



**Ngugi v Ndure (Miscellaneous Application 024 of 2025)
[2025] KEELC 4537 (KLR) (4 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 4537 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION 024 OF 2025**

JG KEMEI, J

APRIL 4, 2025

BETWEEN

RICHARD NJOROGE NGUGI APPLICANT

AND

CLEMENT NDURE RESPONDENT

(In respect to the applicant's application dated the 30/1/25 seeking inter alia leave to file an appeal out of time, stay of execution and proceedings in MCELC No E516 of 2023)

RULING

1. Vide a Notice of Motion dated the 30/1/25 the Applicant sought the following orders; stay of execution of the Ruling of the court in MCELC No E516 of 2023 delivered on 30/9/24; leave to file an appeal out of time against the aforesaid Ruling; the said leave to operate as a stay of the proceedings in the trial suit and costs of the application.
2. The application is premised on the grounds annexed as well as the Supporting affidavit sworn by Richard Njoroge Ngugi on even date who deposed that he is aggrieved with the Ruling on the Preliminary Objection of the court delivered on the 30/9/24; the ruling was delivered in his and advocates absence; consequently the respondent was awarded costs of Kshs.64,000/- ; His advocates learnt of the said ruling on 22/12/24 when Fisra Auctioneers served the proclamation and warrants upon them for the recovery of the costs and auctioneers fees in the sum of Kshs. 46,824/- without any justification
3. That he was informed by his Advocates that his case was struck out because he failed to exhaust the dispute resolution mechanism under the Environmental Management and Coordination Act, (EMCA) a position that is untenable as the main issues in the suit related to a violation of a right to clean and healthy environment and trespass, which are causes of action which fall within the ambit of the jurisdiction of this Honourable court.



4. He averred that the respondent has commenced execution process and time to file an appeal had in the meantime run out rendering this application necessary. That this court has power to extend time and order that the stay granted act as stay of proceedings in the lower court.
5. The applicant also filed another application of similar nature dated the 19/2/25
6. In apposing the application, the respondent filed grounds of opposition dated the 3/3/25 on the grounds as thus;
 - a. The application is an abuse of the process of the court in view of his earlier application of the 30/1/25 which is pending hearing and determination before this court.
 - b. In any event the application does not meet the conditions required for the orders sought and the application serves to clog the judicial system.
 - c. That the application should be dismissed
7. Dick Warutumo , Counsel who acted for the Respondent in the trial court swore an affidavit on the 13/3/25 and stated that the ruling date was set down for 22/8/24 in his presence and that of Mr Steve Aencha Advocate who appeared on behalf of the firm of Atuti & Associates the current lawyers for the applicant. He attached a profile from the LSK portal showing that the said Aecha Advocate worked for the firm of Atuti & Associates. That the said counsel failed to attend court for reasons best known to them and the consequent indolence cannot be visited on the respondent. That in any event the ruling was uploaded on the Courts CTS and therefore the applicant cannot feign ignorance of the said ruling. That the intended appeal stands no chance of success for want of exhaustion of the internal dispute resolution provided for under the EMCA Act. Finally, that the applicant is undeserving of the orders sought in the application and the same should be dismissed with costs.
8. On the 3/3/25 the parties elected to canvass the application by way of written submissions. Only the Respondent filed submissions which I have read and considered.
9. The key issues for determination are;
 - a. Whether the court should grant leave to file the appeal out of time
 - b. Whether the court should order stay of execution and proceedings in the trial court
 - c. Costs of the application.
10. What can be gleaned from the pleadings in this Misc cause is that the Applicant sued the respondent in MCELC No 516 of 2023 on 5/12/23 alleging dumping of waste causing nuisance and odors making it difficult for the applicant and his tenants to enjoy a clean and healthy environment and that the respondent had trespassed on to the suit land.
11. In response the respondent filed a preliminary objection dated the 22/7/24 on grounds that the applicant had not exhausted the dispute resolution mechanism found in Sections 108 and 125 of the EMCA Act.
12. The Court in its Ruling delivered on the 30/9/2024 upheld the objection with costs and consequently proceeded to strike out the suit on grounds that the internal dispute resolution mechanisms provided under EMCA had not been exhausted.
13. Consequent to the delivery of the Ruling the respondent pursued the execution and recovery of Kshs 64,000/- being costs that the applicant had been condemned to pay.



14. This triggered the filing of the current application dated the 30/1/25 which is under consideration.
15. Section 79G of the CPA provides as follows; -
- 79G. Time for filing appeals from subordinate Courts
- Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
- Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.
16. It is trite that extension of time to file an appeal out of time is a discretionary relief which like all discretionary remedies must be granted by the court on sound legal basis and not on caprice or whims. This is the import of the provisions of Section 95 CPA which empowers the Court to enlarge such time as follows; -
95. Enlargement of time
- “Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.
17. The Supreme Court laid down the principles to be considered in an application for extension of time in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR 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 to be 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.” See also *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi* [1999] 2 EA 231.
18. In addition, the Supreme Court in the case of *Nyamboki v Gathuru (Application 6 of 2019)* [2019] KESC 44 (KLR) held as follows in determining an application seeking such extension;
- “ , the Court has to consider whether the explanation given for any delay is reasonable and credible; whether there also exist extenuating circumstances to enable the Court exercise



its unfettered jurisdiction; and that the delay, in any event, should not be so inordinate as to leave no doubt, that an applicant has been slothful, and filed such an application as an after-thought.”

19. From the above precedents, it is the period of delay, and the reason for the delay that will unlock the discretion of the court. In this case the applicant has explained that he and his advocate were not notified of the ruling date. The respondents counsel swore an affidavit that the ruling date was taken in the presence of the respondent’s counsel. The applicant has not refuted this position and in the absence of any such rebuttal, it will be taken as the correct position. I note that though the delivery date was alleged to have been given as the 28/8/24, the ruling was finally delivered on the 30/9/24. It has not been explained to the court how the date of 30/9/24 was taken and neither was there any explanation as to why the ruling was not delivered on 22/8/24 as scheduled. In the absence of the proceedings in the trial court the court is unable to tell what happened. That being the case it was the responsibility of the applicant to put all the documents in support of his case before the court. In the absence of any explanation having been tendered by the applicant the court will presume that the documentary evidence, if any, may be adverse to the applicant hence the reason why he failed to place it before the court. Taking the delivery date of 30/9/24, the applicant had a full 30 days to file his appeal which is the 30/10/24. The application was brought 90 days later which in my view is inordinate.
20. Has the applicant tendered a satisfactory reason for the delay? In the era of digitized Court processes in form of a CTS system , once the court renders itself, the decision is shortly uploaded onto the CTS which is mapped to the parties and his counsel on record. The applicant has not informed the court that the Ruling was not uploaded onto the CTS system timeously or at all.
21. Section 1A(3) of the CPA provides as follows;

“a party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and to that effect to participate in the processes of the Court and to comply with the directions and orders of the court.”
22. The applicant bore the responsibility of monitoring his case before the court as to the date of the delivery of the Ruling notwithstanding. He cannot therefore feign ignorance on how his counsel conducted the prosecution of his suit, moreso, that he and his counsel were kept in the dark as to the delivery of the Ruling.
23. In the end the court finds that the applicant has not explained the delay in filing this application to the satisfaction of the court. In the absence of a satisfactory explanation, the applicant is disentitled to the orders of enlargement of time to file the appeal.
24. Having held that the applicant is not deserving of the orders to file the appeal out of time, I find no necessity of determining the rest of the prayers herein. They are moot and therefore stand dismissed.
25. The application is unmerited and is dismissed with costs in favour of the Respondent.
26. Interim orders issued on 3/3/25 now stand discharged.
27. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF APRIL 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE



Delivered online in the presence of
Ms. Aencha for the Applicant
Mr. Warutumo for the Respondent
CA - Ms. Yvette

