



**Kigea & another v Mailanyi (Environment and Land Miscellaneous Application  
E033 of 2022) [2023] KEELC 16133 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16133 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E033 OF 2022**

**CK YANO, J**

**MARCH 15, 2023**

**BETWEEN**

**GERVASION MURIIRA KIGEA ..... 1<sup>ST</sup> APPLICANT**

**JUSTER NCULUBI BRITHIA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**NAHASHON MWETERI MAILANYI ..... RESPONDENT**

**RULING**

1. The applicants herein moved this court by the notice of motion application dated September 28, 2022 brought under Section 3A and 63 ( e) of the *Civil Procedure Act*, Order 42 rule 6 ( 1) of the *Civil Procedure Rules* and Article 159 (2) (d) of the *Constitution* and all enabling provisions of the law. The applicants mainly seek leave to appeal out of time and stay of execution of the judgment and decree in Tigania PMC ELC No 21 of 2015 delivered on August 4, 2022 pending the hearing of this application and the intended appeal.
2. The application is supported by the affidavit of Gervasio Muriira Kigea, the 1<sup>st</sup> applicant sworn on September 28, 2022 and is premised on the following grounds-;
  - i. The judgment of the court was delivered on the August 4, 2022.
  - ii. The applicants/appellants are greatly dissatisfied with parts of the said judgment and wish to appeal against the same.
  - iii. That the court registry at Tigania Law courts delayed in issuing typed proceedings and judgment thus the delay in lodging an appeal.
  - iv. That the time allowed to file an appeal has run out.
  - v. That the respondent is unlikely to suffer any prejudice.



- vi. That the delay herein is not so inordinate or so great as to be inexcusable.
- vii. That it is in the interest of justice to allow the instant application.
3. In the affidavit in support of the application, the 1<sup>st</sup> applicant has deposed inter alia that they followed up the typed proceedings and judgment but on several occasions could not find any assistance at the Tigania law court registry since majority of the staff had either travelled or were away in preparation to participate in the 2022 General Elections. The applicants have exhibited a draft memorandum of appeal which they argue is arguable and has high chances of success.
4. In opposing the application, the respondent filed a replying affidavit sworn by himself on November 9, 2022. The respondent states that despite the applicants making the application without unreasonable delay, they have failed to prove that they will suffer substantial loss and have not offered any security for costs as required under the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules*.
5. The respondent avers that he is already in use of the suit property having fenced the same and utilizing it to earn a livelihood. The respondent has annexed a photograph showing the suit property.
6. Relying on legal advice, the respondent believes that there is nothing to stay since the trial court declined to issue any orders and instead dismissed the matter with costs. The respondent contends that it is trite law that all the conditions for stay must be met for the court to grant order of stay and that it is not enough to merely observe some and ignore the rest. It is also the respondent's contention that the annexed draft memorandum of appeal raises no arguable issues and has no chances of success and is an abuse of the court process.
7. The respondent states that the reason given for the delay is only an excuse since the general election took place on August 8, 2022 which was the only day gazetted as a public holiday, and accused the applicants of unfairly accusing the staff at Tigania law Court's registry of absconding duties, adding that the applicants have not annexed a certificate of delay to confirm when the typed proceedings and judgment were applied for and issued.
8. I have considered the application and the response. The issues for determination are whether leave should be granted to the applicants to appeal out of time and whether stay of execution of the judgment in Tigania PMC ELC No 21 of 2016 should be granted pending the hearing and determination of the intended appeal.
9. The decision which is sought to be appealed is from the lower court. Under Section 79G of the *Civil Procedure Act* and Section 16A (1) of the *Environment and Land Court Act* provides that all appeals from the subordinate court shall be filed within a period of thirty days from the date of the decree or order appealed against. The proviso of Section 79G of the *Civil Procedure Act* and Section 16A (2) of the *Environment and Land Court Act* however allow for extension of time to appeal where good and sufficient cause has been shown. As such extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he/she has a good cause for doing so.
10. The principle upon which the court should exercise the said discretion and grant leave to appeal out of time are now well settled. The court ought to consider the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. These principles were outlined in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil application No Nai 255 of 1997 and *Thuita Mwanig v Kenya Airways Limited [2003] eKLR* among others. The question therefore is whether taking into account the facts of the instant case, the applicants have satisfied the said conditions. As for the length of delay,



the judgment of the trial court was delivered on August 4, 2022 while the instant application was filed on September 28, 2022. The application has been brought after a period of less than two months. It is my considered view, and as rightly admitted by the respondent, that the application has been brought without unreasonable delay.

11. In justifying the said delay, the applicants aver that there was delay in obtaining typed copies of the proceedings and judgment which was caused by the August 2022 General Elections. It is my opinion that the reason given for the delay is well explained and reasonable. The court has further noted that the impugned judgment was delivered in the absence of counsel for the parties.
12. As for the chances of the appeal succeeding, the court has perused the draft memorandum of appeal. The same inter alia, faults the trial magistrate for misapprehending the principles and law governing contracts. An arguable appeal is not one which must necessarily succeed, but one which raises arguable issues and ought to be argued before the court, that is one which is not frivolous ( see [\*Joseph Gachau & another v Pioneer Holdings \(a\) Ltd\*](#) & 2 others civil application No 124 of 2008). In my view, the intended appeal raises triable issues and is not frivolous. It is therefore my considered opinion that since the applicants have expressed their intention to be heard by this court on appeal, they ought to be given an opportunity to pursue the appeal since the delay is not inordinate.
13. The other issue to consider is whether the order of stay of execution should be granted. The purpose of a stay order is to prevent the intended appeal from being rendered nugatory and the court will also consider whether the applicants will suffer substantial loss if stay is not granted. It is trite law that before grant of stay of execution of a decree or order, the applicant is supposed to satisfy the requirements set under Order 42 Rule 6(2) of the [\*Civil Procedure Rules\*](#) which gives the court discretionary powers to stay execution. The said provisions states that an applicant must satisfy the court that substantial loss may result to the applicant unless the order is made, that the application has been made without unreasonable delay and such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. The power of the court is discretionary and the discretion in such a way as not to prevent justice.
14. In this case, the applicants have not stated that they will suffer any substantial loss if the stay is not granted. On the other hand, the respondent has deposed that there was no positive order issued by the trial court because it simply dismissed the applicants claim with costs. Further, the respondent stated that he has already fenced the suit land and is utilizing it to earn a livelihood. The applicants did not challenge the averments made by the respondent. Accordingly, the court will not grant the order of stay of execution since the applicants have not met requirements set under Order 42 Rule 6 (2) of the [\*Civil Procedure Rules\*](#).
15. In the result, the court will allow the application in the following terms.
  - a. Leave is hereby granted to the applicants to file appeal out of time.
  - b. The appeal shall be filed and served within 14 days from the date of the ruling herein.
  - c. Costs of the application to the respondent in any event.
16. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 15<sup>TH</sup> DAY OF MARCH 2023**

In the presence of;

Court assistant- Kibagendi

No appearance for Applicants



No appearance for Respondents

**C K YANO**

**JUDGE**

