



**Mogesi v Nyakundi (Environment & Land Miscellaneous Case
E016 of 2024) [2025] KEELC 1024 (KLR) (5 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1024 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND MISCELLANEOUS CASE E016 OF 2024**

FO NYAGAKA, J

MARCH 5, 2025

BETWEEN

PATROBA O. MOGESI APPLICANT

AND

STEPHEN GEORGE NYAKUNDI RESPONDENT

RULING

Brief Facts

1. The Applicant filed the instant application dated 5th December, 2024 seeking the following orders:
 1. ...spent.
 2. ...spent.
 3. That pending the hearing and determination of the intended appeal, this honourable court be pleased to stay the execution of decree in Chief Magistrate Court at Kitale Environment and Land Case No. 55 of 2020 in respect of the judgment delivered in open court at Kitale on 6/11/2023 by Hon. S.K. Mutai SPM and all consequential orders.
 4. That this honourable court be pleased to extend the time and grant leave to the applicant to appeal out of time against the judgment delivered in open court at Kitale on 6/11/2023 by Hon. S.K Mutai SPM in Chief Magistrate Court at Kitale Environment and Land Case No. 55 of 2020 and the annexed draft Memorandum of Appeal be deemed as duly filed and served upon payment of the requisite court fees.
 5. That OCS and OCPD Kitale Police Station to enforce the above orders.
 6. That costs of this application be in the cause.



2. The Application was based on grounds set out and supported by the Affidavit of Patroba O. Mogesi the Applicant herein sworn on 12th November, 2024.
3. He stated that he is the registered allottee of UNS. Residential Plot No. 32 Kitale Reference No. 20089/XXVIII, the suit land herein. He stated further that she was in possession of the suit land and that the Respondent attempted to evict her. Further, Hon. S.K Mutai delivered judgment on 6th November, 2023 in his absence. He has an arguable appeal with chances of success. He stated that the delay in filing the appeal was that he has been unwell, thus was unable to instruct a counsel to file the present application. He added that the eviction carried out by the Respondent was contrary to Section 152E of the Land Laws (Amendment) Act No. 28 of 2016 for want of notice. He went on to state that he had refunded the Respondent Kshs. 180,000/= from the Kshs. 200,000/= paid as purchase price for the suit land. He stated that she was willing to abide by any terms for security for costs as imposed. He urged the court to exercise its discretion and allow the application as prayed.

Response

4. The Respondent filed a Replying Affidavit sworn on 26th November, 2024 in which he deposed that the Applicant was bound by the terms of the sale agreement dated 19th February, 2017, by which he sold to him the suit land. He further averred that the agreement was valid and the Applicant had the duty to pay the arrears of the rent and rates and obtain the lease for transfer but she failed to do so. He added that after execution of the agreement, he took possession but the Applicant forcefully moved back and constructed a temporary structure without his consent. He deposed that he filed Kitale Environment and Land Case No. 55 of 2020 in the court, which ordered the eviction of the Applicant from the suit land, together with an order for specific performance of the sale agreement. He averred that the Applicant was served with the notice to show cause why execution should not be carried out. When it came up for hearing, the applicant never raised the issue of illness.
5. The Respondent deposed that he did not receive any refund from the Applicant and added that the sale agreement did not provide a clause for any refund. He averred that the Applicant's deliberate refusal to attend court and delay in filing the application demonstrates that he slept on his rights and should not be allowed to benefit from his negligence.
6. The Applicant filed a further affidavit sworn on 27th November, 2024, where he stated that he complied with the trial court's directions and served the Respondent with the application dated 12th November, 2024. He further stated that orders were issued on 15th November, 2024 and the following day, the Respondent took advantage of the lack of stay orders and the eviction orders in place and tried to evict him in vain. He added that the said eviction order issued on 23rd July, 2024 was illegal. He deposed again that lack of the stay orders has greatly prejudiced him and as there was a likelihood that he would be evicted before his application is heard.

Submissions

7. Counsel for the Applicant filed his submissions dated 10th December, 2024 in which he identified two issues for determination. The first issue was whether the Applicant's Amended application dated 15th December, 2024 was opposed. He submits that the Respondent filed a replying affidavit sworn on 9th December, 2024 in opposition to the application. He submits that the Replying Affidavit was sworn by the Respondent in Kitale yet by an advocate in Nairobi. He argues that the said Bench and Company Advocates is neither an Advocate or Commissioner for oaths. He further submits that the said affidavit does not conform to the requirements of Section 5 of Chapter 15 Laws of Kenya and it ought to be



- struck out with cost thus rendering the amended application unopposed. He cited the case of CMC Motors Group Limited V Bengeria Arap Korir t/a Marben School & Another [2013] eKLR.
8. Regarding the issue on whether the prayers were merited, learned counsel, while submitting in the affirmative, relied on Order 42 Rule 6 of the Civil Procedure Rules. He submitted that the Applicant met the threshold for stay of execution pending appeal. He submits the application filed the application dated 18th January, 2024 on 19th February, 2024. He further submits that on substantial loss, the Applicant has demonstrated that he is still in occupation of the suit land and that he would be rendered landless if the stay orders are not granted. On unreasonable delay, he submits that the Supporting Affidavit of James Omakori that he paid the firm of M/S Bikundo to reply to the Notice to Show Cause due to the Applicant's illness is uncontroverted. He submits that evidence on record confirmed that the Applicant was unwell since 19th February, 2024 and unable to give instructions to M/S Bikundo advocates.
 9. Regarding the draft memorandum of appeal, he argued that it raised an arguable appeal with high chances of success. Counsel relied on the Supreme court case in Torino Enterprises Limited V Attorney General (Petition 5(E006 of 2022) [2023] KESC 79 KLR. He submits that the Applicant was unable to pass title to the Respondent by virtue of being an allottee until he acquired title upon registration. He urged the court to allow the application as prayed.
 10. Counsel for the Respondent filed his submissions dated 15th December, 2024. He identified three issues for determination. The first issue was whether the court had jurisdiction to determine the application. He submitted in the negative and relied on Order 42 Rule 6 of the Civil Procedure Rules. It was his submission that the Applicant was supposed to move the trial court that she intends to appeal from before the same was filed in the court she intends to lodge the appeal.
 11. The second issue was whether the Applicant satisfied the conditions for stay pending appeal. Counsel while submitting in the negative argued that the instant application was an afterthought due to the impending execution of judgment in favour of the Respondent. He submitted that the application was aimed at frustrating the execution process and that the Applicant failed to prove that she will be prejudiced by the said execution. He added that the draft memorandum of appeal raised no triable issues and the same had no chances of success. He submitted that the Applicant failed to state the form of security for costs in the appeal.
 12. The final issue was whether the Applicant satisfied the conditions for appeal out of time. He relied on Section 79G of the *Civil Procedure Act* and submitted in the negative. He further submitted that the appeal may be admitted out of time if the Appellant satisfies the court that he/she had good and sufficient cause for not filing the appeal on time. Counsel relied on the case in Edith Gichungu Koine V Stephen Njagi Thoithi [2014] eKLR and submits that the Applicant filed the present application more than one year after the judgment was delivered. He submits that the Applicant stated that she was unwell since 19th February, 2024, thus unable to instruct her advocate to institute the appeal. He further submits that the Applicant failed to explain why she did not lodge the appeal within 30 days since the same lapsed on 6th December, 2023. It was counsel's submission that there was no reason for the delay by the Applicant in filing of the appeal. He added that the appeal had minimal chances of success. He cited the case of Asma Ali Mohamed V Fatime Mwinyi Juma C/A 75/2014 and urged the court to dismiss the application with costs.

Analysis And Determination

13. This Court has carefully considered the application and the main issue for determination is whether the Applicant should be granted leave to file an appeal out of time.



14. Section 79G of the *Civil Procedure Act* provides as follows:

“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.”

15. In the instant case, it is not in dispute that judgment was delivered on 6th November, 2023. It is trite law that the Applicant had 30 days within which he was to file an appeal. It was, however, the Applicant’s claim that the delay in filing the appeal was due to the fact that he had been unwell since 19th February, 2024, thus unable to instruct her advocate to file the appeal. The Applicant in support of this annexed copies of invoice and medicine forms from the various hospitals bearing various dates from 19th February, 2024. It is not in dispute that the 30 days lapsed on 6th December, 2023. The treatment records he provided showed that he was healthy at the time. He only fell ill after time had lapsed. It therefore meant that the Applicant had sufficient time within which to file the appeal since it was not until almost a month later when he allegedly fell sick. The timelines within which he alleged to be ill were over one month after the 30 days to file an appeal. It is this court’s view that she had sufficient time to instruct her advocate as she was not unwell at the time.

16. It is noteworthy that this court has the discretion to extend time which ought to be exercised within the principles of the law. In the Court of Appeal case of *Omar Shurie v Marian Rasbe Yafar (Civil Application No. 107 OF 2020)* UR where it was held:

“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.” [Emphasis mine]

17. It is a fact that the time lapsed between the date of the judgment and the date of filing this application was approximately about one year. I find that the delay was inordinate. I also find no reasonable explanation as to be sufficient to convince the court why the appeal was not filed in time. It is this court’s view that the Appellant failed to establish the prejudice he would suffer if this court were to discharge the interim stay of proceedings currently in place. Furthermore, this court has perused the Memorandum of Appeal. This Court is of the humble view that the grounds as raised by the Appellant can either succeed or not. I am of the view that the Applicant failed to adduce sufficient reason to warrant extension of time within which he should file an appeal.

18. The upshot of the foregoing is that the application dated 5th December, 2024 is dismissed with costs to the respondent. I further discharge the interim orders of stay that were in force. The file to be closed, subject to the payment of the said costs.

19. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIA THE ELECTRONIC MAIL (EMAIL) THIS 5TH DAY OF MARCH, 2025.

HON DR. IUR F. NYAGAKA



JUDGE

