



Mbugua & another v Njuguna & another (Miscellaneous Application E004 of 2024) [2025] KEELC 3662 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3662 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION E004 OF 2024**

JM ONYANGO, J

APRIL 30, 2025

BETWEEN

SAMUEL MUIGAI MBUGUA 1ST APPELLANT

DAVID KIBORO KARIRO 2ND APPELLANT

AND

PETER KAMUMU NJUGUNA 1ST RESPONDENT

SERAH WAITHIRA KAMUMU 2ND RESPONDENT

RULING

1. The Appellants/Applicants moved the court vide a Notice of Motion dated 27th August, 2024 seeking the following orders:
 1. Spent
 2. Spent
 3. Spent
 4. Spent
 5. That pending hearing and determination of the Appeal, this honourable court be pleased to issue an order of stay of execution on the judgment delivered on 25th day of July 2024 and consequential orders ensuing therefrom extracted in facilitation of the execution process against the Appellants/Applicants in the matter of Githunguri Senior Resident Magistrate's Court ELC Case No. 3 of 2019 -Serah Waithira Kamumu (Plaintiff) vs Peter Kamumu Njuguna (1st Defendant), David Kiboro Kariro (2nd Defendant) and Samuel Muigai Mbugua (3rd Defendant).



6. That pending the hearing and determination of the Appeal, this honourable court be pleased to issue an order of injunction prohibiting the 1st and 2nd Respondents whether by themselves, their employees, agents and/or any other person acting with their authority from entering upon all those agricultural farmlands known as Title Number Githunguri/Ikinu/2764 and Title Number Githunguri/Ikinu/2765 and/or harvesting, destroying, cutting down or in any other way interfering with the coffee, nappier grass, trees and/or any other property belonging to the Applicants growing on the aforementioned properties.
 7. That pending the hearing and determination of the Appeal, this honourable court be pleased to issue a conservatory order allowing the Applicants to access all those agricultural farmlands known as Title Number Githunguri/Ikinu/2764 and Title Number Githunguri/Ikinu/2765 for purposes of tending to and reasonably preserving the coffee, napier grass, trees and other property growing on the aforementioned properties.
 8. That this honourable court be pleased to issue an order granting leave to the 1st and 2nd Appellants/Applicants to appeal against the impugned decision of the lower court out of time.
 9. That costs for this Application be provided for.
2. The Application is based on the 1st Applicant's Supporting Affidavit sworn on the 27th August 2024, in which he deposes that the Githunguri Senior Principal Magistrate's Court (lower/trial court) delivered the impugned judgment on 25th July 2024, however, they were only able to access the file on 26th August 2024 due to administrative challenges.
 3. He claims that he and the 2nd Applicant are the duly registered proprietors and legal owners of Land Title Numbers Githunguri/Ikinu/2764 and Title Number Githunguri/Ikinu/2765 (hereinafter referred to as the "suit properties"), having purchased the same from the 1st Respondent at Kshs 170,000 and Kshs 80,000 respectively. He deposes that he bought the two properties vide an agreement for sale dated 9th September 1998, during a time when there was no requirement for obtaining spousal consent before the purchase of a property. He added that the suit properties were subdivisions of Land Title Number Githunguri/Ikinu/2539, which had been registered in the name of the 1st Respondent.
 4. The 1st Applicant claims that unbeknown to them, the 2nd Respondent who was a spouse to the 1st Respondent, filed Land Dispute Tribunal Case No. 16/20/34/2000 against the 1st Respondent faulting him for subdividing Land Title Number Githunguri/Ikinu/2539 and selling the suit properties without either informing her or their children. As a result, the tribunal reversed the subdivisions done by the 1st Respondent over Land Parcel Number Githunguri/Ikinu/2539.
 5. The 1st Applicant contends that they continued their quiet occupation of the suit properties, unaware of the decision of the tribunal, until the 2nd Respondent invaded the suit properties and maliciously damaged properties causing them to institute Githunguri SRMCC Criminal Case No. 3748 "A" of 2001 against her in which she was convicted.
 6. The 1st Applicant faults the trial court for finding merit in the tribunal's decision despite being aware of the historical facts relating to the suit properties, and despite the fact that the law on spousal consent was different at the time of purchase of the suit properties by the Applicants. He further faults the trial court for issuing an injunction preventing them from accessing the suit properties, even though they hold valid titles to the suit properties. He adds that they stand to suffer irreparable loss unless this court grants an order of stay of execution. He explains that they have an appeal that raises triable issues and has credible chances of success.



7. In his Supplementary affidavit sworn on 23rd January 2025, the 1st Applicant states that Section 79 G of the *Civil Procedure Act* grants this court powers to enlarge time to file an appeal.
8. The Application is opposed by the 2nd Respondent through the Replying Affidavit sworn by her on 17th October 2024. In the said affidavit, she avers that this application is fatally defective given that the Applicants have sought stay of execution and injunctive orders through the same, even though leave to file an appeal out of time had not yet been granted. She contends that the Applicants were present during the delivery of the impugned judgment and that no viable explanation has been given as to why the appeal was not filed on time.
9. It is her claim that the sale agreement dated 9th September 1998 is invalid, given that it refers to the suit properties which were non-existent at the time. She explains that the then Githunguri District Officer wrote a letter dated 24th December 1999 to the Land Registrar asking him to place a restriction on Land Parcel Number Githunguri/Ikinu/2539 on the basis that the 1st Respondent had purported to sell the property without the approval of his family.
10. She faults the Applicants for raising the issue of fraud in this application when the same was never raised at the trial court. She adds that she commenced the proceedings at the Land Disputes Tribunal before subdivision of Land Parcel Number Githunguri/Ikinu/2539 and issuance of titles to the suit properties.
11. The 2nd Respondent contends that she successfully appealed the decision of the court in Githunguri Criminal Case Number 3748 “A” of 2001 at the High Court. She further contends that the High Court, in overturning the conviction, found that the dispute was civil in nature. She adds that the Applicants neither sought consent from the Land Control Board to subdivide Land Parcel Number Githunguri/Ikinu/2539 nor to transfer the suit properties.
12. In conclusion, she emphasized that the interlocutory orders by the ELC Court were given over 10 years ago, while the award by the Land Disputes Tribunal was made over 23 years ago.
13. The Application was canvassed through written submissions. The Applicants filed written submissions dated 24th February 2025 through M/s K. Mberia & Partners, Advocates LLP, while the 2nd Respondent filed written submissions dated 26th February 2025 through M/s Moses Odawa & Company Advocates.
14. The issues for determination are:
 - i. Whether the Applicants should be granted leave to appeal out of time and if so, whether execution of the judgment delivered on 25th day of July 2024 ought to be stayed.
 - ii. Whether the Applicants should be granted an injunctive order preventing the 1st and 2nd Respondents from entering the suit properties.
 - iii. Whether this court should issue a conservatory order allowing the Applicants to access the suit properties.
15. The principles for granting an application for leave to appeal out of time are now well settled. In the case of *Nicholas Kiptoo Arap Salat v IEBC & 7 Others* (2014) eKLR, it was held that:

“... 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:

- a. “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;
- b. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
- c. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
- d. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
- e. whether there will be any prejudice suffered by the respondents, if extension is granted;
- f. whether the application has been brought without undue delay;”

16. In an application for extension of time, the applicant must explain the delay in filing the appeal to the satisfaction of the court. 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”

17. In the instant case, the impugned judgment was delivered on 25th July 2024. The law provides for a 30-day period within which a party should file an appeal if aggrieved by a decision of the court. The Applicants filed this application on 27th August 2024, two days after the statutorily prescribed period. The reason for the delay given is that the applicants were unable to access the court file before 26th August 2024 due to “administrative challenges”. The Applicants have not clarified whether the administrative challenges were caused by the court or emanated from their end. Nonetheless, this court will give them the benefit of doubt and assume that the said challenges were on the court’s end. In the circumstances, given that the delay was not inordinate, I am persuaded that I should exercise my discretion in favour of the Applicants and grant them leave to file the appeal out of time.

18. On whether execution of the judgment delivered on 25th day of July 2024 ought to be stayed, I rely on Order 42 Rule 6 of the *Civil Procedure Rules* which provides as follows:

- “6. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as



may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

- (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

19. The Applicants aver that they had been in quiet possession of the suit properties since they bought the same in 1998, where they have planted coffee, napier grass, and trees. They further aver that as a result of an injunction issued by the lower court preventing them from accessing the suit properties, the 1st and 2nd Respondents seized the opportunity to harvest the coffee on the plantations and to cut down the trees and napier grass on the suit properties.
20. In the circumstances, I am of the considered view that the interests of justice would be served if the status quo obtaining as at the date of this ruling is maintained so as not to render the appeal nugatory. This means that the Respondents shall not cut down trees or the coffee bushes planted by the Applicants. However, the Applicants are restrained from accessing the suit property pending the hearing and determination of the Appeal.
21. Consequently, the application is allowed in part and I make the following orders:-
 - a. The 1st and 2nd Applicants are granted leave to appeal against the decision of the lower court out of time. The Record of Appeal shall be filed within 30 days.
 - b. The status quo obtaining on land titles No. Githunguri/ Ikinu/2764 and Githunguri/ Ikinu/2765. This means that the Respondents shall not cut down any trees of the coffee bushes planted by the Applicants. However, the Applicants are restrained from accessing the suit property pending the hearing and determination of the appeal.
 - c. Each party shall bear their own costs.



DATED, SIGNED AND DELIVERED THIS 30TH DAY OF APRIL 2025.

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J. M ONYANGO

JUDGE

In the presence of:

Mr Wambua for the Applicant

No appearance for the Respondent

Court Assistant: Hinga

