



**M'Elongi v M'Impwi (Environment and Land Miscellaneous Application  
E002 of 2023) [2023] KEELC 17079 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17079 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E002 OF 2023**

**CK NZILI, J**

**APRIL 26, 2023**

**BETWEEN**

**M'MAILANYI M'ELONGI ..... APPLICANT**

**AND**

**JUSTUS MUGAA M'IMPWI ..... RESPONDENT**

**RULING**

1. By an application dated 19.12.2022 the court is asked to issue interim orders of stay of execution against a judgment or decree issued on 13.10.2022 by the trial court and to extend the time within which to file an appeal.
2. The reasons for the application are contained on the face of the application and in the supporting affidavit sworn on 19.12.2022 by M'Mailanyi M'Elongi. The applicant stated that though an appeal was filed through his son on 28.10.2022 as Meru H.C Appeal No. E062 of 2020, he later on discovered that the same was filed by an unqualified advocate hence he had to source for the instant advocates. Further, the applicant averred that the respondent was granted 2 acres out of his LR No. Athinga/Athanja/1819 which he has extensively developed over the years with permanent buildings. That if the execution proceeds, there would be subdivisions of the land, new titles will be issued and that the respondent if registered as the new owner was likely to deal with the property in a manner prejudicial to him, hence rendering the appeal nugatory. Additionally, the applicant avers that he would also suffer substantial losses if an order of stay was not granted as he could suffer permanent deprivation of the land in the event the appeal was to succeed. The applicant has attached a copy of the appeal filed by M/S D.P Mugambi and Co. Advocates as an annexure marked MM "1".
3. The application is opposed through a replying affidavit by Justus Mugaa M'Impwii sworn on 6.2.2023 on the basis that the lower court judgment was read in the presence of the parties and no evidence has been placed before the court that the annexure marked MM "1" was filed by an unqualified advocate, either by way of correspondence to the counsel or a confirmation from the Law Society of Kenya that



- the said lawyer does not feature in the Roll of Advocates. That to that extent the burden of proof over he who alleges a fact has not been discharged. Further, to this the respondent averred that no security for the due realization of the decree has been offered, the application had been overtaken by events since a surveyor's report attached as JM "1" was that the decree had been implemented and what remained was the issuance of a title deed.
4. That after the new boundaries were fixed by the county surveyor, the applicant caused malicious damage and created disturbances and since he who comes to court must come with clean hands, the applicant does not deserve the orders sought. Lastly, the respondent averred that costs are escalating including those arising out of the previous litigation in Meru JR Misc. Application No. 3 of 2007 which were due for taxation on 16.2.2023 as per the annexures marked JM 3 (a) & JM 3 (b) respectively.
  5. With leave of court parties agreed to canvas the application through written submissions dated 3.2.2022 and 10.2. 2023. The applicant submitted that the application has met the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules. On the first condition since the subject matter was land in real danger and the likelihood of subdivisions, transfer and registration to excise the decreed two acres, the applicant submitted that it may be difficult to recover the land if disposed of to third parties or perhaps when charged with a bank hence exposing him to substantial loss. Therefore, the applicant submitted that there was need to preserve the status quo. Reliance was placed on *Mukuna vs Abuoga* (1988) KLR 645, *Christopher Njeru vs Eugenio Njagi M'Nchege* (2019) eKLR.
  6. Regarding delay, the applicant submitted that following judgment on 13.10.2022, they moved with speed and diligence to file an appeal within 8 days only to discover later on that the same was prepared by an unqualified person one Mbijiwe Muthuri of Muriri market on 20.1.2023 whose mobile No. xxxx would not go through or be traced in his office, hence any delay thereafter has been explained and was due to factors beyond his control.
  7. As to security for the due realization for the decree should the appeal not succeed, since this is not a monetary decree, the applicant submitted that this condition should not be considered since no financial obligations are involved on either side as held in *Praxides Okutuyi vs Medical Practitioners and Dentists Board* (2018) eKLR, *Sarah N. Sakwa vs Elizabeth Wamwayi t/a Namukhosi Ltd & another* (2017) eKLR.
  8. On leave to file the appeal out of time, the applicant submitted that under Section 79 G of the *Civil Procedure Act*, good and sufficient reasons for the delay have been offered since the applicant trusted that his son would get him a lawyer only to fall under the hand of a quack without his knowledge.
  9. On the part of the respondent it was submitted that immediately upon the delivery of the lower court judgment, a scene visit was conducted and a report by the surveyor was made dated 4.11.2022. Therefore, the applicant should have applied for a stay of execution before then if at all the appeal had been filed by 22.10.2022. Further, the respondent submitted that the applicant participated in the scene visit on 4.11.2022 hence the application for stay has been rendered an academic exercise since even if title deeds are issued they can still be reversed.
  10. The respondent further submitted that nothing had been produced to show the said lawyer was unqualified by dint of Section 9 of the *Advocates Act*. Therefore, the burden to prove that under Sections 109, 110 & 112 of the *Evidence Act* has not been discharged. Lastly, the respondent submitted that the grounds under Order 42 Rule 6 of the *Civil Procedure Rules* have to be proved sequentially hence since none have been proved the application must fail.
  11. The court has carefully gone through the application, affidavit in reply and the written submissions filed by the parties.



12. Section 79 G of the *Civil Procedure Act* requires that there be good reasons why the appeal was not filed within time. Similarly, for a party to be entitled to stay of execution he must bring the application within a reasonable time, demonstrate substantial loss, offer security for the due realization of the decree should the appeal not succeed and lastly, demonstrate that it is in the interest of justice to grant the stay of orders.
13. In the *County Government of Mombasa vs Kooba Kenya Ltd* (2019) eKLR, the court cited with approval *Karui Zabarya & another vs Shalom Levi* C. App No. 80 of 2018 on the considerations for an application on extension of time as the length of the delay involved; reasons for the delay; the possible prejudice; conduct of the parties the need to balance the interests of a party who has discretion in his favour against the right to appeal; the need to protect a party's opportunity to agitate its dispute against the need to ensure timely disposal of a dispute the public interest and whether prima facie the intended appeal has any chances of success.
14. Further, in the case of *KRA & 2 others vs Mount Kenya Bottlers & 4 others* application 12 (E021) of 2021 (2022) KESC 2 (KLR) 10<sup>th</sup> February (2022) Ruling, the court said that extension of time was an equitable remedy, the grant of which involves the exercise of judicial discretion and that equity aids the vigilant and not the indolent. The court went on to state that an extension of time was not a right of a party but was only available to a deserving party at the discretion of the court, the party has the burden to lay a basis to the satisfaction of the court why the discretion should be exercised in his favor and that a reasonable reason for the delay should be explained.
15. As to stay of execution, the court in *Re-estate of Harish Chandra Hindocha (deceased)* (2021) eKLR, said that the position in law is that an appeal would be rendered nugatory if the consequential effects for the failure to grant the relief sought would be either irreversible or highly prejudicial so as to render of no consequence the intended appeal or appeal if ultimately successful.
16. The court has looked at the replying affidavit to the application to gauge whether the respondent had made a provision for the preservation of the substratum of the intended appeal or had given some guarantee, undertaking or assurance that the substratum of the proceedings which was little of the suit property will not fizzle out before the determination of the intended appeal.
17. Additionally, in *Jenifer Akinyi Osodo vs Boniface Okumeu Osodo & 3 others* (2021) eKLR, the court granted a temporary injunction since the suit property was likely to be dealt with in an adverse manner to an extent of losing the substratum of the appeal and rendering it nugatory.
18. Applying the foregoing binding caselaw and principles to this application, the applicant takes the view that there are good reasons for not filing the appeal on time while on the other hand, the respondent states no evidence has been availed that the lawyer who filed the appeal was unqualified. Annexure marked MM "11" is an appeal from the lower court purportedly filed at the High Court of Kenya Meru and not this court. That anomaly alone shows that whoever filed the appeal whether qualified or not misled the applicant. To my mind, the explanation appears reasonable, genuine and sufficient for this court to exercise its discretion in favour of the applicant. The prejudice likely to be caused to the respondent can be compensated by way of costs. Similarly, I find the grounds of an appeal raising arguable points which entitles the applicant the right to be allowed to ventilate it in the exercise of his unfettered right of appeal.
19. On the issue of substantial loss, the court in *James Wangalwa vs Agnes Naliaka* (2012) eKLR, held that there must be a demonstration that the execution would result in circumstances that would affect the very essential core of the appeal if the said appeal was to succeed.



20. The applicant in his application and affidavit has given cogent and sufficient details on the substratum including the possible or prejudice and losses he may incur should execution proceed to completion. As much as the respondent has averred that there was the execution of the decree, nothing has been produced before this court by way of mutation forms, duly executed transfer forms and registration forms as well as an official search certificate indicating that the decree has been executed and all what was remaining was the issuance of title deeds.
21. The upshot is that leave is hereby extended to file and serve the appeal. The memorandum of appeal shall be filed within 7 days from the date hereof.
22. Further, the decree at the lower court and the implementation of the judgment is hereby stayed for a period of one year. There shall be no eviction of the applicant from the suit land and or issuance of new title deeds or taking up of any portion that may have been hived off from the initial parcel number pursuant to the decree or judgment from the lower court.
23. The applicant shall deposit Kshs.100,000/=, before the court as security for costs alongside the filing of the memorandum of appeal in default of which the stay orders shall stand vacated on the 30<sup>th</sup> day from the date hereof. Costs of this application to abide by the appeal.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 26<sup>TH</sup> DAY OF APRIL, 2023**

**In presence of:**

C/A: John Paul

Gatwiri Mwititi for Murango Mwenda for the applicant

Mwititi for respondent

**HON. C.K. NZILI**

**ELC JUDGE**

