



**Kuronoi v Kodonyo (Environment & Land Case 515 of 2017)
[2023] KEELC 22271 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22271 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 515 OF 2017
CG MBOGO, J
DECEMBER 19, 2023**

BETWEEN

DAVID RAKOI OLE KURONOI PLAINTIFF

AND

MOROSUA OLE KODONYO DEFENDANT

RULING

1. The plaintiff/respondent filed a plaint dated 9th February, 2009, seeking the following orders;
 - a. Declaration that land parcel No. Suswa Kitet Group Ranch No. 778 was properly and legally allocated to the plaintiff and therefore belongs to the plaintiff.
 - b. An order of temporary injunction restraining the defendant either by himself, servants, agents and, or by any other persons acting on their behest from interfering or meddling with the plaintiff's vacant possession occupation and right of utilizing and developing land parcel no. Suswa Kitet Group ranch No. 778 until this case is heard and determined.
 - c. An order for the eviction of the defendant from the suit land.
 - d. General damages.
 - e. Costs of suit and interest thereof at court rates.
2. This court delivered its judgment in favour of the plaintiff/respondent in the following terms: -
 - i. A declaration is hereby made that land parcel No. Suswa Kitet Group Ranch 778 was properly and legally allocated to the plaintiff and therefore belongs to the plaintiff;
 - ii. The defendant is hereby ordered to vacate the suit land within 90 days from the date of the said judgment failure to which an order of eviction be issued against the defendant. Any eviction



thereof must comply strictly with the mandatory provisions of the section 152E of the land Act; and

- iii. The costs of the suit to be borne by the defendant.
3. The defendant/applicant being aggrieved by the said judgment intends to appeal. Execution is imminent hence necessitating the filing of this application.
4. The Notice of Motion dated 10th July, 2023, seeks the following orders.
 - i. Spent.
 - ii. Spent.
 - iii. That leave be granted for extension of time to file a notice of appeal and the annexed notice of appeal be deemed as duly filed.
 - iv. That there be stay of execution of the judgment and decree pending hearing and determination of the intended appeal filed in the court of appeal.
 - v. That the costs of this application be provided for.
5. The application is premised upon the grounds set out in the application and supporting affidavit sworn by Morosua Ole Kudonyo on 10th July, 2023. The applicant deposed that judgment was entered in this suit on 22nd March, 2023 against the defendant/applicant to which he was ordered to vacate the suit property within 90 days from the date of delivery of judgment. The defendant/applicant being aggrieved by the decision, intends to lodge an appeal. Further, that the defendant/applicant through their advocates on record has followed up severally on the certified copy of the judgement and certified typed proceedings but their efforts have since been rendered fruitless. That unless the orders sought are granted, the plaintiff/respondent will proceed with execution thereby rendering the appeal nugatory and mere academic exercise. Further, that unless the orders are granted the defendant/applicant will suffer substantial and irreparable loss. He went on to depose that the application has been brought without undue delay and no prejudice will be caused to the plaintiff/respondent if it is granted as prayed.
6. The plaintiff/ respondent filed a notice of preliminary objection dated 19th July, 2023 challenging the application on the grounds that;
 - i. The application dated 10th July, 2023 has been filed by an advocate and firm not on record for the defendant there being a consent that the firm of Kamwaro & Co. Advocates took over from the firm of Solonka & Co. Advocates.
 - ii. The application dated 10th July, 2023 is an abuse of the court process.
7. The plaintiff/respondent filed his replying affidavit sworn on 19th July, 2023 in response to the application. The plaintiff/respondent deposed that the application is incompetent and bad in law as it has been filed by a firm of advocates which is not on record for the defendant/applicant. Further, that the firm of Solonka & Co. advocates who have filed this instant application ceased acting for the defendant/applicant vide a consent dated 12th April, 2023 and filed in this court on 18th April, 2023 and the firm of Kamwaro & Co. Advocates took over the matter. It was his deposition, that the jurisdiction of this court has not been properly invoked as the application has not been brought under the proper provisions of the law and as such, the orders sought cannot be granted. Further, that the judgment in the matter was delivered on 22nd March, 2023, in the advocate's presence for the defendant/applicant. In any event, the defendant/applicant was aggrieved by the said judgment, and



together with his Advocate, they were aware that the notice of appeal ought to have been filed within 14 days as provided for by Rule 77 of the [Court of Appeal Rules](#) 2022.

8. The plaintiff/respondent further deposed that his Advocate was served with the notice of appeal dated 29th March, 2023 and received in court on 14th April, 2023. Further, that his Advocate upon being served with the notice of appeal, filed and served a notice of address of service as provided for by Rule 81 of the [Court of Appeal Rules](#) 2023. That by the time the notice of appeal was received in court and served, the defendant/applicant ought to have known that the notice of appeal had been filed out of time but instead went to sleep.
9. The plaintiff/respondent further deposed that the court in its judgment, properly held that the plaintiff/respondent is the owner of the suit land and ordered that the defendant/applicant vacate the said parcel of land within 90 days from the date of the delivery of judgment failure to which an order of eviction to be issued. Further, that the 90 days lapsed a long time ago and the defendant/applicant ignored the said order of the court and never took any action within that period. Further, that the defendant/applicant is in contempt of the said orders of the court which are still in force as they have never been reviewed or set aside hence he has not come before this court with clean hands.
10. The plaintiff/respondent deposed that the defendant/applicant was served with an eviction notice dated 5th June, 2023 on 7th June, 2023.
11. The plaintiff/respondent further deposed that on 18th July, 2023, the defendant/applicant served him with a notice of appeal received in court on 13th July, 2023 which was 114 days from the date when the judgment was delivered. That the delay of the 114 days has not been explained hence his indolence to act on the matter should not be entertained by this court.
12. The plaintiff/respondent deposed that it is common knowledge that upon sending any document to court for assessment, a party has to make a follow-up to the registry on the matter to ensure that the document is assessed and filed. That no explanation has been tendered by the defendant/applicant on what steps he took or what action was taken by his advocate to ensure that the notice of appeal was filed and served within the prescribed time and that the period and reason for the delay have not been explained to this court.
13. The plaintiff/respondent further deposed that the defendant/applicant has not met the conditions for the granting of the orders of stay execution as provided for by Order 42 Rule 6 of the [Civil Procedure Rules](#) hence this instant application is a non-starter.
14. The plaintiff/respondent deposed that this application has been filed for the sole reason of denying him from enjoying the fruits of the judgment delivered by this court on 22nd March, 2023 and to defeat the justice through the indolence of the defendant/applicant. Further, that he has been kept out of his property since the year 2009 when this instant suit was filed and the defendant/applicant is frustrating every effort he makes to enjoy his bundle of rights over the suit property hence the continued actions of failing to obey court orders and statutory timelines have injured his property right which has greatly prejudiced him.
15. The plaintiff/respondent further deposed that the purported letter by the defendant/applicant seeking typed proceedings and a certified copy of the judgment was never copied or delivered to his advocate on record. Further, that he has not annexed any proof that the same has been paid for or any effort has been made to make a follow-up on the same.
16. It was the plaintiff/respondent deposition that the law is clear on the issue of timelines which strictly should be adhered to and as such, a party should invoke the discretionary power of this court to cure



- his disobedience of the law and failure to act. Further, that the applicant has been wasting the suit land by indiscriminately cutting trees and he stands to suffer irreparable loss if the orders sought are granted.
17. The plaintiff/respondent further deposed that the defendant/applicant woke up when he was served with the eviction notice, as ordered by the court and he is there for guilty of laches and this court should not exercise its discretion in his favour. Further, that the trial court properly analyzed the material evidence before it, and rendered a sound judgment free of any flaws and as such, the purportedly intended appeal is a mere academic exercise that is meant to waste precious judicial time and prevent him from enjoying the fruits of the judgment delivered by this court.
 18. The plaintiff/ respondent deposed that there is no material that has been placed before this court to demonstrate that the defendant/applicant has an arguable appeal and as such, the court cannot grant the orders sought.
 19. The defendant/applicant filed a supplementary affidavit sworn on 24th September, 2023. The defendant/applicant deposed that he reinstructed the firm of Solonka & Co. Advocates, his advocate on record to act on his behalf in this matter. Further, that he had instructed the firm of Kamwaro and Company Advocates to act on his behalf, however, they did not follow up on the stamping of the notice of appeal in due time which necessitated him to have his previous advocate on record to continue with his matter.
 20. The defendant/applicant averred that the application has been brought within the proper provisions of the law. Further, that his advocate on record submitted that the notice of appeal dated 29th March, 2023 was filed within time to the court registry who informed his Advocate on record that the file was not available at the registry as it had been taken to the Judicial Service Commission. Further, that the said notice of appeal was submitted for filing within 14 days and he should not be punished for an error on the part of the registry as the file was at the Judicial Service Commission and at the same time, his advocate was following up on certified copies of proceedings and judgment hence the delay experienced.
 21. The defendant/applicant further deposed that the application has been brought without undue delay and no prejudice will be caused to the plaintiff/respondent if it is granted and that it is in the interest of justice that the application before this court be heard as it is his constitutional right to a fair hearing. Further, that he was served with the eviction notice and he instructed his advocate to file an application seeking stay of execution.
 22. The defendant/applicant deposed that the 90 days stay of execution granted by this court have since lapsed and, that the application herein has met the conditions for the granting of the orders of stay of execution. He deposed that he is willing to abide by such terms as security as this court may impose or as may be agreed by the parties and that he was not frustrating the plaintiff/respondent.
 23. In conclusion, the defendant/applicant deposed that he has a very good arguable case with a high chance of success on hearing of the appeal.
 24. The application was argued by way of written submissions. On the 11th October, 2023 the defendant/applicant filed his written submissions of even date where he raised three issues for determination as listed below: -
 - a. Whether the trial court is *functus officio*.
 - b. Whether the applicant has met the threshold of grant of stay pending appeal.
 - c. Whether the applicant should be granted the orders sought for.



25. The defendant/applicant submitted that this court is not *functus officio* after it delivered its judgment as it retains its power to undertake several actions including but not limited to stay, review, execution of proceedings, and such other acts and steps towards the closure of the file. The defendant/applicant relied on the case of *Silvanus Kizito v Edith Nkirote Mwiti* Civil Appeal No. 46 of 2020 which case relied on the case of *Leisure Lodge Limited v Japhet Asige & Anor* [2018] eKLR.
26. The defendant/applicant further submitted that he will suffer substantial loss and great financial loss which would not be recoverable from the plaintiff/respondent if the appeal succeeds. He contends that it would be extremely difficult to recover the suit land as he has developed it for farming. He prays that the status quo be maintained until the appeal is heard and determined. The applicant relied on the case *Nicholas Stephen Okaka & Another v Alfred Waga Wangalwa & and Another V Agnes Naliaka Cheseto* [2012] eKLR.
27. The defendant/applicant further submitted that the application was made without undue delay and that it was brought 3 months after delivery of the judgment considering that the court granted 90 days of stay of execution upon delivery of the judgment. Further, that he was following up through his advocates for a copy of the judgment and typed proceedings and that he did what was within his means to bring the application within the shortest time. He submitted that the delay in obtaining the copy of the judgment and typed proceedings was beyond his control. The defendant/applicant relied on the case of *Jaba Mohsen Ali & Anor v Priscillah Bolt & Anor* [2012] eKLR.
28. The defendant/applicant further submitted that he is willing to abide by such terms as security as this court may impose or as may be agreed by the parties. Reliance was placed on the cases of *Ndubiu Gitabi v Warugonyo* [1988] eKLR and *Firoze Nuralji v Housing Finance Company of Kenya Limited & Anor* [2012] eKLR.
29. The defendant/applicant submitted that he has met the threshold for granting stay pending appeal and that no prejudice will be occasioned upon the plaintiff/respondent. That the intended appeal is arguable and has an overwhelming chance of success and as such, he should not be hindered from exercising his constitutional right to appeal and have a level playing field with his opponent. The defendant/applicant relied on the cases of *Global Tours & Travel Limited* HC Winding Cause No. 43 of 2000, *Butt v Rent Restriction Tribunal* [1982] KLR 417 and *Kenya Shell Limited v Kibiru & Anor* [1986] KLR 410.
30. On 7th November, 2023, the plaintiff/respondent filed his written submissions dated 18th October, 2023 where he raised four issues for determination as can be seen herein below:-
 - i. Whether the notice of preliminary objection is merited.
 - ii. Whether the court should extend the time within which to file a notice of appeal and whether the annexed notice of appeal should be deemed as filed.
 - iii. Whether the application herein is merited for the orders sought herein.
 - iv. Who should bear the costs of this application.
31. The plaintiff/respondent submitted that the defendant/applicant has violated the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*. The plaintiff/respondent submitted that from the pleadings before this court, the defendant/applicant was represented by the firm of Solonka and Company Advocates until the judgment on the matter was delivered. Further, that on 18th April, 2023, the defendant/applicant filed a consent dated 12th April, 2023 stating that the firm of Kamwaro and Company Advocates had taken over from the advocates previously on record. However, the instant



- application was filed by the firm of Solonka and Company Advocates which was filed without consent from the firm of Kamwaro and Company Advocates who were at the time on record. The plaintiff/respondent relied on the cases of *S.K. Tarwadi v Veronica Mueblemann* [2019] eKLR, *Monica Moraa v Kenindia Assurance Co. Ltd* [2010] eKLR and *Jyoti Jigish v Dickson Odingo Chiro & 2 Others* [2022] eKLR.
32. The plaintiff/respondent further submitted that since Section 7 of the *appellate jurisdiction* was not invoked, this court has no jurisdiction to entertain the present application. Reliance was placed on the cases of *National Bank Of Kenya Ltd v Interior Contract Supplies Ltd* [2008] eKLR, *Serab Wanjiru Kung'u v Peter Munyua Kimani*[2021] eKLR, *Nicholas Kiproo Arap Korir Salat v Independent Electoral And Boundaries Commission & 7 Others* [2014] eKLR and *In Re Estate Of The Late Juma Matayo Murere(Deceased)* (Succession Cause 137 of 2005) [2023] KEHC 2131 (KLR) (20 march 2023) (Ruling).
33. The plaintiff/respondent further submitted that the delay in filing the application has not been explained and there is no evidence that the defendant/applicant followed up on the matter to ensure that the notice of appeal was assessed and paid for. Further, that no evidence of payment has been annexed to the application and no evidence has been adduced to show when the file was taken to JSC. Further, that he was able to file the notice of address for service on 25th May, 2023.
34. The plaintiff/respondent submitted that he was served with a notice of appeal stamped in court on 14th April, 2023 and that the applicant has not stated when he discovered that the notice had not been properly filed. Further, that the defendant/applicant was served with an eviction notice on 5th June, 2023 and his advocate started following on the proceedings on 23rd June, 2023- vide letter dated 23rd June, 2023, which was sent to court on 27th June, 2023. Therefore, the defendant/applicant was woken up from the slumber when he was served with an eviction notice. The plaintiff/respondent relied on the case of *Andrew Kiplangat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR.
35. The plaintiff/respondent further submitted that this court has no jurisdiction to entertain an application for stay of execution, where there is no valid notice of appeal and that the jurisdiction of this court should be invoked where an appeal has been filed or where a valid notice of appeal has been filed. That the purported notice of appeal was filed out of time and without leave of the court. Further, that under Section 85 of the *Court of Appeal Rules* 2022, the defendant/applicant is deemed to have withdrawn his notice of appeal since no record of appeal was filed within 60 days from the time of filing of a notice of appeal.
36. The plaintiff/respondent further submitted that the defendant/applicant has not demonstrated that he will suffer any substantial loss if the orders sought are not granted. Further, that the occupation and use of the suit land does not amount to substantial loss. Further, that the subject matter is land that is immovable and would be available to any party if the appeal eventually succeeds. The plaintiff/respondent relied on the cases of *Charles Kariuki Njuri v Francis Kimaru Rwara (Suing as Administrator of the Estate of Rwara Kimaru Alias Benson Rwara Kimaru (Deceased)* [2021] eKLR, *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, *Mohammed Salim T/A Choice Butchery v Nasserpuria Memon Jamat* [2013] eKLR, and *Sammy Some Kosgei v Grace Jeles Boit* [2013] eKLR.
37. The plaintiff/respondent further submitted that the defendant/applicant has not explained or given a reason for failing to bring the application promptly and that to the date of filing the instant application, no proper appeal had been filed. Further, that the instant application was filed on 12th July, 2023 which was a period of 114 days after the delivery of the judgment. In addition, the defendant/applicant has



- also not paid for the proceedings or demonstrated any efforts to file an appeal. The plaintiff/respondent relied on the cases of *Jaber Mohsen Ali & Another v Priscillah Boit & Another* [2014] eKLR.
38. The plaintiff/respondent submitted that the defendant/applicant has not deposited any security which is an indication that he is not committed or not serious about pursuing the appeal. He relied on the cases of *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR, *Arun C Sharma v Ashana T/A Ruirundalia & Co. Advocates & 2 Others* [2014] eKLR, *Charles Kariuki Njuri v Francis Kimaru Rwara (Suing As Administrator of the Estate Of Rwara Kimaru Alias Benson Rwara Kimaru(Deceased))* [2021] eKLR and *Butt v Rent Restriction Tribunal* [1982] KLR 417.
39. In conclusion, the plaintiff/respondent submitted that the application should be dismissed with costs. To buttress on this submission, the plaintiff/respondent relied on the case of *Jasbir Singh Rai & 3 Others v Torlochan Singh Rai & 4 Others* [2014] eKLR.
40. I have considered the application, notice of preliminary objection, the replying affidavit thereof, the rival submissions and authorities cited by both parties.
41. In my view, the main issues for determination are; -
- i. Whether the applicant violated the provisions of order 9 rule 9 of the *Civil Procedure Rules*.
 - ii. Whether leave to appeal out of time should be granted
 - iii. whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited.
42. On the first issue, the plaintiff/respondent raised the grounds of opposition dated the 19th July, 2023, to the effect that the application had contravened the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*. The court notes that the defendant/applicant filed a consent dated the 12th of April, 2023 in which the firm of M/S Kamwaro & Company Advocates, purported to come on record for the defendant/applicant in place of M/S Solonka & Company Advocates who had previously been on record for him. The consent, according to the court's record has not been adopted as an order of this court.
43. Order 9 Rule 9 of the *Civil Procedure Rules*, provides for change of Advocates to be effected by an order of the court or consent of parties to wit:
- “When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court —
- a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be”
44. The provisions of Order 9 Rule 9 of the *Civil Procedure Rules* make it mandatory that for any change of Advocates after judgment has been entered to be effected, then there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and



the proposed incoming Advocate. The reasoning behind the provision was well articulated in the case of *S. K. Tarwadi v Veronica Muehlmann* [2019] eKLR where the judge observed as follows:

“...In my view, the essence of the Order 9 Rule 9 of the *CPR* was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

45. In the case of *Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi* [2012] eKLR the Court held as follows:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

46. The court went further to quote with approval the holding by Hon. Sitati, Judge in *Monica Moraa v Kenindia Assurance Co. Ltd.* [2010] eKLR where the court held as follows:

“...there is no doubt in my mind that the issue of representation is critical, especially in case such as this one where the applicant’s advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court’s leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached...”

47. In the present case, judgment was rendered on the 22nd March, 2023 where there was a determination of the court and therefore the provision of Order 9 Rule 9 were applicable herein.

48. As per the provision of Order 9 Rule 9, the correct procedure that was to be followed in the present case was that counsel coming on record, ought to have sought leave of the court to come on record, then file and serve the notice of change of Advocates before filing the application herein. More importantly, and I note, the consent had not been adopted therefore the said change had not been effected. As such, the application does not offend the express provisions of Order 9 Rule 9 of the *Civil Procedure Rules*.

49. Having found that the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* were not violated, the said firm is properly on record, and has legal standing to move the court on behalf of the defendant/ applicant and, therefore, all pleadings filed by it ought not to be struck out.

50. On the second issue, the factors to be considered when determining an application for an extension of time are found in various judicial pronouncements. In *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR the court discussed those factors as follows:

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the



respondent and interested parties if the application is granted, and whether the matter raises issues of public importance...”

51. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR laid down the principles that govern the exercise of discretion in applications for extension of time 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.”

52. I have considered the application, in light of the principles that guide this court in the exercise of its discretionary jurisdiction when determining an application for extension of time. The first question to be answered is whether the defendant/applicant has tendered a satisfactory explanation for the delay in filing the notice of appeal? The judgment which the defendant/applicant intends to appeal against was delivered on 22nd March, 2023. The period for filing the notice of appeal lapsed on or about 5th April, 2023. The period of delay is therefore approximately 110 days. The explanation tendered by the defendant/applicant is that his advocate on record submitted the notice of appeal dated 29th March, 2023 within time to the court registry who informed his advocate on record that the file was not available at the registry as it had been taken to the Judicial Service Commission. He contends that the notice of appeal was submitted for filing within 14 days and he should not be punished for an error on the part of the registry. The file was at the Judicial Service Commission and at the same time, the defendant/applicant’s advocate was following up on certified copies of proceedings and judgment hence the delay experienced.

53. In the case at hand, the notice of appeal is dated 29th March, 2023 but the same was lodged on 24th July, 2023. The period between when the notice of appeal was dated and when it was lodged has not been explained. The defendant/applicant has produced an email excerpt dated 29th March, 2023 forwarding the notice of appeal for assessment and filing. A mere allegation of the court registry’s indolence is not enough to warrant a grant of extension of time. It must also be seen that the parties on their part were not careless. The defendant/applicant was invoiced vide invoice No. 4219276 on 5th April, 2023. From a perusal of the record, the defendant/applicant was invoiced again on 12th July, 2023. He paid for filing of the notice of appeal on 13th July, 2023. From this, it can be seen that the defendant/applicant and or his advocate went to slumber after sending the email requesting for assessment of the notice of appeal.



54. The defendant/applicant did not pay for the filing fees as was invoiced on 5th April, 2023 and he only woke up on or about 12th July, 2023 to follow up on the filing of the notice of appeal. Further the defendant/applicant instructed his counsel to file the instant application on 12th July, 2023 and the delay can therefore be said to be inordinate in the circumstances. In my view, the explanation tendered by the defendant/applicant is not plausible or sufficient considering the delay period was over 100 days. I find carelessness in the actions of the defendant/applicant hence the explanation offered for the delay is not sufficient.
55. The import of the *Tana & Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 Others* [2015] eKLR was that while the mistake of a counsel was excusable if it is accompanied by a litigant's carelessness and inactivity, then the refusal by the court to exercise discretion in favour of such a party, cannot be impugned. There is an inordinate delay in this case which delay has not been explained. The attempted explanation is not truthful. The defendant/applicant is therefore guilty of unexplained inordinate delay. I find the application for an extension of time an afterthought and an attempt to frustrate the plaintiff/respondent decree holder from enjoying the fruits of a lawful judgment. Justice cannot be served if the courts were to go forward one step and turn back ten steps in favour of an indolent litigant who does not want to settle the decree.
56. The other limb to be considered by the court as to whether it will exercise its discretion to extend time is the degree of prejudice to the plaintiff/respondent if the application is granted. This court is fully aware that the defendant/applicant has a constitutional right to appeal. However, an extension of time to file an appeal out of time is a matter of exercise of judicial discretion. Therefore, where a party is aggrieved and wishes to pursue an appeal, it would be fair to exercise discretion in his favour and especially where the delay in filing the appeal is not inordinate or even if the delay is inordinate, it is explained to the satisfaction of the court and the adverse party will not be prejudiced in any way.
57. In the instant case, the delay by the defendant/applicant in filing the notice of appeal has not been explained and the plaintiff/respondent has been denied the fruits of his judgment for close to 10 months now as the court had to hear both parties on the application and fix a date for this ruling. The defendant/applicant has accordingly come to this court with unclean and dishonest hands and, therefore, he does not deserve the exercise of discretion of this court.
58. On the third issue, this court having found that the application for extension of time to file an appeal out of time is devoid of any merit and having dismissed that prayer, it follows that the court cannot stay execution of the decree of the lower court pending nothing. Nonetheless, just to satisfy the defendant/applicant that this court considered all aspects of his application, I will briefly address the issue of stay of execution pending appeal and the requirements under the law.
59. Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules* provides as follows:
- “(1) 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 sub rule



- (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.”

60. Further to the above, stay may only be granted for sufficient cause, and the court in deciding whether or not to grant stay and in light of the overriding objective stipulated in Sections 1A and 1B of the [Civil Procedure Act](#), the court is no longer limited to the foregoing provisions. Courts are now enjoined to give effect to the overriding objective in the exercise of their powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.
61. Section 1A (2) of the [Civil Procedure Act](#) provides that “the court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
62. Therefore, an applicant, seeking for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. (See [Antoine Ndiaye v African Virtual University](#) [2015] eKLR.
63. The defendant/applicant herein stated in his application that he is willing to provide security as may be ordered by the court. I have already discussed herein above that the delay in bringing the instant application was unreasonable and further that the unreasonable delay has not been sufficiently explained. The only thing remaining is to consider whether substantial loss may result to the defendant/applicant if the order is not made.
64. On whether the plaintiff/respondent will suffer substantial loss if the orders sought are not granted, the defendant/applicant argued that if orders of stay are not issued, he will suffer irreparable loss. The court in the case of [Elishaphan Omollo Nyasita v Gradus Atieno Othim & another](#) [2019] eKLR held as follows:

“ 11. It is trite law that it is not merely sufficient for the applicant to state that he or rather she is likely to suffer substantial loss if the application for stay of execution sought is not allowed. The applicant has not shown the damage or loss that he is likely to suffer if the order sought in the application is not granted. Moreover, to grant the order aforesaid would deny a successful litigant (respondent) the fruits of his judgment as held in Kenya Shell Ltd case (supra).”



65. The court in the case of *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR further held as follows on what constitutes substantial loss:

“The corner stone of the jurisdiction of the court under order 42 of the *Civil Procedure Rules* is that substantial loss would result to the applicant unless a stay of execution is granted. What constitutes substantial loss was broadly discussed by Gikonyo J in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* where it was held inter alia that:-“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein v Chesoni*...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

66. In the instant case, I find that the defendant/applicant other than merely mentioning that he would suffer substantial loss, has failed to demonstrate what loss that he is likely to suffer, if the execution of the decree passed way back in March 2023 proceeds. I must emphasize that the defendant/applicant in this case approached this court with unclean hands as he sought to hoodwink it on the reasons for his delay in bringing this application. Further, the defendant/applicant has failed to fulfill the conditions for grant of extension of time to file an appeal out of time as well as for grant of stay of execution of decree pending appeal.

67. For all the above reasons, I find and hold that the applicant’s application dated 10th July, 2023 is without merit and is hereby dismissed with costs to the plaintiff/respondent.

DATED, SIGNED & DELIVERED VIA EMAIL this 19TH day of DECEMBER, 2023.

HON. MBOGO C.G.

JUDGE

In the presence of:-

CA:MEYOKI

