



**Masumbuko & 2 others v Mae (Environment and Land Miscellaneous Application E048 of 2024) [2025] KEELC 4248 (KLR) (28 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4248 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E048 OF 2024**  
**EK MAKORI, J**  
**MAY 28, 2025**

**BETWEEN**

**ONESMAS DANIEL MASUMBUKO ..... 1<sup>ST</sup> APPLICANT**

**EMILY FIKIRINI KAFWIHI ..... 2<sup>ND</sup> APPLICANT**

**REBECCA MVERA MASUMBUKO ..... 3<sup>RD</sup> APPLICANT**

**AND**

**COSMAS MAZERA MAE ..... RESPONDENT**

**RULING**

1. The applicant's Notice of Motion dated November 12, 2024, seeks an extension of time to file an appeal and a stay of execution pending that appeal, along with the associated costs.
2. The application is supported by the attached affidavit from the 2<sup>nd</sup> applicant, Emily Fikirini, which was sworn on November 12, 2024.
3. The application is contested, as the respondent, Cosmas Mazera Mae, has submitted a replying affidavit dated 28th March 2025.
4. The application was disposed of through written submissions. Legal counsel for the parties cited pertinent legal provisions and judicial precedents relevant to the matters under consideration, for which I express my gratitude.
5. Based on the materials and submissions presented to me, the issues I identify for the determination of this suit are whether to grant leave for an enlargement of time within which to appeal, whether to grant a stay of execution pending appeal, and who should bear the costs.
6. Pursuant to Section 79G of the *Civil Procedure Act*, the timeframe for submitting an appeal from the judgment of a Subordinate Court to the High Court is established at thirty (30) days:



7. In the present case, the judgment under contestation was issued on August 20th, 2024. Therefore, any appeal regarding that judgment should have been filed on or before the 20th of September 2024. Nonetheless, the Applicant submitted this application on November 12, 2024, resulting in a delay of seventy-two (72) days.

8. Section 79G of the *Civil Procedure Act* states:

“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 a good and sufficient cause for not filing the appeal in time.”

9. In the case of *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR, the Court of Appeal provided guidance indicating that the factors to consider before extending time include the following:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

10. The Court of Appeal additionally indicated that there exists an obligation placed upon courts to ensure that the factors taken into consideration align with the paramount objective of civil litigation proceedings. This objective is defined as the just, expeditious, proportionate, and cost-effective resolution of disputes presented before the court. In the matter of *Kamlesh Mansukhalal Damji Pattni v Director of Public Prosecutions & 3 others* [2015] KECA 690 (KLR), the Court of Appeal articulated that:

“It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of *the Constitution* which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of *the Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting *the Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.

For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”



11. The Court of Appeal in the aforementioned case further articulated that:

“It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint. So far the applicant did not have a chance to file a defence. He sought to set aside that default judgment and that application was dismissed on a date he contents the same was not due for hearing and when he had no notice.....”

12. In paragraphs four and five of the supporting affidavit, the applicant avers the reasons for the delay in filing the appeal in a timely manner, which are stated as follows:

4. That we are aware of the judgment in this matter was delivered by the honorable court on the 20<sup>th</sup> August, 2024.

5. That by the time we could give out sufficient instructions to our Advocate, the time to allowed to file an appeal had run out.”

13. Failure to instruct legal counsel to file an appeal within the designated timeframe has been determined to be insufficient grounds for the court to exercise its discretion in extending the period for filing an appeal, see, for example, in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, where the court stated:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

14. In a similar vein, in the case of *Bi-Mach Engineers Limited v James Kahoro Mwangi* [2011] eKLR, the court reaffirmed the obligation of an applicant to diligently pursue the instructions provided to an advocate and articulated its position as follows:

“The applicant had a duty to pursue his advocates to find out the position on the litigation, but there is no disclosure that the applicant bothered to follow up on the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy.”

15. Both the applicants and counsel were aware of the court's judgment. The applicants became complacent and were only prompted to act once execution began, leading them to seek a stay of the lower court's judgment. I am not convinced to rule in favor of the applicants, as they have not shown that the delay resulted from factors other than their failure to instruct counsel to appeal. The applicants approached this court because the respondent had started enforcing the lower court's judgment, particularly regarding the seizure of the applicants' goods.

16. The principles that the court may use to grant a stay of execution pending appeal are well established. These principles are outlined in Order 42 Rule 6 of the Civil Procedure Rules, which requires that an applicant seeking a stay of execution pending appeal demonstrate that:

a. Substantial loss may result to the Applicant unless the order was made;

b. The application was made without unreasonable delay; and



- c. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the Applicant.
17. The principles as mentioned above were reaffirmed in the case of Antoine Ndiaye v African Virtual University (2015) eKLR, in which Gikonyo J. expressed that:
- “.... stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42, Rule 6 of the Civil Procedure Rules...:
18. The grant of orders for a stay of execution pending appeal is at the discretion of the Court. In the case of Butt v Rent Restriction Tribunal [1982] KLR, the court guided how such discretion should be exercised and held that:
- “The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
- A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute, and the appellant had an undoubted right of appeal.
- The court, in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
19. The purpose of the stay of execution is to preserve the status quo while awaiting the hearing of the appeal. In the case of RWW v EKW [2019] eKLR, it was observed that:
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”
20. As stated, the application for an extension of time to appeal is predicated (on their admission) on the applicants' failure to provide their counsel with timely instructions to appeal. I find this reasoning to be insufficient, as it was only after the execution had begun that the applicants filed the motion to appeal out of time, intending to challenge the execution of a completed sale of land.
21. In conclusion, the entire application is not meritorious and is hereby dismissed with costs.



**DATED, SIGNED, AND DELIVERED ELECTRONICALLY IN MALINDI ON THIS 28TH DAY OF MAY 2025.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Oyatsi for the Applicant

Mr. Mangaro for the Respondent

