



Nyabonei & another v Chemutai (Environment and Land Appeal E033 of 2024) [2025] KEELC 98 (KLR) (24 January 2025) (Ruling)

Neutral citation: [2025] KEELC 98 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E033 OF 2024
MAO ODENY, J
JANUARY 24, 2025**

BETWEEN

JANE NYABONEI 1ST APPLICANT

STEPHEN KEMEI 2ND APPLICANT

AND

ALICE CHEMUTAI RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion dated 5th July, 2024 seeking the following orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That pending the hearing and determination of this appeal this Honourable Court be pleased to stay execution of the Judgment delivered on 11th February 2022, Decree and all consequential orders arising from Nakuru CMELC No 142 of 2020.
 - e. That this Honourable Court be pleased to admit the appellants appeal herein out of time.
 - f. That costs of this application do abide the outcome of the appeal.
2. The application was supported by the affidavit of Jane Nyabonei, the 1st Appellant/Applicant sworn on 5th July, 2024 who deponed that they face imminent execution of the judgment delivered on 11th February 2022 and the ruling delivered on 24th August, 2023.
3. It was the Applicant's case that the Respondent has already engaged the police and stands to be evicted from the suit land. She further stated that she is illiterate and was not aware of the court processes and



the ruling hence the delay in filing an appeal and further that she is ready and willing to abide by any reasonable condition the court may impose for the grant of stay of execution.

4. The Respondent filed a Replying Affidavit sworn on 11th October, 2024 and deponed that she is the legal and registered owner of the suit property known as Nakuru/Sururu/876 and was issued with a title deed dated 16th July, 1997. She further deponed that the appeal has no basis and the application is meant to delay the course of justice and should the stay to be issued, the Applicant should deposit Kshs. 500,000/= as security on costs.

Appellant/applicants' Submissions

5. Counsel for the Applicants filed submissions dated 4th November, 2024 and submitted that the applicants have met the conditions for stay under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and relied on the case of Jaber Mohsen Ali & another vs Priscillah Boit & another E & L NO 200 of 2012 [2014] eKLR.
6. Counsel submitted that substantial loss may result to the Appellants unless stay of execution is ordered as the Applicants may be evicted and that there is no guarantee that the Respondent will be able to reconstitute them in the event the Appellants succeed in the appeal.
7. Counsel relied on the cases of Jason Ngumba Kagu & 2 others vs Intra Africa Assurance Co Limited [2014] eKLR, Antoine Ndiaye vs African Virtual University [2015] eKLR, James Wangalwa & Another vs Agnes Naliaka Cheseto HC MISC No 42 of 2012 and Apar Industries Limited vs Joe's Freighters Limited [2015] eKLR and submitted that the Applicants are willing to abide by any condition that may be set forth by this Honorable Court thus satisfying the third condition for stay. Counsel relied on the case of John Odongo vs Joyce Irungu Muhatia [2015] eKLR.
8. It was counsel's submission that the Applicant has satisfied the conditions for leave to file the appeal out of time and relied on the case of Mwangi vs Kenya Airways Ltd and submitted that the delay is not inordinate and not designed to defeat the ends of justice. Counsel relied on the cases of Hellen Wanza Maeker, Bernard Njoroge Gathua & another HCC Miscellaneous Application 286/2009, Synresins Limited vs Pravin Vora T/A Construction [2016] eKLR and urged the court to allow the application as prayed.

Respondent's Submissions

9. Counsel for the Respondent filed submissions dated 31st October, 2024 and identified the issues for determination as:
 - a. Whether the Applicants have met the threshold for grant of stay.
 - b. Whether the Applicants' appeal should be admitted out of time.
 - c. Who shall bear the costs of this application.
10. On the first issue, counsel submitted that an application for stay of execution of a decree or order pending appeal, the Applicant is obliged to satisfy the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules namely (a) that substantial loss may result to the Applicant unless the order is made; (b) that the application has been made without unreasonable delay; and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given. Counsel submitted that the Applicants have not satisfied any substantial loss that will be occasioned upon them in the event that stay is not granted and there will be no damage that will be occasioned upon the Applicants that cannot be compensated with costs.



11. Counsel submitted that mere financial burden occasioned by a judgment does not constitute substantial loss for purposes of grant of an order of stay of execution. Further that the Applicants are occupying the suit land illegally and that is not a ground to claim substantial loss and relied on the cases of *Butt vs Rent Restriction Tribunal* [1979], *James Wangalwa & another vs Agnes Naliaka Cheseto* [2012] eKLR, *Andrew Kuria Njuguna vs Rose Kuria* (Nairobi Civil Case 224 of 2001) and *Machira t/a Machira & Co Advocates vs East African Standard (No 2)* (2002) KLR 63.
12. Counsel further submitted that the Applicants have not provided any security for due performance of the decree and should stay be granted, it should be on the condition that the Applicants deposit Kshs 500,000/= as security on costs and relied on the cases of *Absalom Dova vs Tarbo Transporters* [2013] eKLR, *Mwaura Karuga t/a Limit Enterprises vs Kenya Bus Services Ltd & 4 others* [2015] eKLR, *Gianfranco Manenthi & another vs Africa Merchant Assurance Company Ltd* [2019] eKLR and *RWW vs EKW* [2019] eKLR.
13. On the second issue, counsel submitted that the Applicants have not given any good or sufficient cause for the delay in filing the appeal within the time provided under Section 79G of the *Civil Procedure Act*. Counsel submitted that the instant application is an afterthought and an abuse of the judicial process and relied on the case of *Charles Karanja Kiiru vs Charles Githinji Muigwa* [2017] eKLR and *Edith Gichungo Koine vs Stephen Njagi Thoithi* [2014] eKLR.

Analysis And Determination

14. The issue for determination is whether the Appellant has met the threshold for grant of stay of execution and enlargement of time to file an Appeal out of time. Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:
 - “(2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) 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
 - (b) 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.”
15. Currently there is no Appeal filed as the Applicant is seeking for enlargement of time to file the said Appeal together with an application for stay of execution. The Applicant should have filed a miscellaneous application first for the enlargement of time to file the appeal. Once that is determined in the positive then the Applicant can peg the application for stay pending Appeal. The court will ignore the form and deal with the substantive issues at hand.
16. In the case of *Fahim Yasin Twaha vs Timamy Issa Abdalla & 2 Others* [2015] eKLR where the court stated that:

“As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”



“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents, if 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”. [emphasis supplied].
17. The issue of enlargement of time is a matter of judicial discretion which is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.
18. The 1st Appellant/Applicant deponed in her supporting affidavit that she has limited education and not well versed with the Court process and thus was not aware of the matter and ruling hence the delay in filing the Appeal. In the case of Jaber Mohsen Ali & another v Priscillah Boit & another [2014] the court held as follows:
- “The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.”
19. Further it is trite law that ignorance of the law is not an excuse or defence. The Applicant cannot be heard to claim that the reason for the delay in filing the appeal was due to her illiteracy and lack of knowledge of court processes. If you do not know, you ask for assistance from the people who know.
20. In the case of *Margaret Apiyo vs. Jotham Chemwa Matayo Civil Application No. Nai. 257 of 1996*, it was held that:
- “True, ignorance of the law is no excuse but the particular circumstances of this case do militate the court’s grant of discretion in favour of the applicant. She is old and illiterate. She is aggrieved. The respondent is smart and educated...Where will the scale of justice tilt towards? Extension of time is granted.”
21. In the interest of justice, I will exercise my discretion and allow the application for extension of time to file an appeal. Applicant to file an appeal within 14 days, failure to which the order lapses. Further



I grant stay of execution on condition that the Applicant deposits Kshs. 200,000/ in a joint interest earning account of the Advocates on record within 30 days, failure to which the order lapse.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 24TH DAY OF JANUARY 2025 .

M. A. ODENY

JUDGE

