



**Cheptoo (Suing as Administrator of the Estate of Dinah Cheptum Ng'etich) v Onoka
(Land Case Appeal E007 of 2024) [2025] KEELC 3204 (KLR) (7 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3204 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
LAND CASE APPEAL E007 OF 2024
GMA ONGONDO, J
APRIL 7, 2025**

BETWEEN

**MARGARET CHEPTOO APPLICANT
SUING AS ADMINISTRATOR OF THE ESTATE OF DINAH CHEPTUM
NG'ETICH**

AND

ALICE ANDEYO ONOKA RESPONDENT

RULING

1. By way of Notice of Motion dated 8th May 2024 brought under, inter alia, Article 40 of *the Constitution* of Kenya, Sections 79G and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Order 51 of the *Civil Procedure Rules*, 2010, the appellant/applicant Margaret Cheptoo, through Matthew and Partners Advocates is seeking the following orders;
 - a. Spent
 - b. That the applicant be granted leave to appeal out of time the judgment of Hon. D. A. Charo (SPM) delivered on 12th April 2023 in Kapsabet CMC ELC No. E108 of 2021.
 - c. Spent
 - d. That pending the hearing and determination of the appeal, the court be pleased to issue an order for stay of further execution of the judgment dated 12th April 2023 and all consequential orders thereto
 - e. Spent



- f. That pending the hearing and determination of the appeal, the court be pleased to issue an order for temporary injunction against any dealing in any manner, whatsoever on property title number LR. Nandi/Kamobo/4174 (the suit land herein)
 - g. That costs of this application be provided for.
2. The application is founded upon fourteen grounds including:
 - a. The trial court herein heard and determined this matter and issued a summary judgment dated 12th April 2023.
 - b. That in the said judgment, amongst other orders, the Learned Judge (I think meant magistrate) determined the suit land to belong to the respondent herein.
 - c. That the applicant herein was never served with the pleadings and/ or summons for the trial court's proceedings, and was only made aware of the impugned judgment when the respondent herein trespassed on the said property on or about April 2024, with a view to erecting temporary structures.
 - d. That the applicant has been in active occupation of the suit land, and the summary judgment issued is contra and prejudicial to her proprietary rights over the suit land.
 - e. That without the timely intervention of this Honourable Court and the grant of orders of stay pending the hearing and determination of the appeal, the applicant's proprietary rights as guaranteed under Article 40 of *the Constitution* of Kenya will be interfered with.
3. Further, the application is anchored on the applicant's supporting affidavit of fifteen paragraphs sworn on even date, alongside the annexed documents marked as MC 1 to MC 5 which are; a copy of the judgment dated 12th April 2023, a copy of the title deed of the suit land, a copy of a draft memorandum of appeal, a copy of the official search certificate in respect to the suit land and a copy of OB report.
4. Briefly, the applicant laments that she is the daughter and administratrix of the estate of Dinah Cheptum Ng'etich (now deceased), in whose name the suit land is registered. That the trial court issued a summary judgment in favour of the respondent herein. That however, the applicant was not served with any summons and/or proceedings in the trial court. That her family has been in active occupation of the suit land but were only made aware of the trial court's judgment in April 2024 when the respondent and her agents attempted to trespass on to the suit land. That subsequently, she conducted a search at the Lands Registry and discovered that the suit land had been transferred to one Chirchir Tenai on 23rd July 2014, who was not a party to the proceedings at the trial court. That the instant application has been brought in good faith and without undue delay.
5. The respondent through Martim and Company Advocates filed Grounds of Opposition dated 28th October 2024, opposing the application. Counsel deponed in part that the prayer for stay of execution is superfluous as there is nothing to stay since it is a negative order. That upon proper service of the pleadings of the trial court, the applicant entered appearance but failed to file a statement of defence. That thus, the judgment so entered was not a summary judgment.
6. Further, the respondent averred that the applicant has not demonstrated that she has an arguable appeal since she neither has ownership or possession of the suit land. That the application has not met the threshold for grant of the orders sought therein. That the same has also not met the conditions for grant of stay pending appeal. That the applicant has also not furnished security for costs already assessed. Thus, counsel urged the court to dismiss the instant application and the intended appeal with costs.



7. It is important to note that this application was dismissed with costs for non-appearance and want of prosecution on 11th November 2024. However, the same was reinstated on 10th December 2024, by consent of the parties.
8. Hearing of the application proceeded by way of written submissions pursuant to the court's directions of 27th January 2025.
9. Accordingly, the applicant's counsel filed submissions dated 6th February 2025 and identified a single issue for determination thus: Whether the application is merited to warrant the court's discretionary purview to grant leave. Learned Counsel submitted that the applicant and/ or the estate of the deceased was not notified of the trial court's proceedings. That the instant application was lodged immediately the applicant learnt that summary judgment had been delivered hence, there was no delay. That the draft Memorandum of Appeal raises genuine legal issues that warrant determination on merit. That the applicant risks losing her parcel of land. Thus, counsel urged the court to allow the instant application as prayed. To fortify the submissions, Counsel relied on various authoritative pronouncements including *Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others* [2014] eKLR and *Diplack Kenya Limited v William Muthama Kitonyi* [2018] eKLR.
10. The respondent's counsel filed submissions dated 12th February 2025 and urged the court to dismiss the application on the ground that the same has been rendered moot since the suit land has been disposed of. That therefore, the orders of stay of execution and injunction cannot issue herein. That the applicant is guilty of laches as there has been delay in lodging the instant application and the intended appeal. That further, the respondent ought to be allowed to enjoy the fruits of her judgment. That the decree and certificate of costs has been drawn thus, there is need to make provision for security for costs as stipulated under Order 42 Rule 7 of the Civil Procedure Rules, 2010.
11. Counsel relied on the case of *Almer Farm Limited v National Land Commission, Chief Land Registrar & Betty Rono (Sued as Executrix of the estate of the late David Rono)* [2021] eKLR and *Samvir Trustee Limited v Guardian Bank Ltd.* [2007] eKLR, among others, to reinforce the submissions.
12. In the foregone, the following issues fall for determination:
 - a. Whether the applicant has proved the conditions set for grant of leave to file an appeal out of time;
 - b. Whether the applicant has proved the conditions set for grant of orders of stay of execution;
 - c. Whether the applicant has proved the conditions set for grant of an order of injunction; and
 - d. Who should bear the costs of the instant application?
13. On the first issue, it is noteworthy that Section 75 of the *Civil Procedure Act* Chapter 21 Laws of Kenya sets out the orders from which appeal lies. It is further noted that Section 79 G of the same Act stipulates the time for filing of appeals from subordinate courts.
14. Order 50 Rules 4, 6, 7 and 8 of the *Civil Procedure Rules*, 2010 provides for when time does not run, power to enlarge time, enlargement of time and computation of days respectively.
15. It is trite law that an application for extension of time must show good and substantial reasons for the delay, and, prima facie good cause why the intended appeal should be heard. That the court has to balance the competing interests of the applicant with those of the respondent, see *M/S Portreitz Maternity v James Karanga Kabia Civil Appeal No 63 of 1997*.



16. In *Nicholas Kiptoo Arap Korir Salat* (supra), the Supreme Court of Kenya set out the considerations to guide the court in exercising its discretion in cases of this nature. It stated that:
- 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 for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
17. The applicant averred that she was not served with any summons and/or proceedings in the trial court, before summary judgment was entered. That the instant application has been brought in good faith, expeditiously and without undue delay.
18. So, is the delay excusable? In *Njoroge v Kimani* [2022] KECA 1188 (KLR), the Court of Appeal stated that:
- "...Excusable delays are delays that are unforeseeable and beyond the control of the party. Non- excusable delays are delays that are foreseeable or within the party's control..."
19. In *Njoroge* case (supra) which cited the decision in *National Union of Mineworkers v Council for Mineral Technology* [1998] ZALAC 22 at para 10, the court further held that:
- "...The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive...
- There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused..." (Emphasis laid)
20. I bear in mind that the trial court's judgment was delivered on 12th April 2023. The instant application was lodged herein on 15th May 2024, more than 12 months later.
21. To that end, it is my considered view that the delay in excess of 12 months is inordinate. No reasonable and acceptable explanation for the delay has been advanced herein. I further note that the costs at the



trial court have been assessed and a decree and certificate of costs drawn. Clearly, the instant application is an afterthought.

22. Therefore, I find and hold that the delay in mounting this application is inexcusable and has not been satisfactorily explained.

23. As regards the second issue, the applicant laments that she risks losing the suit land, unless stay orders are granted herein. However, she conceded that the suit land has since been transferred to a third party, one Chirchir Tenai, who was not a party to the proceedings at the trial court and is also not a party herein. In response, Learned Counsel for the respondent submitted that the instant application has been rendered moot since the suit land has been disposed of. That therefore, the orders of stay of execution and injunction cannot issue herein.

24. The conditions concerning grant of an order for stay of execution are stipulated under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 which provides in part thus:

“No order for stay of execution shall be made under subrule (1) unless:

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

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.” (Emphasis supplied)

25. Having considered the applicant’s lamentation, I find the respondent’s contention as contained in paragraph 23 hereinabove quite cogent. It is therefore, my considered view that the applicant has failed to advance sufficient and good reason for the grant of the orders of stay of execution of the trial court’s judgment as provided for under Order 42 Rule 6(2) (supra).

26. Besides, since leave to file an appeal out of time has not been granted herein, no order for stay of execution can issue. Similarly, an order of injunction cannot be granted in the circumstances.

27. Wherefore, the application by way of a Notice of motion dated 8th May 2024, be and is hereby dismissed with costs to the respondent.

28. It is so ordered.

DATED AND DELIVERED AT KAPSABET THIS 7TH DAY OF APRIL 2025.

G.M.A ONGONDO

JUDGE

Present

Mr. Nyachio, Learned Counsel for the applicant

Mr. Maritim, Learned Counsel for the respondent

Walter, Court Assistant

