



REPUBLIC OF KENYA



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**Wanyir & 2 others v Alubokho (Environment & Land Miscellaneous Case
E001 of 2025) [2025] KEELC 1144 (KLR) (10 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1144 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND MISCELLANEOUS CASE E001 OF 2025**

**BN OLAO, J
MARCH 10, 2025**

BETWEEN

FRED WANYIR 1ST APPLICANT

JACK MAKOKO 2ND APPLICANT

IPALI BARASA 3RD APPLICANT

AND

WYCLIFFE MUKOLWE ALUBOKHO RESPONDENT

RULING

1. This ruling is in respect to the Notice of Motion by Fred Wanyir, Jack Makoko and Ipali Barasa (the 1st, 2nd and 3rd Applicants respectively) dated 21st January 2025 and anchored on the provisions of Orders 22, 42 and 50 of the Civil Procedure Rules as well as Sections 3A, 63, 79G and 95 of the [Civil Procedure Act](#). It is based on the grounds set out therein and supported by the affidavit of the 1st Applicant. I may point out at this stage that although in the motion it is indicated that it is supported by the affidavit of the 1st Applicant that of their counsel Mr Hammerton J. Maloba, the body of the motion has only the supporting affidavit of the 1st Applicant.
2. The gravamen of the application is that the Applicants and the Respondent one Wycliffe Mukolwe Alubokho were the litigants in Busia Chief Magistrate's Court ELC Case No 71 of 2018 which involved the land parcel No South Teso/Amukura/1583. The dispute was settled by consent in which a report of the surveyor was adopted as an order of the trial Court. The parties were however directed to file submissions on the issue of costs.
3. The trial Court delivered its ruling on costs on 4th November 2024 in favour of the Respondents but due to a mistake, counsel for the Applicants misapprehended the ruling to be in favour of the Applicants and proceeded to file his Bill of costs. That error was only discovered on 21st January 2025



when counsel, upon checking the CTS System, discovered that counsel for the Respondent had also filed a party and party Bill of Costs.

4. The Applicants are aggrieved by the said ruling and intend to appeal the same. By the said Notice of Motion, they seek the following orders:
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to enlarge time within which the Applicants may lodge the intended appeal against the ruling delivered on 4th November 2024 in Busia Chief Magistrate's Court ELC Case No 71 of 2018.
 4. That this Honourable Court be pleased to order stay of execution of the decree issued in Busia Chief Magistrate's Court ELC Case No 71 of 2018 pending the hearing and determination of the intended appeal.
 5. That costs of the application be provided for.

When the Motion was placed before me on 22nd January 2025 under Certificate of Urgency, I did not certify it as urgent but directed that it be canvassed by way of written submissions to be filed on or before 25th February 2025 with the Respondent being allowed 21 days from date of service to file his responses and submissions. The record shows that the Respondent's counsel was served with the Motion and submissions on 25th January 2025 when the matter came up for mention on 25th February 2025, there was no appearance by either of the parties or their counsel and I directed that they be notified to attend Court on 5th March 2025.

5. On that day, Mr Maloba counsel for the Applicants informed this Court that he had served Mr Ashioya counsel for the Respondent with the Motion and submissions on 25th January 2025 but had not been served with any response to the Motion. This Court directed that the ruling would be delivered on 10th March 2025.
6. The Motion is therefore not opposed. I have considered it together with the submissions by Mr Maloba instructed by the firm of Harmmerton Maloba & Company Advocates for the Applicants.
7. The Applicants seek two substantive orders. These are:
 1. Enlargement of time within which to appeal the ruling delivered on 4th November 2024 in Busia Chief Magistrate's Court ELC Case No 71 of 2018.
 2. Stay of execution of the decree issued in Busia Chief Magistrates Court ELC Case No 71 of 2018.

I will address them in that order:

1. Enlargement of Time to Appeal:

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

79G: "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.” Emphasis mine.

Section 16A (1) and (2) of the [Environment and Land Court Act](#) on the other hand also reads:

- 1: “All appeals from subordinate Courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in Section 13(2) of the [Environment and Land Court Act](#), provided that in computing such time within which the appeal is to be instituted, there shall be excluded such time that the subordinate Court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.
- 2: 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”. Emphasis mine.

Section 95 of the same Act provides as follows:

“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 it’s discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

Finally, Order 50 Rule 6 of the Civil Procedure Rules provides that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these rules or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed;

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application unless the Court orders otherwise.” Emphasis mine.

It is clear therefore that this Court has the power and discretion, for sufficient or good cause, to enlarge time within which an appeal can be lodged out of time. The terms “sufficient cause” or “good cause” were defined in the case of Attorney General -v- Law Society of Kenya & Another C.A. Civil Appeal No 133 of 2011 as:

“.....the burden placed on a litigant (usually by Court rule or order) to show why a request should be granted or an action excused ... sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.” Emphasis mine.

Finally, in the case of Nicholas Kiptoo Arap Electoral And Boundaries Commission & 7 others, Supreme Court Application No 16 of 2014 [2014 eKLR], the Supreme Court emphasized that the power to extend time is discretionary and unfettered but the party seeking such a remedy must explain the delay and other extenuating circumstances to enable the Court exercise that discretion in his favour. The Court went on to set out the following principles to guide the Court while considering such an application:

1. Extension of time is not a right. It is an equitable remedy which is only available to a deserving party at the discretion of the Court.



2. A party seeking an order of 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 Respondent if the extension is granted.
6. Whether the application has been brought without undue delay.
7. Whether in certain cases like election Petition, public interest should be a consideration for extending time.

This application was not opposed. Nonetheless, I must consider it in light of the above precedents and legal provisions.

9. The ruling sought to be appealed was delivered on 4th November 2024 and it was not until 21st January 2025 that counsel for the Applicants discovered that he had misapprehended the terms of the ruling which had in fact granted costs to the Respondent and not to the Applicants. This application was filed on 22nd January 2025, a day after counsel discovered that error. The delay is not unreasonable but has also been explained to my satisfaction. Besides, the now well-trodden path is that the mistake of counsel ought not to be visited on the party – Philip Chemwolo & Another -v- Ausustine Kubende 1982 – 88 KLR 103, and also Belinda Murai & others -v- Amos Wainaina 1979 eKLR among other cases.
10. In the circumstances of this case, I am persuaded that the order of enlargement of time is merited. I grant it.

2. Stay of Execution Pending Appeal:

11. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules provides that:

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- (1) “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.
- (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.”



It is clear from the above that for the Applicants to be entitled to orders of stay of execution pending appeal, they must satisfy the following conditions:

1. Show sufficient cause.
2. Demonstrate that unless the order is granted, they will suffer substantial loss.
3. File the application without unreasonable delay.
4. Offer security.

The Applicants have annexed to the Motion a draft memorandum of appeal dated 21st January 2025 and which is basically challenging the award of costs to the Respondent. I think there is nothing wrong in filing an application for stay together with the draft memorandum of appeal.

12. I do not consider the delay herein to be unreasonable either.

13. The Applicants were also required to demonstrate that unless the order for stay of execution pending appeal is granted, they will suffer substantial loss. Such loss, as was held by platt ag J A (as he then was) in the case of Kenya Shell Ltd -v- Benjamin Karuga Kibiru & Another 1986 KLR 410 "... is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondents should be kept out of their money." In the same case, Gachuhi Ag J.A (as he then was) also added that "In an application of this nature, the Applicant should show the damages it would suffer if the order for stay is not granted." In paragraph 13 of the Motion, it is stated that if the order of stay is not granted, the Applicants will suffer irreparable loss as the Respondent will not be able to refund the decretal sum. The same is repeated in paragraph 14 of the supporting affidavit. There is however no evidence to suggest that the Respondent is so impecunious as to be unable to refund the costs should the appeal succeed. A mere un-supported claim of irreparable loss is not enough. As was stated in Machira t/a Machira & Company Advocates -v- East African Standard (No 2) 2002 KLR 63:

"In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars ... where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay."

That is the situation obtaining in this matter as "no pecuniary or tangible loss" has been satisfactorily shown. On that ground, the prayer for stay of execution is not deserved.

14. Finally, it is not disputed that the parties recorded a consent on the main suit in the trial Court save for costs. Any execution can therefore only be with respect to costs and ordinarily, the Court will not stay any execution for costs – Western College of Arts And Applied Sciences -v- Oranga & Others 1976-80 I KLR 78 [1976 eKLR]. In the circumstances, the order for stay of execution is not available.

15. The up-shot of all the above is that having considered the Notice of Motion dated 21st January 2025, I issue the following disposal orders:

1. The prayer for stay of execution is declined.
2. The prayer for leave to appeal out of time is allowed.
3. The appeal be filed and served within 14 days from today.
4. The costs of this Motion shall abide by the said appeal.



BOAZ N. OLAO

JUDGE

10TH MARCH 2025

**RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 10TH
DAY OF MARCH 2025.**

BOAZ N. OLAO

JUDGE

10TH MARCH 2025

