was submitted, as stay "is a grave judicial action, which interferes with a parties (sic) right to fair hearing; access to fair trial". Citing the case of *Global Tours and Travels Limited: Nairobi HC Winding up Cause No. 43 of 2000*, the respondents submitted that the court should consider the need for expeditious disposal of cases; prima facie merits of the intended appeal limited to and not going further than consideration of whether the appeal is arguable; optimum use of judicial time; and/or whether the application itself has been brought expeditiously.
 14. In the matter at hand, the intended appeal is said to be an afterthought and also not arguable. It is also the respondents position that the orders sought to be appealed against should not have been sought in the lower court in the first place.
 15. The respondents' focus then shifted to consideration of whether time to file the intended appeal should be enlarged. It shouldn't; the respondents submitted. Placing reliance on the case of *First American Bank Ltd v Gulapshah & 6 others*: [2000] EA 65, the respondents submitted that the court should consider the explanation, if any, for the delay; whether the appeal is arguable; and whether the respondent can be adequately compensated for any prejudice suffered as a result of enlarging time.
 16. Turning to the matter at hand, it was submitted that the delay is unexplained; that the appeal is not arguable; and that there is no letter showing that the lower court proceedings were asked for.
 17. I have considered the application as filed, the response and counter-response made, and the rival submissions. I have also considered the authorities cited by each side. A perusal of the records in the court file show that the parcel of land in dispute in the lower court – Land parcel No. Mbeere/Wachoro/432 – was also among the parcels of land in dispute Petition No. 54 of 2015, which this court heard and later determined on 4/6/2020. That petition is now subject of Appeal No. E028 of 2021 at Court of Appeal, Nyeri. The lower court ruling intended to be appealed against was delivered on 7/7/2022 and it was essentially a dismissal of an application dated 20/9/2022 which had sought stay of the lower court proceedings pending the outcome of the appeal at Nyeri.
 18. The stay of proceedings sought before me is a bit different. Its focus is not the appeal at Nyeri. The stay sought is about staying the lower court proceedings pending the outcome of the appeal intended to



be filed in this court contesting the outcome of the lower court ruling. The applicant was late in filing that appeal, hence the prayer also to enlarge time within which to file it. I think the sole issue before me is whether the applicant has demonstrated the merits of the prayers he is seeking.

19. I will begin by considering the prayer for enlarging time to file the appeal (prayer 4) because the prayer to stay proceedings is pegged on the granting of the prayer to enlarge time. According to the respondents the lower court ruling was delivered in presence of the applicant's counsel. To the respondents the application before the court is an afterthought and meant to delay justice. It was allegedly filed after the applicant had filed "all sorts of superfluous application (sic) in the primary suit at Siakago Law Court." The intended appeal was said to lack merit and the applicant was accused of "engaging the court in circus"
20. On his part the applicant averred that the ruling he intends to appeal against was delivered on 7/7/2022 but it was sent to his counsel "vide electronic mail" on 17/8/2022. The counsel was therefore unable to prepare a memorandum of appeal on time.
21. As a starting point, I think it is necessary to consider the law that applies to enlargement of time to file appeals. In this regard, Section 79(G) of the Civil Procedure Act (Cap 21) states as follows

"79(G) 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."
22. In the case of Tbuita Mwangi v Kenya Airways Ltd [2003] eKLR the court outlined the factors to consider as follows:
 1. The period of delay
 2. The reason for the delay
 3. The arguability of the appeal
 4. The degree of prejudice which could be suffered by the respondent if the extension is granted.
 5. The importance of compliance with time limits to the particular litigation in issue.
 6. The effect, if any, on the administration of justice or public interest, if any is involved.
23. The supreme court had occasion to pronounce itself on the issue of extension or enlargement of time in the case of Mwambura & 9 others v Spire Properties (K) Limited & 50 others (Petition (application) 27 (E031) of 2022 [2023] KESC 12 (KLR) (Civ) (17, February 2023) (Ruling). It held:
 - a. Extension of time was not a right of a party. It was an equitable remedy that was available to a deserving party at the discretion of the court.
 - b. A party seeking extension of time had the burden of laying a basis to the satisfaction of the court.



- c. Whether or not the court should exercise the discretion to extend time was a consideration to be made on a case-to-case basis.
 - d. Whether there was a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
 - e. Whether there would be any prejudice suffered by the respondents if the extension was granted.
 - f. Whether the application had been brought without undue delay
 - g. Whether in certain cases, like election petition, public interest should be a consideration for extending time.
24. In my view, the court should in addition consider whether allowing the application to file an appeal out of time promotes the overriding objective in civil cases which require that the court should aim at achieving the just, expeditious, proportionate, and affordable resolution of disputes.
25. In the application now under consideration, the applicant has deposed, inter alia, that the ruling was delivered on 7/7/2022 but the same ruling was sent to him for purposes of appeal on 17/8/2022. The respondents has not responded to this. It appears to me that the ruling itself was therefore made available to the applicant outside the time allowed for appeal. When the applicant therefore avers that the reason for the delay was outside his control, it is easy to understand him.
26. The respondents on the other hand allege that the delay is unexplained. To the respondents, the application is an after thought and is essentially meant to delay the matter. To the court, this is not very much so. The respondents should have responded to the issue raised by the applicant alleging lateness or delay by the lower court in making the ruling available.
27. This court is persuaded that it should enlarge time to file the appeal. The applicant has offered a good reason for doing so. That prayer in the application is hereby granted.
28. There is then the prayer to stay proceedings. This prayer is asked for because the appeal pending at Nyeri, which involves several parcels of land, also has the disputed land in the lower court as one of the subject matter. In order to make my decision, I have looked at everything made available including a deposition in the respondents further affidavit.
29. It seems reasonably clear that the disputed parcel of land – Mbeere/Wachoro/432 – is one of the land parcels which are subject matters in the appeal at Nyeri. It is also apparent that though the appellant may not be a party in that appeal, the order being sought is wide enough to affect him as it is expressed to affect not only the interested parties but also “other persons”.
30. I appreciate well that the law is largely in disfavor of granting an order of stay of proceedings. It is an order that is only granted sparingly and only in the very deserving cases. In this matter, the applicant says he is living on the disputed land. The respondents are seeking to evict him from the land.
31. I think I need to point out that I am not persuaded that an order of stay of proceedings can not be made by the same court that is handling the proceedings. My view is that in appropriate cases, it can be granted. What has been made available before me persuades me that I should grant an order of stay of proceedings pending the appeal intended to be filed before this court. I hereby grant that order too. Costs of the application will be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 23RD DAY OF MARCH, 2023.

In the presence of Musyoka for Mungai for applicant and in the absence of Muriuki M. for respondent.



Court assistant: Leadys

A.K. KANIARU

JUDGE

23.3.2023

