



**Mangeni (Suing as the Administrator to the Estate of Joel Abuti Eshitashe) v National Bank of Kenya; Keysian Auctioneers (Interested Party) (Environment and Land Appeal E007 of 2024) [2025] KEELC 3071 (KLR) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3071 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT AND LAND APPEAL E007 OF 2024  
BN OLAO & BN OLAO, JJ  
APRIL 2, 2025**

**BETWEEN**

**GETRUDE AWINO MANGENI ..... APPLICANT  
SUING AS THE ADMINISTRATOR TO THE ESTATE OF JOEL ABUTI  
ESHITASHE**

**AND**

**NATIONAL BANK OF KENYA ..... DEFENDANT**

**AND**

**KEYSIAN AUCTIONEERS ..... INTERESTED PARTY**

**RULING**

1. What calls for my determination is the Notice of Motion dated 29<sup>th</sup> April 2024 by Getrude Awino Mangeni (the Applicant herein and suing as the legal representative of the Estate of Joel Abuti Eshitashe now deceased). The Motion is premised under the provisions of Article 41(2) (a) and Article 159 of *the Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 Rule 2, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. She seeks the following orders:
  - a. Spent
  - b. That leave be granted to the Applicant to appeal against the ruling delivered on 19<sup>th</sup> March 2024 by the learned magistrate out of time and the memorandum of appeal annexed herein be deemed as duly filed and served upon payment of the requisite fees.
  - c. That an order be issued joining Keysian Auctioneers as Interested Parties.



- d. That an order be issued staying the proceedings and ruling by hon edna nyaloti chief magistrate in Busia Cmc Elc case No E116 OF 2024 pending the hearing and determination of this application and appeal.
  - e. Spent.
  - f. That an order of temporary injunction be and is hereby issued restraining the Respondent whether by itself, its agents, workers and/or servants from contracting service of any other person/contractor save for the Applicant from advertising for sale, auctioning, transferring, alienating, disposing or altering the land records or charging ownership of property known as NO Bukhayo/Mundika/4244 and or completing the purported sale of the suit property pending the hearing and final determination of this appeal.
  - g. That an order of temporary injunction be and is hereby issued restraining the Respondent whether by itself, its agents, workers and/or servants from constructing services of any/or other person/contractor save for the Applicant from advertising for sale, auctioning, transferring, alienating, disposing or altering the land records or charging ownership or property known as Bukhayo/Mundika/4244 and/or completing the purported sale of the suit property pending the hearing and final determination of the main suit in Busia CMC ELC NO E116 of 2024.
  - h. That the costs of this application be provided for.
2. The gravamen of the application which is supported by the Applicant's affidavit and on the grounds set out therein is that the Applicant is the co-Administratrix of the Estate of her late husband Joel Abuti Eshitashe (the deceased) and the land parcel No Bukhayo/Mundika/4244 (the suit property) was their matrimonial home. That the Respondent in collusion with Keysian Auctioneers (the Interested Party) are in the process of selling the suit property which will render the Applicant and her children homeless and affect the deceased's Estate. That the Applicant was not aware of the loan which has necessitated the sale by auction of the suit property and which is being done in bad faith and will result in substantial loss to the Applicant who has established a prima facie case.
  3. Annexed to the Motion is a copy of the Memorandum of Appeal.
  4. The Motion is opposed and Chrispinus Wanyangu the Respondent's Branch Manager Busia, has filed a replying affidavit dated 16<sup>th</sup> May 2024 in which he has deposed, inter alia, that the Applicant's counsel are not properly on record as the Applicant was previously represented by the firm of Ashioya & Company Advocates in the subordinate Court when her previous similar application was dismissed on 19<sup>th</sup> March 2024. That this Court's jurisdiction can only extend to granting any order of temporary injunction but not to enjoin the Interested Party in the appeal. This application lacks merit, is incompetent, frivolous and an abuse of the process of this Court. It should be dismissed with costs.
  5. The Motion has been canvassed by way of written submissions. These have been filed both by Mr Otieno instructed by the firm of Masiga, Wainaina & Associates Advocates for the Applicant and by Mr Otanga instructed by the firm of Bogonko, Otanga & Company Advocates for the Respondent.
  6. I have considered the application, the rival affidavits and the submissions by counsel.
  7. I shall first start with the averment that the firm of Masiga Wainaina & Associates Advocates are not on record for the Applicant who was represented by the firm of Ashioya & Company Advocates in the subordinate Court. Counsel for the Respondent has made the following submissions on that issue:

“The Applicant was represented by the firm of M/s Ashioya & Company Advocates in the lower (sic) and we have not been served with any notice of appointment or notice of change



of advocates taking over the conduct of the Applicants case from the firm of M/s Ashioya And Co Advocates by the present advocates and the application should be struck out with costs.”

Perhaps counsel for the Respondent had in mind the provisions of Order 9 Rule 9 of the Civil Procedure Rules which provides that:

“Where 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.”  
Emphasis added

It is clear to me that Order 9 Rule 9 of the Civil Procedure Rules only applies where there is a judgment already entered in the proceedings. In this case, there is nothing to show that any judgment has already been entered. What is pending is an appeal against a ruling dismissing the Applicant’s application for an order of temporary injunction.

8. Even if the application had been filed after a judgment, the Court of Appeal has stated in the case of Tobias M. Wafubwa -v- Ben Butali 2017 eKLR that:

“Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate Court is not a continuation of proceedings in the lower Court, but a commencement of new proceedings in another Court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules 2010. Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned Court to be placed on record in substitution of the previous advocate.”

On the basis of the above, it is not correct to submit that his application should be struck out on the basis that the firm of Masiga Wainaina & Associates Advocates are not properly on record. That argument must be dismissed.

9. I shall now consider the merits or otherwise of the Motion herein having dispensed with the issue as to whether or not the firm of Masiga, Wainaina & Associates Advocates are properly on record for the Applicant.
10. On the prayer for extension of time within which to appeal the ruling delivered by Hon. E. Nyaloti Chief Magistrate Busia on 19<sup>th</sup> March 2024, it is common ground that this application was filed on 29<sup>th</sup> April 2024. The Applicant’s case is that her then counsel did not inform her about the ruling. The ruling does not indicate how it was delivered or who was present. It simply shows the date of delivery as 19<sup>th</sup> March 2024. The Applicant’s case is that she was only made aware about the ruling on 26<sup>th</sup> April 2024. This application was filed on 29<sup>th</sup> April 2024 and I do not consider that delay to be inordinate. The extension of time is at the Court’s discretion. The Court of Appeal in the case of Leo Sila Mutiso



-v- Hellen Wangari Mwangi 1999 EA 231 provided the following principles to guide the Court while considering an application for extension of time to appeal. It said:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay; secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly; the degree of prejudice to the Respondent if the application is granted.”

The Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat -v- Independent Electoral And Boundaries Commission And 7 Others 2014 eKLR listed the following principles to guide a Court considering such an application:

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 petition, public interest should be a consideration for extending time.

In the circumstances of this application, there has been no unreasonable delay in filing this Motion and further, the Respondent has not suggested that the extension of leave will prejudice it in any manner. I am persuaded that reasonable grounds have been adduced for extension of time and that prayer is allowed.

11. On the prayer to enjoin Keysain Auctioneers as interested parties in these proceedings, no reasons have been advanced for doing so. An Interested Party is defined in Black’s Law Dictionary 10<sup>th</sup> Edition as:

“A party who has a recognizable stake (and therefore standing) in a matter.”

In the case of Communications Commission Of Kenya And 4 Others -v- Royal Media Services Ltd & 7 Others Petition NO 15 of 2014 eKLR, the Supreme Court adopted the decision in the case of Mumo Matemu -v- Trusted Society Of Human Rights Alliance & 5 Others 2013 Eklr [c.a. Civil Appeal 290 of 2012] where it said:

“An Interested Party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her case.”



As I have already stated above, no reasons have been advanced by the Applicants as to why the proposed Interested Party namely Keysian Auctioneers should be enjoined in these proceedings. It has not been stated what recognizable stake or interest it has in the suit property and which it needs to protect by being enjoined in the proceedings. This Court can only conclude that Keysian Auctioneers has been engaged by the Respondent to sell by auction the suit property. An Auctioneer has no interest in proclaimed property. The duty of Auctioneers is basically to advertise and sell property for their clients and account for the proceeds. They have no interest in the properties being auctioned other than their fees. It is clear therefore that the prayer to enjoin Keysian Auctioneers as Interested Parties especially at this stage is not well founded considering that no attachment has been done. That prayer is declined for lacking in merits.

12. With regard to the prayer for stay of proceedings pending appeal, the Applicant contends that the suit property is their matrimonial home and they are likely to be rendered homeless. In the case of *William Odhiambo Ramogi & 2 Others -v- Ag & 3 Others* 2019 eKLR, a 5 Judge Bench of the High Court having considered the jurisprudence on the issue of stay of proceedings laid down the following principles to be taken into account while considering an application for stay of proceedings pending the hearing and determination of an appeal over an interlocutory application as in this case. Those principles are:

1. There must be a pending appeal.
2. Where such stay is sought in the Court hearing the case as opposed to the Higher Court to which the appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the Higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of application for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly.
3. The Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
4. The Applicant must demonstrate that the appeal would be rendered nugatory if the order of stay of proceedings is not granted.
5. The Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal;
6. The Applicant must demonstrate that the application for stay was filed expeditiously.

From available jurisprudence, it is clear that the grant of an order of stay of proceedings is a matter of judicial discretion and also a radical remedy to be granted in exceptional circumstances. The sole question being whether it is in the interest of justice to do so. Therefore, the Court must consider the pros and cons of granting such an order and in doing so, take into account the need for expeditious disposal of cases and whether or not the appeal is arguable. In this matter, I find that no reasons were advanced for ruling being appealed thus rendering the appeal arguable which of course does not necessarily mean it is an appeal which must succeed. This is of course a matter which the Appellate Court will have to consider.



13. Having considered all the issues herein, I am persuaded that the prayer for stay of proceedings in Busia CMC ELC case NO E116 of 2024 pending the hearing and determination of the appeal is well merited. I allow it.
14. Further, I take the view that having allowed the prayer for stay of proceedings in Busia CMC ELC case NO E116 of 2024 pending appeal, it will be superfluous to grant prayers (f) and (g). However, for the avoidance of any doubt and guided by the principles set out in the case of Patricia Njeri & 3 Others - v- National Museum Of Kenya 2004 eKLR, those prayers are allowed.
15. The up-shot of all the above is that having considered the Notice of Motion dated 29<sup>th</sup> April 2024, I issue the following disposal orders:
  1. The Applicant is granted leave to file an appeal out of time against the ruling of the Chief Magistrate delivered on 19<sup>th</sup> March 2024 in Busia CMC ELC case NO E116 of 2023.
  2. The Memorandum of Appeal herein be deemed as filed and duly served upon payment of the requisite fees.
  3. An order is issued staying the proceedings and ruling in Busia ELC CMC NO E116 of 2024 pending the hearing and determination of the appeal herein.
  4. An order of temporary injunction is issued restraining the Respondent by itself, it's agents, servants from offering for sale by auction transferring, alienating or in any manner changing the ownership of the land parcel NO Bukhayo/Mundika/4244 pending the hearing and determination of the appeal herein.
  5. The prayer to enjoin Keysain Auctioneers as Interested Party in this appeal is declined.
  6. Costs shall abide by the appeal.

**RULING DATED, SIGNED AND DELIVERED ON THIS 2<sup>ND</sup> DAY OF APRIL 2025 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.**

**BOAZ N. OLAO**

**JUDGE**

**2<sup>ND</sup> APRIL 2025**

