



**Pertet v Wambua (Environment and Land Appeal E040 of 2022)  
[2025] KEELC 3736 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3736 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E040 OF 2022  
LC KOMINGOI, J  
APRIL 24, 2025**

**BETWEEN**

**IBRAHIM WANGUNYU PERTET ..... APPELLANT**

**AND**

**PIUS WAMBUA ..... RESPONDENT**

*(Being an Appeal against the Judgement of Hon. Judicaster Nthuku, in PM  
ELC Case No. E001 of 2022 at Oloitoktok delivered on 23rd August 2022)*

**RULING**

1. This is the Ruling in respect of the Notice of Motion dated 11th September 2024 brought pursuant to Order 42 Rule 6 of the Civil Procedure Rules 2010 and Sections 1A, 1B, 3, 3A and 3B of the [Civil Procedure Act](#).
2. It seeks orders;
  - a. Spent
  - b. That this Hon. Court be pleased to grant the Applicant leave to appeal out of time against the Judgement delivered by Hon. L.Komingoi on 11th July 2024.
  - c. Spent
  - d. That the Hon. Court be pleased to stay execution of the Judgement delivered by Justice L.Komingoi on 11th July 2024 in ELC Appeal No. E040 of 2022 and all other consequential orders arising therefrom pending the hearing and determination of the Appeal arising here from and/or as may be directed by the Hon. Court.
  - e. Cost of the Application.



3. The grounds are on the face of the application and are set out in paragraphs 1 to 7.
4. The Application is supported by the affidavit of Pius Wambua, the Respondent herein sworn on the 11th of September 2024.
5. The Application is opposed. There is a Replying Affidavit sworn by Edwin Kamau Maina, Advocate for the Appellant on the 29th of November 2024.
6. On the 4th December 2024, the Court directed that the Notice of Motion be canvassed by way of written submissions.

#### **The Respondent's submissions.**

7. They are dated 27th January 2025. Reliance is placed on Order 42 Rule 6 of the Civil Procedure Rules. Counsel submitted that the Respondent is likely to suffer irreparable and substantial loss should he be evicted as the Appellant would proceed with execution which will frustrate or cripple any opportunity, he may have to salvage his land. He has put forward the cases of: Sewankambo Dickson VS Ziwa Abby (HCT-00-CC-MA 178 of 2005) [2005] UGCOMM9; Antoine Ndiaye VS African Virtual University [2015] eKLR
8. Counsel also submitted that the Respondent acted with utmost good faith in his pursuit of justice, given that no inordinate time lapsed in making the application. He has put forward the case of Antoine Ndiaye (Supra).
9. It is also submitted that the Court has discretion to set the security terms that it considers reasonable and just in the circumstances as provided for under Order 42 Rule 6 (2)(b) of the Civil Procedure Rules. That the Respondent wishes to express his willingness to abide by any order as to security as this Court may direct. He prays that the Application be allowed.

#### **The Appellant's submissions.**

10. They are dated 3rd March 2025. Counsel submitted that the attached Notice of Appeal is in breach and/or contrary to the provisions of Rule 77 (2) of the Court of Appeal Rules which require the Notice of Appeal to be filed within 14 days of the impugned decision. The same has to be lodged with the Superior Court from where the Appeal emanates from. The Notice attached is addressed to the Deputy Registrar, High Court of Kenya Machakos which is the wrong forum.
11. Counsel also submitted that the Notice of Motion is defective since the firm of Nzoka Kivuva & Associates Advocates have not sought leave to come on record for the Respondent as mandatorily required by law or at least obtained consent from Counsel previously on record. Order 9 Rule 9 of the Civil Procedure Rules is couched in mandatory terms.
12. It is also submitted that the Respondent did not actively participate in ELC Appeal E040 of 2022. In essence, the Appeal was unchallenged and uncontroverted and as such, there is no plausible basis to file the 2nd Appeal when he did not defend the Appeal.
13. It is also submitted that the Application has been filed after inordinate delay. That the Respondent has not annexed any document to show that he has applied for certified copies of the proceedings and judgements herein nor has he applied for the Decree and Certificate of costs herein yet these are critical documents for the compilation of the Record of Appeal.



14. It is submitted that the Appellant shall be extremely prejudiced in the event that stay of execution orders are granted as the pursuit of the redress herein has been arduous since the filing of the suit in the SPM's Court on 4th February 2022.
15. He also submitted that this Application is meant to curtail the Appellant from enjoying the fruits of his justly obtained judgement. He has put forward the cases of: Hezron Muiruri Githau VS James Waiharo Kagiri & another [2024] KEHC 6320 (KLR); Nicholas Kiptoo Korir Arap Salat VS IEBC & 7 others [2014] eKLR.
16. Counsel also submitted that there is absolutely no prospect of success of the intended Appeal from the Judgement of this Court since the Respondent failed to defend the Appeal herein. He has failed to demonstrate that his Appeal has any prospects of success. He prays that the Application be dismissed with costs.

### **Analysis and Determination**

17. I have considered the Notice of Motion, the Affidavit in support, the Response thereto, the Rival Submissions and the Authorities cited. The issue for determination is whether this Application is merited.
18. I have gone through the Court Record. On the 26th of June 2023, Mr. Nairi informed the Court that he had filed a Notice of Appointment to come on record for the Respondent. Directions were taken on the disposal of the Appeal; parties were directed to put in written submissions. The matter came up to confirm filing of submissions on 21st September 2023. On the 21st September 2023, 31st October 2023, 20th December 2023 and 22nd January 2024, the Respondent and his counsel neglected to appear. By the time the matter was reserved for Judgement, the Respondent had not filed any submissions. Judgement was delivered on 11th July 2024. I agree with the Appellant's submissions that the Respondent neglected to participate in this Appeal.
19. This Application is dated 11th September 2024 while Judgement was delivered on 11th July 2024. I find that there is inordinate delay in lodging the said Notice of Appeal and the instant application for leave. Rule 77 (2) of the Court of Appeal Rules require the Notice of Appeal to be filed within 14 days of the impugned Judgement. In the instant case, he ought to have filed the Notice of Appeal by 25th of July 2024. In the case of *Utalii Transport Company Ltd & 3 others VS NIC Bank Ltd & another* [2014] eKLR the Court stated thus; "Whereas there is no precise measure as to what amounts to inordinate delay, and whereas what amounts to inordinate delay will defer from case to case, depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay, which leads the Court to an inescapable conclusion that it is inordinate and therefore inexcusable. On applying the Court's mind on the delay, caution is advised for Courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."
20. I also note that the Notice of Appeal is lodged with the Deputy Registrar High Court Machakos. It was therefore filed in the wrong court.
21. I find that the delay in bringing this application is inordinate and inexcusable. In the case of *Paul Musili VS The AG & 2 others* [2015] eKLR, the Court of Appeal stated thus; "...it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal, the judge exercises unfettered discretion. However, in the exercise of such discretion the Court must act upon reason(s) not based on whim or caprice. In general, the matter which a Court takes into account in deciding whether or not to grant an extension of time are; the length of the delay; the reason



for the delay; the chances of the Appeal succeeding if the application is granted; the degree of prejudice to the Respondent if the application is granted.”

22. Similarly, in the case of *Rajesh Ragani VS Fifty Investments Ltd & another* [2016] eKLR, the Court of Appeal stated that, “It is not enough for a party in litigation to simply blame the Advocate on record for all manner of transgressions in the conduct of litigation. Parties have a responsibility to show interest and follow up their case even when they are represented by Counsel.” It should be noted that the Respondent herein did not participate in the Appeal yet he was fully aware.
23. I am of the view that the Respondent is unlikely to succeed in the intended Appeal as he did not participate in this Appeal. In the case of *Stanley Kang’ethe Kinyanjui VS Tony Ketter & 5 other* [2013] eKLR where the Court held that; “...on whether the Appeal is arguable, it is sufficient if a single bona fide arguable ground of Appeal is raised...An arguable Appeal is not one which must necessarily succeed but one which ought to be argued fully before the Court, one which is not frivolous...” It is my view that the Respondent has not demonstrated an arguable Appeal.
24. In conclusion, I find no merit in this Application and the same is dismissed with costs to the Appellant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 24<sup>TH</sup> DAY OF APRIL 2025.**

**L.KOMINGOI**

**JUDGE**

