



**Kiarie & another v Makungu (Environment and Land Appeal
E005 of 2025) [2025] KEELC 2859 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2859 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E005 OF 2025**

JG KEMEI, J

MARCH 20, 2025

BETWEEN

MARY WAIRIMU KIARIE 1ST APPELLANT

ELIZABETH NDUTA KIARIE 2ND APPELLANT

AND

RUTH MUNASYA MAKUNGU RESPONDENT

(In respect to the Appellant's Application dated 7/1/2025)

RULING

1. Before Court is the Appellant's application dated 7/1/2025 brought under Article 159 (2) (d) of *the Constitution* of Kenya, 2010, Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 22 Rule 22, Order 42 rule 6 and Order 51 of the Civil Procedure Rules seeking the following orders;
 - a. Spent
 - b. Pending the hearing and determination of this application and the intended appeal this Court be pleased to issue an order of injunction, restraining the respondent, her agents, servants or anyone acting under her instructions from constructing, building, or making any alterations on the premises known as Dagoretti/Kinoo/3009.
 - c. The Court be pleased to grant the Appellants leave to appeal out of time against the judgment delivered on 9/9/2024 in BPRT No.914/2022.
 - d. The Court be pleased to stay any further proceedings or enforcements of the judgment delivered on 9/9/2024 pending the hearing and determination of the intended appeal.
2. The application is supported by the grounds annexed thereto alongside the supporting affidavit sworn by Mary Wairimu Kiarie on 31/12/2024. It is averred that the Tribunal dismissed the Appellant's notice



of termination and allowed the Respondents to retain possession of the premises including disputed rooms and dilapidated structures. Further that the Respondents are about to commence unauthorised construction of a permanent structure/church on the premises with the likelihood of significantly altering the character and the value of the property without the appellant's consent.

3. The Appellant is aggrieved by the judgment of the Tribunal rendered on the 9/9/24 on the grounds enumerated in the Memorandum of Appeal dated 7/1/25. It is further contended that if the Respondents are allowed to proceed with the construction, the appeal will be rendered an academic exercise. That the reason for the delay in filing the appeal was occasioned by the period taken in obtaining certified copies of judgment and proceedings from the Tribunal hence the need to seek leave to file the appeal out of time. That the balance of convenience favours the granting of the injunction to protect the Appellant's proprietary rights pending the hearing and determination of the appeal.
4. Mary Wairimu Kiarie reiterated the grounds underpinned in the application and urged the Court to grant the orders to preserve the current state of the premises pending the hearing and determination of the appeal which appeal, she argues raises serious and arguable points of law and fact with a high likelihood of success.
5. The application is opposed vide the replying affidavit of Ruth Munasia Makungu sworn on the 10/2/2025.
6. She contends that the intended appeal and the application is bad in law since the Appellants are appealing the wrong case. That is to say, E914 of 2022 instead of E409/2024. She averred that she entered into a lease agreement with the landlord namely James Kiarie Kihara from 1/2/2018 giving them access to a 50x100 plot together with and 5 rooms where they run a church and a school. However, the 1st Appellant who is the daughter of James Kiarie Kihara forbade them from using the rooms and went ahead and constructed a permanent structure in front of the church reducing the rented plots further. She urged the Court to dismiss the application on the grounds that it is frivolous, vexatious and an abuse of the process of the Court. On whether the Appellant is entitled to leave to file an appeal out of Court, the Respondents have vehemently argued that there was no judgment entered in E914/2022 and therefore the Memorandum of Appeal is premised on the wrong judgment contrary to the correct file that is E409/2024. Further that the appellants have not demonstrated any evidence in support of the eviction of the Respondents forcefully from her business premises.
7. On whether the Applicants have established a prima facie with a chance of success, the Applicants submit that the continued occupation and construction on the property is illegal, unauthorised and contrary to the tenancy agreement. Irreparable harm was explained as to constitute the permanent alteration of the character of the structures if construction is allowed, appeal will be rendered nugatory and that the balance of convenience is in favour of granting the injunction
8. On whether the appellants have established a case for issuance of injunctive reliefs it was submitted that the threshold in *Giella Vs Cassman Brown & Co Ltd (1973) E A 358* has not been established at least at the prima facie stage and neither have the appellants established any injury that cannot be adequately atoned by damages and in conclusion the Court was urged to dismiss the application as it is devoid of any merit.
9. There are three key issues for determination in this application namely; whether the Applicants are entitled to leave to file an appeal out of time and whether orders of injunction ought to be granted.



10. The Application before Court for consideration has been anchored under Section 3A, 63 (e), 79G and 95 of the CPA and Order 50 Rule 5 of the CPR. Section 79 G reads as follows;

“79G. Time for filing appeals from subordinate Courts

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”.

11. Section 95 of the CPA reads as follows; -

“Where any period is fixed or granted by the Court for the doing of any acts prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired”

12. It is clear from the above provisions of the *Civil Procedure Act*, Cap 21 that the extension of time for a party to do certain acts is a matter of discretion by the Court. It is also true that the Court may admit an appeal out of time provided that the applicant satisfies the Court that he had a good and sufficient cause for not filing the appeal in time.

13. The Supreme Court in the case of County Executive of Kisumu Vs. County Government of Kisumu & 8 Others (2017) eKLR pronounced the general criteria for considering applications for extension of time in the following words: -

“it is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as:

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 a basis to the satisfaction of the Court
3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and



7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
14. In this case the judgement of the Court was rendered on the 9/9/24 and the application seeking extension of time was filed on the 7/1/25 about 4 months after the delivery of the said judgement. The applicant has attributed the delay in filing the appeal out of time to the time taken to obtain the certified copies of the judgement and the proceedings. I have carefully perused the pleadings of the Applicants and fail to find any communication to the Court requesting for the said documents or at the very least the evidence of a certificate of delay issued by the Tribunal certifying that there was a delay and for how long.
15. A perusal of the provisions of Order 42 Rule 1(1) provides that every appeal to this Court shall be in the form of a Memorandum of Appeal signed in the same manner as a pleading. It is a requirement under (2) of the said Rules that the memorandum shall set forth concisely and under distinct heads the grounds of objection to the judgement appealed against and the grounds which must be numbered consecutively. Rule 2 of the said Order allows an Appellant to file a copy of the order or decree appealed against as soon as possible or as directed by the Court.
16. I find that the Applicants have not established sufficient and good reasons to allow the Court to its discretion in their favour. This issue must fail on that account.
17. As to whether the Applicants are entitled to orders of grant of injunction, the Court finds that having dismissed the prayer for leave to file an appeal out of time, there is no necessity to determine this issue as I find that it is now spent.
18. The costs of the application will be borne by the Applicants in favour of the respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF MARCH 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the presence of:

1. Ms Wambugu for the Appellants
2. Respondent present in person
3. C/A- Ms Yvette Njoroge

