



Maingi & 5 others v Nzei (Environment & Land Miscellaneous Case E030 of 2023) [2025] KEELC 1312 (KLR) (18 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1312 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND MISCELLANEOUS CASE E030 OF 2023**

AY KOROSS, J

MARCH 18, 2025

BETWEEN

GRACE KASIVA MAINGI & 5 OTHERS & 5 OTHERS APPLICANT

AND

DANIEL KUTU NZEI RESPONDENT

RULING

Judgment debtors' case

1. This ruling seeks to determine the notice of motion that has been moved under several provisions of law, and it is dated 9/11/2023. It seeks numerous reliefs from this court and some of them are spent. The prayers sought are thus: -
 - a. Spent.
 - b. Spent.
 - c. That the applicants be granted unconditional leave to extend the time to file an appeal.
 - d. That the draft memorandum of appeal filed with the motion be deemed duly filed upon payment of requisite court fees.
 - e. That there be a stay of execution pending hearing and determination of the appeal.
2. The motion is supported by the grounds set out on the body thereof and the supporting affidavit of Stephen Mutuku who is the 2nd applicant that he swore with the authority of his co-applicants. This affidavit is deposed on 9/11/2023.
3. In brief, it was contended the applicants had resided on undisclosed land for over 100 years to the 3rd generation, they were not privy to the pending suit and they were purchasers who owned portions of this undisclosed land.



4. It was averred that they delayed appealing because they only learnt of court orders in ELC CM. 17 of 2019 on 13/10/2023 when they were served with eviction orders. According to the 2nd applicant, this particular suit proceeded ex parte without allowing them to be heard.

Respondent's case

5. The motion was opposed by the respondent's replying affidavit which he swore on 20/11/2023.
6. In summary, it was stated there had been an unreasonable delay as the impugned judgment was rendered on 26/07/2023. According to him, the threshold to warrant the grant of the reliefs sought had not been met and the motion sought was baseless, speculative, ill-informed, frivolous, vexatious and an abuse of court process.
7. He argued the applicants' counsel was not properly on record as leave had not been sought to replace their previous counsel and a draft memorandum of appeal had not been tendered to the court.
8. He asserted in the lower court, the applicants were always represented and their counsel served. Lastly, he averred some of the signatures contained in the affidavit and authority to plead appeared to be forgeries.

Parties' submissions

9. The court directed parties to file written submissions for purposes of arguing their respective cases. Nonetheless, the applicants' law firm on record M/s. Tamata & Company Advocates did not comply.
10. In acquiescing with court directions, the law firm of M/s. Stanley Nthiwa & Company Advocates who are on record for the respondent filed written submissions dated 2/04/2024.
11. In them, counsel identified the following 4 issues as arising for resolution; whether the applicants' advocates are properly on record, whether the application for stay of execution is merited, whether the application meets the threshold to warrant the grant of the order for leave to appeal out of time and whether this is a suitable case for court to exercise its inherent discretion.
12. Therefore, upon identifying and considering the issues for determination, this ruling shall later on in its analysis and determination, consider the respondent's counsel's arguments contained on the particular issue and also bear in mind the law and judicial precedents.

Issues for determination.

13. Having carefully given thought to the motion, its grounds, affidavit, and the respondent's counsel's arguments as contained in the submissions, the issues that arise for resolution and shall be addressed consecutively are: -
 - a. Whether the law firm of J.M. Tamata & Co. Advocates needed to seek leave to come on record for the applicants.
 - b. Whether an extension of time should be granted.
 - c. Whether orders of stay of execution should be granted.
 - d. What orders should this court issue including an order as to costs?



a. Whether the law firm of J.M. Tamata & Co. Advocates needed to seek leave to come on record for the applicants.

14. As rightfully submitted by the respondent’s counsel, Order 9 Rules 9 and 10 of the Civil Procedure Rules provides for the post-judgment change of advocates whereby any change of advocate has to be carried out with leave of the court.
15. In my considered view and as has been held in various court decisions, the intent of Order 9 Rules 9 and 10 of the Civil Procedure Rules was to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying them their hard-earned fees.
16. Had this court been the first court to hear and determine the matter, I would not have hesitated to uphold that once judgment has been rendered, leave has to be sought from the trial court.
17. However, I disagree with the respondent’s counsel’s argument that Order 9 Rules 9 and 10 of the Civil Procedure Rules applied to cases filed by the parties post-judgment to an appellate court.
18. This is so because, at an appellate level, the scenario is different. In my view and as has been held in various court decisions, Order 9 Rules 9 and 10 of the Civil Procedure Rules do not apply in instances of an appeal because the then applicants’ counsel’s instructions in the lower court, in this case, Ms. Muema & Associates Advocates were exhausted after the suit concluded.
19. At an appellate stage, the applicants have a right to representation of their choice. To buttress this argument, I am persuaded by the case of Tobias M. Wafubwa v Ben Butali [2017] eKLR which held thus;

“Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.”

20. Consequently, I find the law firm of Ms. J.M.Tamata & Co. Advocates is properly on record and this argument by the respondent’s counsel is misplaced.

b. Whether an extension of time should be granted.

21. As submitted by the respondent’s counsel, Section 79G of the *Civil Procedure Act* provides that appeals originating from the lower court should be filed before this court within 30 days from the date of the decree or order appealed against.
22. Nevertheless, in occasions of delay, parties can by Section 95 of the *Civil Procedure Act*, move this court to exercise its judicious discretion based on good and sufficient grounds and the court may extend the time as it deems fit even if the time originally fixed has expired. Section 79G of the *Civil Procedure Act* states;

“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.”



While Section 95 of the *Civil Procedure Act* provides as follows: -

“Where any period is fixed or granted by the court for the doing of any act 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.”

23. The principles that guide this court when faced with a prayer for an extension of time have been dealt with in a line of court decisions including the Supreme Court of Kenya decision of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR which was relied upon by the respondent’s counsel to buttress his arguments.

24. In this decision, the apex court summarized the non-exhaustive principles as follows: -

- “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.”

25. The well-cited decision of Leo Sila Mutiso V. Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997 (unreported) summarized the principles that usually guide court courts in the exercise of judicious discretion as follows: -

“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.”

26. In considering the motion, this court has to bear in mind that though it has unfettered discretion, it must exercise its judicious discretion which is anchored on reason, material, and evidence placed before it.

27. Since the circumstances of each case are unique as even a singular day could be tantamount to delay, each case has to be considered on its set of conditions.



28. In addition, this court must also consider its principal objective of facilitating the just, expeditious, proportionate, and accessible resolution of disputes as provided for in Section 3 of the *Environment and Land Court Act*.
29. Having laid the law, this court will proceed to examine the circumstances of this case and establish if the applicants are deserving of the exercise of discretion in their favour.
30. Now, on the principle of delay, the impugned judgment was rendered on 27/07/2023 and the motion was filed on 9/11/2023. Although the respondent's counsel argues this was tantamount to delay, I disagree with him and find this period of close to 4 months was not inordinate.
31. On the principle of reasons for the delay, it is worth noting since the extension of time is a creature of equity, it is expected the applicants could only enjoy the relief of extension of time if they act equitably. This is anchored on the legal maxim that he who seeks equity must do equity.
32. Thus, the onus was on the applicants to demonstrate they were not at fault to let time lapse. In this case, the applicants contended the reasons for the delay were that they were not aware of the case as their previous advocates kept them in the dark.
33. The respondent's counsel countered this and rightfully so, that a case belongs to a litigant and merely blaming a counsel on record will not do. This position was affirmed by the Court of Appeal decision of *Rajesh Rughani v Fifty Investments Limited & another* [2016] KECA 829 (KLR)

where the court stated:-

“In *Habo Agencies Limited -v- Wilfred Odhiambo Musingo* [2015] eKLR this Court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

34. On the principle of arguability of the appeal, it is not in contention that the applicants did not tender a draft memorandum of appeal. Nonetheless, the onus was on the applicants to demonstrate the arguability of their appeal as was held in the case of *Joseph Odide Walome v David Mbadi Akello* [2022] KEHC 2748 (KLR).
35. Having scrutinized the applicants' averments and as duly pointed out by the respondent's counsel, no grounds of appeal have been advanced at all. Put another way, the appeal is not arguable.
36. In the grounds in support of the motion, the applicants are addressing this court as if it were a trial court and seem to suggest that this court should exercise its discretion and set aside the impugned judgment that proceeded ex parte judgment. In my humble view, on this issue, they should first move the trial court before approaching this court.
37. In conclusion, this court concludes, finds, and holds the applicants have not met the ingredients to warrant enlarging the time for them to file an appeal out of time.
38. This finding renders the determination of issue (c) unnecessary. On issue (d), it is trite law costs follow the event and costs are hereby awarded to the respondent. Ultimately, this court hereby issues the following disposal orders: -
 - a. The notice of motion dated 9/11/2023 is hereby dismissed with costs to the respondent.
 - b. This file is hereby effectively marked as closed.



Orders accordingly.

DATED AT MACHAKOS THIS 18TH DAY OF MARCH, 2025

HON A. Y. KOROSS

JUDGE

18.03.2025

Ruling Delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Miss Muthoki for respondents

N/A for applicant

Ms Kanja- Court Assistant

