



**Muthama v Njuguna & 2 others (Civil Suit 754 of 2017)  
[2025] KEELC 3519 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3519 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
CIVIL SUIT 754 OF 2017  
MD MWANGI, J  
APRIL 30, 2025**

**BETWEEN**

**JIM NJUGUNA MUTHAMA ..... DEFENDANT**

**AND**

**VERONICAH WAIRIMU NJUGUNA ..... 1<sup>ST</sup> DEFENDANT**

**PUBLIC HEALTH OFFICER (KAJIADO ..... 2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

(In respect of the application dated 14<sup>th</sup> November 2024 by the 1<sup>st</sup> Defendant/Applicant seeking leave to appeal out of time and a stay of execution of the judgment and decree of this court delivered on 7<sup>th</sup> May 2024)

**Background.**

1. Vide the notice of motion dated 14<sup>th</sup> November 2024, the 1<sup>st</sup> Defendant essentially prays for two orders, namely;
  - a. That pending the hearing and determination of the 1<sup>st</sup> Defendant's intended appeal, there be a stay of execution of the judgment and decree of this Honourable Court given on 7<sup>th</sup> May 2024.
  - b. That leave be granted to the 1<sup>st</sup> Defendant to file and serve her notice of appeal out of time.
2. The application is expressed to have been brought under the provisions of Section 7 of the *Appellate Jurisdiction Act*, Order 9 rule 9 and Order 42 rule 6 of the Civil Procedure Rules. It is premised on the grounds on the face of it and on the supporting affidavit of Veronica Wairimu Njuguna.



3. The 1<sup>st</sup> Defendant/Applicant argues that her draft memorandum of appeal attached to the application raises arguable grounds of appeal. She asserts that the delay in filing and serving the notice of appeal is not inordinate neither was it intentional. It was occasioned by the mistakes of her previous advocates which ought not be visited on her.
4. In regard to the prayer for stay of execution, the Applicant pleads that she stands to suffer substantial loss if the stay is not granted. Her intended appeal will further be rendered nugatory and a mere academic exercise.
5. In the supporting affidavit, the Applicant deposes that judgment was entered against her in favour of the Plaintiff on 7<sup>th</sup> May 2024, without her knowledge. She alleges that she instructed the firm of M/S. Mwaniki Gitau & Co. Advocates to come on record for her which they did on 29<sup>th</sup> May 2024 but they did not inform her what had transpired in the case. She instructed the current advocates around 11<sup>th</sup> November 2024 and it was .....that she established that judgment in this matter had already been entered against her in favour of the Plaintiff way back on 7<sup>th</sup> May 2024.
6. The Applicant further deposes that she was represented in this case by the law firm of M.M. Uvyu & Co. Advocates who ceased acting for her without her knowledge. According to the Applicant, the Advocates never filed written submissions on her behalf and neither did they appear in court when judgment was delivered in this matter.
7. It is the Applicant's case that the Plaintiff /Decree-holder has since commenced execution of the judgment and decree issued herein to the detriment of John Muiruri Gichuhi who had allegedly purchased the suit property from her.
8. The Applicant attached a draft of her intended memorandum of appeal which she asserts raises arguable grounds. The draft memorandum of appeal raises six grounds listed as follows;
  - i. The learned trial Judge erred in law in failing to consider the Appellant's counter claim.
  - ii. The learned trial Judge erred in law in finding that the 1<sup>st</sup> Respondent had a better claim to the suit premises.
  - iii. The learned trial Judge erred in law in finding that the Appellant did not have credible evidence on how she acquired the premises.
  - iv. The Learned trial Judge erred in fact in believing the 1<sup>st</sup> Respondent and his two witnesses.
  - v. The Learned trial Judge erred in fact in not believing that the Appellant owned the suit premises.
  - vi. The Learned trial Judge erred in law in entering judgement in favour of the 1<sup>st</sup> Respondent as against the Appellant.

### **Response by the Plaintiff/Respondent**

9. The application is opposed by the Plaintiff through his replying affidavit sworn on 28<sup>th</sup> January 2025.
10. The Plaintiff/Respondent terms the application fatally defective and incurably incompetent in its entirety. He avers that the application is mischievous and deliberately misleading since it is based on non-disclosure of material facts.
11. The Plaintiff states that in an application dated 7<sup>th</sup> March 2023, the Applicants former advocates M.M. Uvyu & Company Advocates requested for the court's permission to cease acting for her on account



of lack of instructions and non-communication since she had relocated to the U.S.A. The Applicant's claim of mistake of former advocates is therefore without basis. It was her responsibility as the litigant to follow up and find out the status of her case.

12. The Plaintiff asserts that the Applicant has not offered a reasonable explanation for the delay in filing her notice of appeal. It is insufficient to blame her former advocates without a credible, satisfactory and sufficient explanation. The Applicant has not demonstrated any tangible steps she took to follow up on the matter. She is therefore undeserving of the exercise of this court's discretion to extend time.
13. On the prayer for stay of execution pending appeal, the Plaintiff avers that the same was not made without inordinate delay. The application was made after 191 days since the delivery of the judgment. Further, the Applicant has not demonstrated the substantial loss that she stands to suffer if the order of stay of execution pending appeal is not granted.

#### **Further affidavit by the Applicant.**

14. In a further affidavit, the Applicant reiterated the averments in her application urging the court to allow her application. She denied the allegations against her by the Plaintiff in his replying affidavit insisting that the case before the court was a land matter and had nothing to do with the children case between her and the Plaintiff. Their dispute concerning their child was therefore of no relevance to this case.

#### **Directions by the court.**

15. The directions by the court were that the application be canvassed by way of written submissions. The Applicant complied by filing submissions dated 13<sup>th</sup> March 2025. The Plaintiff/Respondent's submissions on the other hand are dated 18<sup>th</sup> February 2025. The court has had occasion to read and consider the submissions which form part of its record.

#### **Issues for determination.**

16. Considering the application, the response thereto and the submissions filed, the issues for determination in the court's opinion are;
  - i. Whether leave should be granted to the law firm of Mokua Ndubi & Company Advocates to come on record for the 1<sup>st</sup> Defendant/Applicant.
  - ii. Whether the Applicant is entitled to an order for stay of execution pending hearing and determination of the intended appeal.
  - iii. Whether the Applicant is deserving of the order of leave to appeal out of time.

#### **Analysis and determination**

##### **A. Whether leave should be granted to the law firm of Mokua Ndubi & Company Advocates to come on record for the 1<sup>st</sup> Defendant/Applicant**

17. The 1<sup>st</sup> Defendant/Applicant submits that prior to the entry of judgment in this matter, she was represented by the law firm of M/S Mwaniki & Company Advocates. Since the law firm of Mokua Ndubi & Company Advocates has been instructed to come on record in place of the previous law firm, leave of the court is required under Order 9 rule 9 of the Civil Procedure Rules.
18. Under rule 9, change of advocates shall not be effected without an order of the court;
  - a. Upon an application with notice to all to 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.
19. Having complied with the above provisions, leave is granted to the Mokuia Ndubi & Co. Advocates to come on record and act for the Applicant in this matter.
20. Having dispensed with that issue, I will move to the next issue.
  - B. Whether the Applicant is entitled to an order for stay of execution pending hearing and determination of the intended appeal.
21. The jurisdiction of this court to order a stay of execution pending appeal is invoked by the filing of an appeal though there is a little window of opportunity under sub-rule 3 of Order 42 rule 6 for the court, upon delivery of a judgment or ruling, to order upon such terms as it may deem fit, a stay of execution pending the hearing of a formal application. This will usually be granted on the delivery of the judgment or ruling upon an oral application by the party who intends to appeal and file a formal application for stay.
22. That window of opportunity is no longer open for the Applicant in this matter. And since there is no pending appeal filed as yet, there is no basis for the grant of an order of stay pending appeal.
23. Notwithstanding my position above, and just in case I may be wrong on that aspect, I will proceed to consider the merits of the prayer for stay pending appeal.
24. The law is well settled that the possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules (Jason Ngumba Kagu & 2 others –v-s Intra Africa Assurance Company Limited (2014) eKLR). The Applicant in this case has not demonstrated what substantial loss she stands to suffer if the order of stay pending appeal is not granted.
25. In her application she states that the Plaintiff has commenced execution against the person who she allegedly sold the subject property to. The loss then, if any, is not to her but to a third party. She has not proprietary interests in the subject property.
26. This court is not the least persuaded that the Applicant is deserving of an order of stay of execution pending appeal.

**C. Whether the Applicant is deserving of the order of leave to appeal out of time.**

27. The Supreme Court of Kenya in Nicholas Kiptoo Arap Korir Salat -vs- IEBC & 7 others (2014) eKLR, set out the principles that govern the exercise of the court’s discretion in application for extension of time as the one before me. The Supreme Court of Kenya held that;
  - i. 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;
  - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
  - iv. Whether there is a reasonable reason for the delay;
  - v. Whether there will be any prejudice suffered by the Respondent if the extension is granted;



- vi. Whether the application has been brought without undue delay; and,
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
28. In this case, the application for extension of time was brought to court after the lapse of 191 days from the date of delivery of the judgment. The delay by all standards is inordinate. The burden was therefore upon the Applicant to lay a basis to the satisfaction of the court by providing a reasonable explanation for the inordinate delay; otherwise demonstrate sufficient cause.
29. The Applicant in a bid to explain the inordinate delay blames her previous advocates and urges the court not to visit the mistakes of her advocates on her. I find this explanation insufficient and insincere. As has been variously held in a number of decided cases, a case belongs to the litigant and not the advocate. That was the decision of the court in the case of Habo Agencies Limited –vs- Wilfred Odhiambo Musiingo (2020) eKLR. The court emphasized, and I fully agree, that a litigant has a duty to follow up on his or her case.
30. Kimaru J (as he then was), in the case of Savings and Loans Limited –vs- Susan Wanjiru Muritu (Nairobi Milimani No. 397/2002), emphasized that;
- “Whereas it would be constitute a valid excuse for the Defendant to claim that she has been let down by her former advocate’s failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. It is the duty of the litigant to constantly check with her advocate the progress of her case.”
31. In this case, the Applicant was indolent and was unbothered by the progress of the case as her former advocate affirmed in his application to cease from acting for her in this matter.
32. The Applicant has not offered a reasonable explanation or to put it in the words of the Supreme Court Kenya in the Nicholas Kiptoo Case (Supra) ‘a reasonable reason’ for the inordinate delay in presenting her application before this court.
33. I need to further state that upon perusal of the grounds in the draft memorandum of appeal, I am not persuaded that the intended appeal is an arguable one.
34. Consequently and from the foregoing, the court’s finding is that the application dated November 14, 2024 is unmerited. It is hereby dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 30<sup>TH</sup> DAY OF APRIL 2025.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Mokuu for the 1<sup>st</sup> Defendant/Applicant

N/a For the Respondents

Court Assistant: Mpoye

**M.D. MWANGI**



**JUDGE**

