



REPUBLIC OF KENYA



**KENYA LAW**  
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**Katua & 2 others v Kitonga & 2 others (Miscellaneous Application  
3B of 2021) [2023] KEELC 16807 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16807 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
MISCELLANEOUS APPLICATION 3B OF 2021**

**EK MAKORI, J  
APRIL 13, 2023**

**BETWEEN**

**MKETHE KATUA & 2 OTHERS ..... APPELLANT**

**AND**

**JOSEPH KITONGA & 2 OTHERS ..... RESPONDENT**

**RULING**

1. By an application dated May 31, 2021, the applicants seeks the following orders inter alia:
  - a. That this honourable court be pleased to enlarge time and grant leave to the applicants to lodge a memorandum of appeal out of time against the judgment and decree in Mariakani SRMCC NO 37 OF 2014 (honourable Stephen K Ngii) made on April 30, 2020;
  - b. That the annexed memorandum of appeal be deemed duly filed;
  - c. That further this honourable court be pleased to stay execution of the said judgment and decree pending the hearing and determination of the intended appeal.
2. The application is opposed. The parties were directed to have the matter canvassed through written submissions. On the record, I received submissions from the applicants and the 1<sup>st</sup> respondents.
3. On April 30, 2020 judgment was delivered electronically by the court in Mariakani SRMCC No 37 of 2014. The plaintiffs/appellants suit was dismissed with costs, which were later assessed by the court, and executions proceedings set in motion.
4. 1<sup>st</sup> applicant who is adversely affected by the judgment delivered in Mariakani SRMCC 37 of 2014, has been actively litigating and/or participating in the matter except for the period between 2020 and 2021,



when the said judgment was pronounced. Applicant stated in her affidavit in support of the application that she had been away and lost contact with her Advocates, so that when the judgment was delivered, she was unable to contact her Advocates for updates. Her Advocates were unable to reach her too for the purposes of informing her about the judgment and obtaining further instructions from her.

5. The applicant further contends that she was further prevented from visiting her Advocates' offices promptly for purposes of following up on the judgment due to the prevailing covid-19 restrictions of movement and only learnt of the judgment sometime in May 2021 when she was finally able to travel back and visit her advocates' office.
6. Consequently, the applicants urge this court to find that the delay in filing the intended appeal was not deliberately calculated at frustrating the due process of justice but was occasioned by unforeseen circumstances beyond the control of the applicant.
7. Nonetheless, the applicant submits that despite the delay - which is in any event excusable, justice can still be served by allowing the applicants to appeal the judgment delivered against it without occasioning the respondents undue prejudice.
8. The intended appellants have good grounds for appeal with high chances of success and indeed intend to appeal against the judgment delivered herein.
9. The applicant has attached a copy of the draft memorandum of appeal in support of the application. In the said draft, the applicant raises issues on the judgment and contends that the Magistrate failed to consider and/or otherwise ignored the applicant's evidence that she had actually purchased the suit property and had been in actual lawful occupation of the same. The applicant demonstrated legitimacy by producing the sale agreement between herself and the 3<sup>rd</sup> respondent vendor. She also produced transfer and clearance documents with respect to the property.
10. The issues raised in the memorandum of appeal are issues that can only be addressed through the appeal and they touch on the property rights of the applicant and it is evident from the documents relied upon by the applicant that she is likely to succeed on appeal.
11. Unless a stay of execution order is granted, the intended appeal will be rendered nugatory and this would be prejudicial to the applicant herein.
12. The applicant states that she has erected structures on the said property. It is also not in doubt that the judgment delivered by hon Ngii gave no protection to the 1<sup>st</sup> applicant or her constructions. In accordance with the provisions of order 42 rule 6 of the *Civil Procedure Rules*, to stay the judgment and decree issued in SRMCC 37 of 2014 pending the hearing and determination of the intended appeal otherwise the applicant's property is at the risk of being demolished by the respondent thereby occasioning the applicant extreme prejudice and the intended appeal would be rendered nugatory.
13. The respondent filed a replying affidavit contending on delay in bringing this application which as the applicant has explained above, was occasioned by unforeseen circumstances beyond the control of the applicant. The respondent has however not shown in any manner that they are likely to suffer undue prejudice through granting of the orders sought herein.
14. The case of *Richard Mutbusi V Patrick Gituma Ngomo & Another* [2017] eKLR, is cited where similar orders were sought, the court found on the issue of a stay pending appeal that:

“Under order 42 rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that: Substantial loss may result to him unless the order is made; That the application has been made without unreasonable delay; and The applicant has given such security as the



court orders for the due performance of such decree or order as may ultimately be binding on him.”

15. The applicant submits that she has proved on a balance of probability that she risks suffering substantial loss through the demolition of her structures unless stay orders are granted. Further, although there is a delay in filing the application, the same is not unreasonable and the respondent is in any event not affected.

16. The court In *Richard Muthusi* Case (supra) also cited the case of *Nicholas Kiptoo Arap Korir Salat V The Independent Electoral And Boundaries Commission & 7 Others* [2014] eKLR on issues of extension time as follows:

“..... It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion: - 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; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

17. Consequently, the court in the former case found that delay in communication with the client was a reasonable ground for the court to exercise its discretion. From the foregoing, the applicant concludes that she has sufficiently demonstrated that her delay was occasioned by the fact that she lost contact with her Advocates and there were no means of informing her in good time of the judgment. Needless to reiterate the respondent has not shown that he will suffer prejudice in any manner should the orders issued herein be granted.

18. The respondent on the other hand submits that there has been an unreasonable delay in bringing up this matter for appeal. The applicant has taken over 1 year and 2 months to make this application for leave. The judgment in the lower court was delivered on April 30, 2020 and this application was filed on May 31, 2021. It is the respondent’s submission that this delay is inordinate in the circumstance.

19. The delay for over one year is unexplained. The applicant says that the covid - 19 restrictions, kept her away. However, her Advocates were notified of the judgment and indeed attended the delivery of the same. There is no affidavit from her Advocates explaining, that they could not get her on phone or otherwise to obtain instructions. In the circumstances, the respondent submit that the application is an afterthought. This case has gone even to the extent of the respondent taxing his bill with full knowledge of the applicant.

20. That the applicant only saw the need to appeal after the respondent threatened to execute for his costs. The applicant in her own averment in the affidavit says she is a very diligent litigant. Then why didn’t she follow up on her case with her Advocate? In the case of *Nicholas Kiptoo Arap Korir Sala V Iebc* [2014] eKLR the Supreme Court aptly stated that the 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

21. Based on the above, the respondent urge the court to find that the applicant has not sufficiently shown why she delayed for over one year to file an appeal. Besides, the applicant has not shown whether she has taken any steps to file an appeal. There is no letter asking for proceedings or otherwise and the court cannot assume the applicant shall appeal.
22. According to the respondent, the appeal herein has no chance of success. The applicant is the one who had sued the respondent for ownership of properties at Mariakani. She had no single document to prove ownership on the contrary, the respondent had all the ownership documents, it is the respondent's respectful submission that the appeal has no chances of success and the applicant shall suffer no prejudice.
23. The applicant sued the respondent. Her suit was dismissed with costs. There is therefore nothing to be executed save for the costs. If the court is minded about granting stay of execution then it is urged that the court imposes a condition that the applicant deposit Kshs, 300,000/- to cover the taxed costs already taxed and any eventual future costs.
24. The issues that fall for determination are whether this court should enlarge the time for filing of the intended appeal and the annexed memorandum of appeal be deemed properly filed, and whether after so doing; it can grant a stay of execution pending the hearing and determination of the intended appeal.
25. On the issue of enlargement of time and as cited by counsels in the case of [Nicholas Kiptoo Arap Korir Sala V Iebc](#) [2014] eKLR the supreme court held:

“The Court of Appeal has pronounced itself on this aspect severally. Recently, in *Paul Wanjobi Mathenge v Duncan Gichane Mathenge* [2013] eKLR the Court of Appeal while referring to other authorities observed (at paragraph 12):

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In *Henry Mukora Mwangi vs Charles Gichina Mwangi*- Civil Application No Nai 26 of 2004, this Court held:-

“It has been stated time and again that in an application under rule 4 of the rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in *Mwangi vs Kenya Airways Ltd.* [2003] KLR 486 in which this Court stated:-“Over the years, the court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the rules. For instance in *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* Civil Application No Nai 255 of 1997 (unreported), the court expressed itself thus:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”



Comparatively, in *United Arab Emirates v Abdelghafar & others* 1995 IRLR 243 the Employment Appeal Tribunal laid down four principles to be observed in exercising the discretion to extend time. It stated at paragraph 7 thus:

“In the light of the guidance contained in these authorities it is possible to state, with reasonable precision, the principles which govern the exercise of the Appeal Tribunal’s discretion to extend time and to identify those factors regarded as relevant.

1. The grant or refusal of an extension of time is a matter of judicial discretion to be exercised, not subjectively or at whim or by rigid rule of thumb, but in a principled manner in accordance with reason and justice. The exercise of the discretion is a matter of weighing and balancing all the relevant factors which appear from the material before the Appeal Tribunal. The result of an exercise of a discretion is not dictated by any set factor. Discretions are not packaged, programmed responses.

2. As Sir Thomas Bingham M R pointed in *Costellow v Somerset CC* (supra) at 959C, time problems arise at the intersection of two principles, both salutary, neither absolute.

“ ... The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met...”

The second principle is that:

“...a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. ...”

1. The approach indicated by these two principles is modified according to the stage which the relevant proceedings have reached. If, for example, the procedural default is in relation to an interlocutory step in proceedings, such as a failure to serve a pleading or give discovery within the prescribed time limits, the court will, in the ordinary way and in the absence of special circumstances, grant an extension of time. Unless the delay has caused irreparable prejudice to the other party, justice will usually favour the action proceeding to a full trial on the merits. The approach is different, however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. The party aggrieved by that decision has had a trial to hear and determine his case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial. The interests of the parties and the public in certainty and finality of legal proceedings make the court more strict about time limits on appeals. An extension may be refused, even though the default in observing the time limit has not caused prejudice to the party successful in the original proceedings.



1. An extension of time is an indulgence requested from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default.”
26. The intended appeal obviously has been overtaken by time. The time to file lapsed a year and so down the line. The reasons that have been stated are that the applicant lost track of her Advocate. The judgment was delivered virtually. This was during the covid - 19 situation when the general population had been guided to stay home to avoid the spread of the same. The Advocate got the judgment but it has not been clearly demonstrated that the Advocate lacked the necessary mode of communication to pass over the findings of the court particularly in this era and time when we have mobile phones and email addresses and other social media platforms; and thereafter get further instructions on the way forward on the matter. Nevertheless, this litigant wishes to ventilate her appeal on merit and has such right to do so. The reasons for being late can be feeble but the court cannot shut her out of a hearing on appeal. The outcome of whether to enlarge time or not depends on the other considerations below.
27. The applicant has elaborately submitted that she has an arguable appeal and the Magistrate erred in failing to consider her side of the evidence as a plaintiff in the primary suit and that her constructions will be halted if no stay is granted. The respondent thinks otherwise and says the matter was concluded and they have nothing to execute other than the recovery of costs. The court below found that the applicant had failed to show her land on the ground with precision. The documents produced by the respondent as to the ownership and supported by the report produced by the County Surveyor showed the respondent as the owner of the plot in question and therefore no declaratory, injunctive, or eviction orders could issue against a respondent who had firmed his case supported by the area land administration the County Government of Kilifi.
28. The role of the court in granting a stay or refusing the same at this point, is as guided in the case of *Richard Mutbusi V Patrick Gituma Ngomo & Another* [2017] eKLR:  
“ Further, order 42 rule 6 of the *Civil Procedure Rules*, 2010 prescribes that:-
  45. An applicant must satisfy the court that the intended appeal is arguable and thus not frivolous; and
  46. An applicant must satisfy the court that unless the order for stay is granted, the intended appeal, if successful, would be rendered nugatory.”
29. On an intended appeal to preserve a suit property that is land that is determinable and both the appellants and respondents lay claim, the Court of Appeal in the case of *Mwadzaya Wachanda Clan*



“In this regard, the principles applicable in the exercise of the court’s unfettered discretion under rule 5(2)(b) to grant an order of stay are well settled. Firstly, an applicant has to satisfy that he or she has an arguable appeal. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this court in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR.

14. The applicants herein have referred the court to their memorandum of appeal and the grounds of its appeal therein to demonstrate that it has an arguable appeal. The applicants have in their grounds faulted the ELC on the application of the doctrine of *res judicata*, which we find arguable and ought to be canvassed fully. The applicants’ appeal is therefore not frivolous. The first limb of arguability has therefore been satisfied. On the nugatory aspect, it was stated by this Court in *Reliance Bank Limited vs Norlake Investments Ltd* [2002] 1 EA 227, that “the term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.” See also *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [supra] wherein it was held, *inter alia*, that whether or not an appeal will be rendered nugatory depends on whether the status of the subject matter sought to be stayed is reversible; or if not reversible whether damages will be an adequate remedy for the party aggrieved.
  15. It is notable that the 1<sup>st</sup> respondent does not dispute that the applicants are in occupation of the property which was the subject of the ruling in Malindi ELC Case No E063 of 2020, namely Kilifi/Madzimbani/Mitangoni/835 and 841. In the circumstances it is our view that the appeal will be rendered nugatory, if the current *status quo* with regard to possession and the status of the title to the suit property is disturbed before the determination of the applicants’ appeal.
  16. The 1<sup>st</sup> respondents has urged that certain conditions be imposed if the orders sought are found to be merited. We are however of the opinion that we cannot impose the conditions sought for two reasons. Firstly, there is no monetary claim sought by, or awarded to the 1<sup>st</sup> respondent against the applicants in relation to the suit land; and secondly, the nature of some of the conditions sought require supervision by this court, which is not possible. It is our view that justice will be better served for all parties in the circumstances of this application by the expeditious hearing and determination of the applicants’ appeal.”
30. In the intended appeal, the applicant seek to fault the findings of the trial court on ownership of the subject matter in question. The court found that it could not at all figure out the location of the parcel in question or at all. It is not germane at this point for this court to determine the appeal summarily, but the applicant cannot point out the land that was the subject matter in the court below or in the intended appeal. The applicant too talks of constructions going on – but with no demonstration of the same. Nothing from the record shows that the applicant had commenced any building or construction on the site as alleged hence it will be futile to issue any stay orders the parcel of land in contention remains blurred as to its identification on the ground.



31. The applicant to me seems to move this court to forestall the impending execution of costs and not the alleged findings by the Magistrate on the land in question.
32. Even if I were to enlarge the time within which to appeal, in my humble view, the subject matter in the appeal and basis of the appeal has not been clearly laid out to warrant the orders sought.
33. At the end, the application dated May 31, 2022 is dismissed with costs to the respondent.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 13<sup>TH</sup> DAY OF APRIL, 2023.**

**E. K. MAKORI**

**JUDGE**

NB: This Ruling has been delivered online to the last known email address for the Advocates on record who have been severally emailed to attend court to no avail.

