



**Kitheka v Githucha (Miscellaneous Application E016 of 2024)
[2025] KEELC 3648 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3648 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
MISCELLANEOUS APPLICATION E016 OF 2024**

AK BOR, J

APRIL 30, 2025

BETWEEN

MICHAEL MWANZIA KITHEKA APPLICANT

AND

JAMES MUKUNDI GITHUCHA RESPONDENT

RULING

1. The applicant filed the application dated 18/6/2024 seeking the enlargement of time within which to file the memorandum of appeal out of time against the judgment delivered in Siakago PM ELC No E048 of 2021 on 21/3/2024. He also sought stay of execution of the decree pending hearing and determination of the appeal and for costs of the application to be in the cause.
2. The application was made on the grounds that judgement was delivered on 21/3/2024 and the decree issued directed the applicant to vacate his homestead within 90 days which were lapsing on 21/6/2024. He averred that he learnt of the judgment on 3/6/2024 from his former advocate and was unaware that the proceedings had been concluded, as he was still waiting to call his witness when he was informed that judgment had already been delivered. He contended that he made efforts to get a certified copy of the judgment without success and that he had appointed a new firm of advocates to represent him in the appeal. It was his position that he had a good appeal which should be heard and determined on merit.
3. He further averred that unless the application was allowed, the appeal would be rendered nugatory as the respondent will proceed to execute the judgment to his detriment. He contended that the failure to file the memorandum of appeal in time was inadvertent and the respondent will not be prejudiced if the orders sought are granted. The applicant swore the affidavit in support of the application and attached a copy of the trial court's judgement.



4. The respondent opposed the application by filing grounds of opposition. He contended that the applicant had not provided any good or sufficient reason to warrant the court to give him leave to appeal out of time. He accused the applicant of not being truthful by saying that he was unaware of the proceedings yet he had an advocate on record and participated in the proceedings and adduced his evidence. He further stated that the applicant had not proved that he would suffer substantial loss if the orders sought were not granted and that the delay of three months in bringing the application was unreasonable and unexplained. He contended that the applicant had not offered any security for the performance of the court's decree and that the appeal did not have merit. He urged that the application be dismissed with costs to him.
5. The court directed parties to file and exchange written submissions. Only the respondent filed his submissions. He submitted that the applicant had not satisfied the principles for grant of an extension of time and that he had not given a satisfactory explanation for the delay in filing the appeal. Further, that the explanation given that he only learned of the judgment on 3/6/2024 was not convincing because he was represented by counsel who had a duty to inform him of court proceedings. He submitted that the lack of certified typed proceedings and judgment was not a justifiable reason for not filing an appeal within the prescribed time. He added that the applicant did not provide any evidence to show the efforts he made to obtain the judgment.
6. The respondent further submitted that the intended appeal was not arguable because the applicant had not presented any substantial legal issues that warrant intervention on appeal. He contended that the applicant had also not met the threshold for grant of stay of execution.
7. The issues for determination are whether the applicant is entitled to an enlargement of time to file an appeal out of time and whether he is entitled to orders of stay of execution pending appeal.
8. Section 79G of the *Civil Procedure Act* provides that an appeal from a subordinate court to the High Court should be filed within 30 days of the date of judgement or order appealed against. The same provision allows the court to extend time if sufficient cause is shown. Order 50 Rule 6 of the *Civil Procedure Rules* empowers the court to extend time upon sufficient cause being demonstrated. The principles guiding the exercise of discretion in extending time were set out in the case of *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR), where the court identified relevant factors to be considered, including the reason for the delay, the length of the delay, the degree of prejudice to the opposing party, and whether the intended appeal has merit.
9. In the present case, the judgment sought to be appealed against was delivered on 21/3/2024 and the present application was filed on 19/6/2024, a delay of close to three months. The delay is not so inordinate and has been sufficiently explained. The respondent will not suffer any prejudice if leave is granted to the applicant to file the appeal out of time for he will have an opportunity to defend the appeal. The draft memorandum of appeal raises arguable points.
10. Consequently, the applicant is granted leave to file an appeal out of time. He is also granted stay of execution of the Magistrate's Court judgement delivered on 21/3/2024 subject to the deposit of the sum of Kshs 20,000/= in court as security for the due performance of the decree within the next 21 days of this ruling.

The costs of the application to be borne by the applicant.

DELIVERED VIRTUALLY AT EMBU THIS 30TH DAY OF APRIL 2025.

K. BOR

JUDGE



In the presence of: -

Ms. F. Wanjala holding brief for Ms. E. Onsembe for the Applicant

Ms. N. Mwinja holding brief for Ms. M. Ndeke for the Respondent

Diana Kemboi- Court Assistant

