



Edmund v Progressive Credit Limited & another (Environment and Land Miscellaneous Application E004 of 2020) [2025] KEELC 3698 (KLR) (5 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3698 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E004 OF 2020
LC KOMINGOI, J
MAY 5, 2025**

BETWEEN

KENNEDY OERI EDMUND APPLICANT

AND

PROGRESSIVE CREDIT LIMITED 1ST RESPONDENT

CARNELLIAN AUCTIONEERS 2ND RESPONDENT

RULING

1. This Ruling is in respect of the Notice of Motion dated 15th December 2023 brought under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules; Section 1A, 1B, 3, 3A and 79G of the [Civil Procedure Act](#). It seeks orders:
 - i. Spent;
 - ii. Pending the hearing and determination of the instant Application, the Honourable Court be pleased to order a stay of execution of the Judgment delivered by Hon. Bernard Kasavuli on the 31st October, 2019 in Ngong Chief Magistrate's Court ELC Case No. 89 of 2018 and the subsequent decree together with all consequential orders flowing the said judgment.
 - iii. The Honourable Court be pleased to grant Leave to the Applicant herein to file and/or mount an Appeal out of the statutory period, against the Judgment delivered by Hon. Bernard Kasavuli on the 31st October, 2019 in Ngong Chief Magistrate's Court ELC Case No. 89 of 2018.
 - iv. Consequent to prayer (3) above being granted, the Applicant do lodge the Intended Appeal within 14 days from the date of the Order of this Honourable Court and/ or such other shorter duration as the Honourable Court may deem fit and expedient..



- v. That upon hearing this Application inter partes, this Honourable Court be pleased to order stay of execution of the Judgment delivered by Hon. Bernard Kasavuli on the 31st October, 2019 in Ngong Chief Magistrate’s Court ELC Case No. 89 of 2018 and the subsequent decree together with all consequential orders flowing the said judgment, pending the hearing and final determination of the Intended Appeal herein
- vi. That the costs of this application be borne in the cause.
2. The grounds are on the face of the Application. The same is supported by the Affidavit of Kennedy Oeri Edmund, the Applicant herein.
3. He avers that the Judgement and resultant orders issued at the Lower Court in Ngong’ CM ELC No. 89 of 2018 were issued ex-parte as neither he nor his advocates were served with hearing notices. He only learnt about the impugned judgement sometime in September 2020 after the lapse of the 30-day statutory Appeal period. He then instructed his then Advocates M/S Matwere Asiyo & Co. Advocates to file an application for stay of orders and despite his previous advocates filing an application for stay in this Court, they never pursued the same or sought Court’s leave to file the Appeal out of time.
4. He then engaged the current advocates on record seeking Stay of execution of judgement as well as leave to appeal out of time because he stood to suffer substantial loss and damage if the Lower Court’s orders were executed. He averred that the actions of his previous advocates should not be fashioned against him and he should be denied access to justice on those grounds. He added that his appeal had a high chance of success and if the stay was not granted, the intended Appeal would be rendered nugatory.
5. The 1st Respondent in its Replying Affidavit dated 25th July 2024 sworn by its Legal Officer Christine Mikai contested the application stating that it was an abuse of the Court process and should be dismissed with costs on grounds that: the Applicant had not stated a reason why his application dated 14th October 2020 was not prosecuted. If he was diligent, it would not have taken him four years to prosecute the application. Additionally, he had not shown that he was diligent in actively following up on his suit at the lower Court. She pointed out that the suit at the Lower Court was instituted by the Applicant in 2017 and once their application for injunction was dismissed, they never appeared in Court again and did not prosecute their suit. The Respondent’s counterclaim was therefore heard and determined in the Applicant’s absence and judgement delivered in the 1st Respondent’s favour. The 1st Respondent’s advocates on 2nd March 2020 and 21st September 2020 notified the Applicant’s advocates of the entry of the judgement and enclosed a copy of the judgement and decree but the Applicant’s advocates never acknowledged receipt.
6. This application was therefore in bad faith aimed at curtailing the 1st Respondent from enjoying fruits of its Judgement. Similarly, the Applicant had not satisfied the threshold under Order 42 Rule 6 because he had not shown that his Appeal had high chances of success or the substantial loss that would be suffered if Stay is not granted. Additionally, the Applicant had not demonstrated good reasons for the delay of filing the application. And if the appeal succeeds, the 1st Respondent being a financial institution, was in a position to refund the decretal sum. She deponed that should the court deem it fit to grant the stay, then three quarters of the decretal sum should be paid to the 1st Respondent and the balance be deposited in a joint interest earning account or the entire amount be deposited in Court.
7. This application was canvassed by way of written submissions.

Submissions of the Applicant

8. Counsel for the Applicant submitted on the following two issues as highlighted below.



9. On whether the Hon. Court should grant leave to the Applicant to lodge their Appeal out of time, Counsel submitted that while at the Lower Court, the Applicant's advocates then M/S Rodgers Ombachi & Co. Advocates stopped attending Court a fact that was never communicated to the Applicant. It was until sometime in October 2020 that he discovered that a Judgement had been delivered earlier in October 2019 when the 2nd Respondent herein sought to auction off his property. He then instructed the firm of M/S Matwere Asiyo & Co. Advocates to challenge the judgement. The firm filed an application for stay of judgement as well as leave to file out of time, but they too failed to prosecute the application. It was then that the Applicant engaged the current advocates on record who seek to right the wrong occasioned by the previous advocates. And accord the Applicant his right to be heard and access justice as per Article 48 and 50 of *the Constitution*.
10. Counsel thus submitted that the Appeal had satisfied grounds for being admitted out of time as per Section 79G of the *Civil Procedure Act* and as laid out by the Supreme Court in Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR and by the Court of Appeal in Structural International Kenya Ltd vs Commissioner of Domestic Taxes [2023] KECA 1476 (KLR) since the delay was not occasioned by the Applicant but failure by his previous advocates. Counsel submitted that an advocate's mistakes on some occasions could constitute grounds for extending time as held in Kariuki vs Wangeci & 7 others [2024] KECA 1692 (KLR) and that the law does not set out any minimum or maximum period of delay as long as the period of delay is satisfactorily explained as held in the Structural International Kenya Ltd case (supra). Counsel also submitted that the Applicant had a right to be heard as per Article 50 and the said right should be granted on appeal with reference to Soft White Beach Ltd vs Kombe & 4 others [2023] KECA 970 (KLR).
11. On whether the stay of execution of the judgement dated 31st October 2019 should be granted, counsel submitted that it was important for stay to be granted so that the substratum of the suit is not rendered nugatory and because the Appeal had high chances of success citing Public Service Commission & others vs Okiya Omtatah & others (2021).

Submissions of the Respondent

12. Counsel for the Respondent also submitted on the two issues of lodging an Appeal out of time and stay of execution.
13. On whether the Applicant should be granted leave to appeal out of time, counsel submitted that the delay in filing the application was both inordinate and unreasonable and should not be granted citing Paul Wanjohi Mathenge vs Duncan Gichane Mathenge [2013] eKLR. Counsel submitted that an Advocate's mistake is not a reasonable reason since the suit belongs to the litigant citing Gachungu vs Karaine & 3 others [2022] KECA, Mwangangi vs Mugi [2024] KEHC 6321 (KLR) and Bi-Mach Engineers Ltd vs James Kahoro Mwangi (2011) eKLR.
14. On whether the Court should stay execution of the judgement dated 31st October 2019, Counsel submitted that the Applicant had not demonstrated the loss likely to be suffered citing Kenya Shell Ltd vs Kibiru [1986] eKLR and Awale Transporters vs Kelvin Perminus Kimanzi. And the judgement being a money decree, the Respondent had the financial capacity to reimburse the Applicant his decretal sum should the Appeal be successful. Counsel also submitted that the Applicant had not made provision for security of costs as held in Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others [2014] eKLR. The Application should thus be dismissed with costs.



Analysis and determination

15. I have considered the Notice of Motion, the Affidavit in support, the Response thereto, the rival submissions and the authorities cited. I find that the issues for determination are:
- i. Whether the Applicant is entitled to enlargement of time to file his Appeal out of time;
 - ii. Whether the Applicant has met the threshold for grant of stay of execution of the Judgement and Decree issued on 31st October 2019 in Ngong’ ELC Case No. 089 of 2018;
 - iii. Who should bear the costs of this application?
16. The Applicant seeks enlargement of time to file his Appeal out of time on grounds that the Lower Court’s judgement was issued without his knowledge because his advocate on record at the time stopped attending Court. He only came to find out about the judgement about a year later. Even then, when he sought legal counsel from another advocate, they too filed the application and never prosecuted it. Until the current advocates came on record in 2023. Therefore, the delay and actions of his previous advocates should not be visited upon him and his right to be heard and access justice as per Article 48 and 50 of *the Constitution* should be protected.
17. The 1st Respondent contested this stating that the application was inordinately late and the reasons given were not sufficient because a suit belongs to the litigant and he should have been diligent in prosecuting his suit both at the Lower Court and at this Court.
18. Section 79G of the *Civil Procedure Act* provides:
- 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.
19. Has the Applicant/Appellant satisfied the Court that he has a good and sufficient cause for not filing the Appeal in time?
20. The Supreme Court in *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR) stated: “...Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it...”
21. This Court has the discretion to weigh objectively what entails access to justice and abuse of court process. Both parties have put up strong cases to support their respective positions.
22. The Applicant has attributed his current position to his previous advocates. The impugned judgement reads “... that the Plaintiff (herein Applicant) after losing his first attempt to stop the auction, never appeared again in this matter to prosecute the same...” The Applicant claims that his advocate stopped attending Court and he only learnt about this Judgement one year later. He then retained a different advocate in 2020 to file the Application to appeal out of time, who equally failed to prosecute the Application. The Applicant has not given this Court any iota of evidence to show his attempts at prosecuting his suit at the Lower Court or the applications herein. While I agree that advocates mistakes



should not be visited upon the client, I also agree that the client/litigant needs to ensure that their case is indeed prosecuted without undue delay. This Court has not been given evidence to show that the Applicant had been assiduous in prosecuting his case and was frustrated by his advocates actions or inactions. To this Court, it looks like the Applicant together with his advocates would fold their hands and sit pretty, and not make any step until the Court woke them up from their deep slumber with adverse orders.

23. However, noting that this Court neither saw nor heard what transpired at the Lower Court, I find that the Applicant deserves an opportunity to be heard and the case determined on merit. And as per the wise words of Apaloo J. in Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR: “Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”
24. I will therefore exercise the Court’s discretion and grant the Applicant an opportunity to prosecute his Appeal as he claims he was not accorded this opportunity at the Trial Court due to his advocates’ non-attendance. I therefore extend time for the Applicant to file his Appeal and Record of Appeal.
25. On the issue of stay of execution of the judgement dated 31st October 2019, the Applicant claims that if the impugned judgement is not stayed, he stands to suffer substantial loss and damage. The 1st Respondent argues that the substantial loss has not been demonstrated and if any, the 1st Respondent would be in a position to reimburse the loss if the Appeal succeeds.
26. Order 42 Rule 6(2) of the Civil Procedure Rules provides:
 - (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.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
27. The Applicant’s case is that he was not heard at the lower court. The 1st Respondent on the other hand, has argued that it is capable of reimbursing the decretal sum should the Appeal succeed.
28. Land is an emotive issue, and courts have held that its loss is not only financial but also emotional and no piece of land is equivalent to the one lost even if it was to be replaced or compensated. It is my view that the judgement dated 31st October 2019 and the subsequent decree ought to be stayed.
29. I find merit in this Application and the same is allowed in the following terms:
 - a. That the Applicant is hereby granted leave to file an Appeal out of time against the judgement delivered on 31st October 2019 in Ngong ELC Case No. 89 of 2018.
 - b. That the draft Memorandum of Appeal dated 14th December 2023 be treated as duly filed upon payment of the requisite fees.
 - c. That the Applicant do file his Record of Appeal within forty five (45) days from the date of this Ruling. In default, the orders granted shall lapse automatically.



- d. That the judgement delivered on 31st October 2019 in Ngong ELC Case No. 89 of 2018 and subsequent decree and all other consequential orders be hereby stayed pending the hearing and determination of this Appeal.
- e. That the Applicant do deposit Kshs. 300,000 as security for costs in a joint interest earning account in the names of advocates for the parties within forty five (45) days of this Ruling.
- f. That costs of this application do abide the outcome of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 5TH DAY OF MAY 2025.

L.KOMINGOI

JUDGE

In the Presence of:

For the Applicant

For the Respondent

Court Assistant: Mutisya

