



REPUBLIC OF KENYA



**Wamboi & another v Gikonyo & 2 others (Miscellaneous Application E019 of 2022) [2023] KEELC 20158 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20158 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
MISCELLANEOUS APPLICATION E019 OF 2022  
JM ONYANGO, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**MARGARET WAMBOI ..... 1<sup>ST</sup> APPLICANT**

**MISHURI MAINA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ESTHER NJERI GIKONYO ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR UASIN GISHU COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. What is before me for determination is the Plaintiff's Application dated March 24, 2023 seeking the following orders:
  - a. Spent.
  - b. That the firm of Limo M/S Seneti & Oburu Associates Advocates be granted leave to come on record for the Appellants herein.
  - c. That the honourable court be pleased to grant the applicant s leave to file a Notice of Appeal out of time against the judgment in High Court Environment and Land Court Case No. 56 of 2018 delivered on December 2, 2020.
  - d. That upon the grant of leave to appeal out of time, the draft Notice of Appeal annexed herewith be deemed as duly filed.
  - e. That pending the hearing and determination of the appeal, the Honourable court be pleased to order a stay of execution of the judgment herein.



- f. The costs of and incidental to this application be in the intended appeal.
2. The application is premised on the grounds set out on the face of the Notice of Motion and the applicant's Supporting affidavit sworn on March 24, 2022 in which she narrates why she was not able to file the appeal on time. The long and short of it is that she was adversely affected by the Covid -19 pandemic as a result of which she lost her husband and her former advocate failed to communicate with her promptly regarding the outcome of her case.
3. With regard to the prayer for stay of execution, she contends that if a stay is not granted, she will suffer substantial loss and hardship including but not limited to exhumation, loss of her home, crops and other developments thereon.
4. The application is resisted by the respondent through her Replying Affidavit sworn on the May 30, 2023 in which she contends that there has been inordinate delay in filing the application and that the applicant has not demonstrated what efforts she made to ensure that the appeal was filed on time.
5. The Application was disposed of by way of Written Submissions and both parties filed their submissions.
6. The main issues for determination are :
  - i. Whether the applicant should be granted leave to file a Notice of Appeal out of time.
  - ii. Whether a stay of execution should be granted.

#### **ANALYSIS AND DETERMINATION**

7. The principles that guide the court in the exercise of its discretion to extend time for filing an appeal out of time were laid down by the Supreme Court in the case of *Nicholas Kiptoo Arap Salat v IEBC & 7 others* (2014) eKLR, 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:

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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if 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” [emphasis supplied]
8. In an application for extension of time the Applicant must explain the delay in filing the appeal to the satisfaction of the court.
9. In the case of *Odera Obar & Co Advocates v Acquva Agencies Limited* (2021) eKLR where the court held as follows:

“The law does not set out any minimum or maximum period of delay. All it states is that the delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable”.
10. In the instant case the judgment was delivered on December 2, 2020. The applicant has explained that her and her late husband contracted Covid-19 in 2020 and they were quarantined for some time. Her husband succumbed to the disease. She has annexed a copy of her late husband’s death certificate. When she visited her advocate’s office she found it temporarily closed and by the time she obtained information about her case the time for filing the appeal had lapsed. Even though there is a delay of almost 2 years, I find the applicant’s explanation sincere and satisfactory.
11. The second issue I must determine is whether the Applicant has satisfied the conditions for stay of execution. In the case of *Samvir Trustee Limited v Guardian Bank Limited* (2007)eKLR where the Court held that:-

“the court in considering whether to grant or refuse an application for stay of execution is empowered to see whether there exist any special circumstances that can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that the successful party is not impeded from enjoying the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is *prima facie* entitled to the fruits of his judgment hence the consequence of a judgment is that it has defined the rights of a party with definite conclusion. The respondent is asserting that matured right against the execution pending appeal and the court must ensure that parties fight out on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure that the execution of one party’s rights should not defeat or derogate the rights of the other. The court is therefore empowered to to carry out a balancing exercise to ensure justice and fairness thrives within the corridors of the court”
12. In the present case the applicant has stated that if the order of stay is not granted she will suffer substantial loss as she will not only lose her home and developments thereon but she may have to exhume the body of her late husband. I am therefore satisfied that the applicant stands to suffer substantial loss if a stay is not granted.
13. Regarding security for costs, the applicant has deponed that she is willing to furnish suitable security for the due performance of the decree.
14. All in all I am of the view that the Application is merited and I grant it and make the following orders.
  - a. The applicant is granted leave to file a Notice of Appeal out time.
  - b. The Notice of Appeal shall be filed within 7 days from the date of this ruling.



- c. A stay of execution is hereby granted pending the hearing and determination of the appeal on condition that the Applicant deposits the sum of Kshs. 50,000 in court within 21 days from the date of this ruling failing which the order for stay shall automatically lapse.
- d. The costs of the application shall be in the intended appeal

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

.....

**J.M ONYANGO**

**JUDGE**

In the virtual presence of;

Miss Kosgey for the Respondent

No appearance for the Applicant

