



**Mwangi v Wanjohi & 2 others (Miscellaneous Application  
E046 of 2022) [2023] KEELC 16429 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16429 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
MISCELLANEOUS APPLICATION E046 OF 2022**

**JG KEMEI, J  
MARCH 16, 2023**

**BETWEEN**

**GABRIEL MWANGI ..... APPLICANT**

**AND**

**AUGUSTINE MURIITHI WANJOHI ..... 1<sup>ST</sup> RESPONDENT**

**LUCY WANJIKU KERTE ..... 2<sup>ND</sup> RESPONDENT**

**HELLEN WAIGUMO GITHINJI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application before me is dated July 15, 2023. The applicant has urged the following orders:-
  - a. Spent
  - b. That this honourable court be pleased to grant leave to the applicant to file an appeal out of time in respect of a judgment delivered in Ruiru MCE & L Case No 14 of 2020 that was delivered on September 30, 2021.
  - c. That this honourable court do issue a temporary order for stay of execution on the decree and all consequential orders issued in Ruiru MCE & L Case No 14 of 2020 pending the hearing and determination of this application.
  - d. That this honourable court be pleased to issue any other orders it may deem appropriate.
  - e. That costs of this application be in the cause.
2. The application is premised on the grounds annexed thereto and the supporting affidavit of the applicant sworn on July 15, 2022. The applicant averred that he was the defendant in ELC No 14/2020



in Ruiru Court where judgment was delivered on September 30, 2021. That aggrieved by the judgment he advised his counsel on record to lodge an appeal. That he has now discovered that the said advocate failed to lodge the appeal on time. seeing that the time to file the said appeal has lapsed, he has sought leave to lodge the said appeal. That the respondents in the process in the process of carrying out eviction hence the application for stay. See eviction order marked as “GBM2” issued on June 24, 2022.

3. The applicant averred that he has attached a draft memo of the intended appeal marked as GBM3 with high chances of appeal.
4. The application is opposed by the respondents *vide* the replying affidavit sworn by all jointly on September 16, 2022.
5. They contend that judgment was rendered on September 30, 2021 in their favour. The applicant failed to file an appeal within the stipulated time. Execution of the judgment has commenced and orders of eviction have been obtained against the applicant. That the application herein is geared at defeating the execution of the said judgment by buying time and deprive them the opportunity to enjoy the fruits of their judgment. Interalia that the applicant has not attached a copy of judgment nor the decree he seeks to appeal against. The applicant has not made out a case for granting stay of execution. The delay in bringing the application is inordinate – almost 10 months after judgment. Finally, in the event the court is inclined to grant the application the applicant should be ordered to deposit monies to act as security for costs. That they stand to suffer prejudice if the orders are granted.
6. Both parties have filed written submissions which I have considered.
7. There are two (2) issues for determination: -
  - a. Whether the applicant is entitled to leave to file an appeal out of time.
  - b. Whether the applicant is entitled to orders of stay of execution of the judgment.
8. It is not in dispute that the trial court delivered its judgment on September 30, 2021.
9. Appeal is a creature of the law. 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.”
10. Enlargement of time on appeal is possible provided that the applicant satisfies the court that he had good and sufficient cause for not filing the appeal out of time.
11. The Supreme Court of Kenya decision in [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR stated as follows:-

“It follows that when considering whether to grant an extension of time for an appeal against a final decision in a case of any complexity, the courts should consider “all the circumstances of the case” including:

  - a. the interests of the administration of justice;



- b. whether the application for relief has been made promptly;
- c. whether the failure to comply was intentional;
- d. whether there is a good explanation for the failure;
- e. the extent to which the party in default has complied with other rules, practice directions and court orders;
- f. whether the failure to comply was caused by the party or his legal representative;
- g. the effect which the failure to comply had on each party; and
- h. the effect which the granting of relief would have on each party.

In the case of a procedural appeal the court would also have to consider item (g):

"whether the trial date or the likely trial date can still be met if relief is granted".

12. Order 50 rule 6 of the [Civil Procedure Rules](#) gives this court power to enlarge time as the justice of the case may require. It states as follows:-

"Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have such power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

13. In the case of [Paul Musili Wambua v Attorney General & 2 others](#) (2015) the court states as follows:-

"It is now well 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. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the 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. (See *Mutiso v Mwangi*) [1999] 2 EA 231). In other words rule 4 of the Court of Appeal Rules donates unfettered discretion and as long as the discretion is exercised judiciously, a single judge would be entitled to consider any other relevant material."

14. It is trite that extension of time or enlargement of time is an equitable remedy granted at the discretion of the court, which discretion must be granted judicially.
15. The judgment was delivered on September 30, 2021 and this application was brought on July 15, 2022, a period of 10 months.
16. There is a plethora of decisions which have held that what constitutes delay depends on the circumstances of each case. in this case the applicant has explained that he advised his previous lawyers to lodge an appeal but discovered later that they did not. He has urged this court not to visit the mistake of his counsel on him.



17. It is on record that eviction orders were issued on June 14, 2022. There is no evidence that the same have been effected. It is to be gleaned that the respondent has not explained any prejudice that he stands to suffer if the orders are granted save that he has a judgment in its possession and should not be deprived for no justifiable cause.
18. The provisions governing stay of execution are found in order 42 rule 6 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 appeal case of 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.
- (3) ...
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.”
19. The applicant has stated that the respondent are in the process of carrying out eviction. I am satisfied that the applicant has demonstrated substantial loss.
20. With respect to the provision of security for the due performance of the decree, it is trite that it is ordered by the court in exercise of its unfettered discretion.
21. In furtherance of paragraph 19 above I order the applicant to deposit in court the sum of Kshs 100,000/- as security for the due performance of the decree.

### **Final Orders For Disposal**

22. The application is granted on terms:
- a. That the applicant pays deposit into the court of Kshs 100,000/- within a period of 30 days from this date.
  - b. Files the appeal within 30 days from this date.
  - c. In default of any of the above, the orders shall lapse with no further orders from this court.



d. Costs of the application is in favour of the respondents.

23. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 16<sup>TH</sup> DAY OF MARCH, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of

Applicant – Absent

1<sup>st</sup> Respondent – present in person

2<sup>nd</sup> Respondent – present in person

3<sup>rd</sup> Respondent – present in person

Court Assistants – Esther / Kevin

