



**Mwake & 10 others v Makenge & 2 others (Environment & Land Case 28 of 2017) [2024] KEELC 1417 (KLR) (13 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1417 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 28 OF 2017  
A KANIARU, J  
FEBRUARY 13, 2024**

**BETWEEN**

- ALEXANDER NYAGA MWAKE ..... 1<sup>ST</sup> PLAINTIFF**
- CHARLES MUNYI NJIRU ..... 2<sup>ND</sup> PLAINTIFF**
- JOHN NGARI KAUMBUTHU ..... 3<sup>RD</sup> PLAINTIFF**
- мбака аthаt RUMBIA ..... 4<sup>TH</sup> PLAINTIFF**
- ANTHONY MWANGI NJIRU ..... 5<sup>TH</sup> PLAINTIFF**
- CECILIA NJURA ETHAN ..... 6<sup>TH</sup> PLAINTIFF**
- JOHN MWANIKI MWAKE ..... 7<sup>TH</sup> PLAINTIFF**
- NJERU ETHA ..... 8<sup>TH</sup> PLAINTIFF**
- SAMBA ETHA ..... 9<sup>TH</sup> PLAINTIFF**
- PETERSON NJERU MERU ..... 10<sup>TH</sup> PLAINTIFF**
- BENEDICT NGARI NYAGA ..... 11<sup>TH</sup> PLAINTIFF**

**AND**

- JOHN MWANIKI MAKENGE ..... 1<sup>ST</sup> DEFENDANT**
- ESPON N.T MAKENGE ..... 2<sup>ND</sup> DEFENDANT**
- ALFRED NGIRI MARANGI ..... 3<sup>RD</sup> DEFENDANT**



## RULING

1. This is a composite ruling on two applications; a Notice of Motion application dated 14.09.2022 filed by the 1<sup>st</sup> & 3<sup>rd</sup> Defendants who are the Appellants; and a notice of motion application dated 30.08.2022 filed by the 1<sup>st</sup> and 5<sup>th</sup> Plaintiffs who are the Respondents.
2. The 1<sup>st</sup> application dated 14.09.2022 was filed by the 1<sup>st</sup> & 3<sup>rd</sup> Defendants who sought to have the court renew and/ or extend the orders of stay of execution issued on 27.07.2020 against the judgement and decree of 14.05.2020 by a further 90 days and until hearing and determination of the intended appeal. The application was supported by the grounds on the face of the application and on the supporting affidavit sworn by the 1<sup>st</sup> Defendant John Mwaniki Makenge on behalf of the 3<sup>rd</sup> Defendant. He deposed that judgement in this matter was delivered on 14.05.2020 in favour of the Plaintiff's. That through a notice of motion application dated 05.06.2020 they sought stay of execution of the judgement and the same was granted on 27.07.2020 for two years or upon conclusion of the intended appeal whichever came first. That in the same ruling, the court directed that they would collect copies of proceedings and other documents for purposes of the intended appeal from court within 14 days and that an order of inhibition would be registered against the suit properties for two years or until conclusion of the appeal whichever came first.
3. He further deposed that they obtained the typed proceedings in mid-August 2020. That in the intervening period they formed the opinion that they should file for review of the judgement instead of appeal and filed the application for the same on 25.08.2020. That the court in its ruling on 18.12.2020, declined the orders sought therein on the premise of the existence of the Notice of Appeal filed which by law precluded the prosecution of an application for review. That since the matter involved other members whose interest they represented, they needed to do extensive consultations with them. That they could not reach a consensus on settlement of the legal fees of their previous advocate that needed to be cleared before they could issue instructions on the intended appeal. That this dragged on for a while as most of the members were facing financial hardships on account of the Covid- 19 pandemic which they ask the court to take judicial notice of its financial effect on the whole country.
4. They further deposed that around March 2022, they instructed their current advocate to come on record and prepare the relevant pleadings and lodge an appeal before the Court of Appeal. That granted the long litigation and historical background surrounding the subject matter of the suit and voluminous nature of the documents that their current advocate was forced to acquaint themselves with, the intended appeal could not immediately be filed upon taking instructions. That further, the country was gearing into the election season and the counsel instructed to act in this matter was and continues to be heavily involved in the electoral dispute process which operates on strict timelines on hearing and determination. That the counsel has prepared a draft Memorandum of Appeal gearing to formally lodge the intended appeal. That their apprehension is that the conditional order of stay of execution having lapsed, the Plaintiffs may at any time now move to execute the judgement to their detriment.
5. He deposed further, that they stand to be rendered homeless and destitute should the court not intervene by renewing and/or extending the stay orders. That the execution of the judgement and decree would occasion them substantial loss and render their intended appeal nugatory. That the prayers sought would not prejudice the plaintiff's in any way as there are inhibition orders issued against the stay orders of 27.07.2020. He urged that they have filed the application herein in utmost good faith, and that they have moved with all due diligence and acted expeditiously in the circumstances of



this case thereby entitling them to the orders sought. He further urges that the interests of justice and fairness tilt in their favour.

6. The application was opposed by the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiff through a Replying affidavit sworn on 09.01.2023 by Alexander Nyaga Mwake. He deposed, that the Defendants have not shown sufficient cause why they did not file the appeal within the statutory period. That in the circumstances the Defendants are guilty of indolence and are not deserving of this Honourable Court's discretion. That there is no guarantee that the Applicants will take any steps towards appealing even if a further stay is granted. That the Defendants have not demonstrated the loss that they stand to suffer in the event that the stay is not granted. That they have not also demonstrated their willingness to provide security as the court may order for due performance of the decree. That the plaintiffs stand to be greatly prejudiced in the event that the orders sought are granted. That the application is an afterthought in view of their application dated 30.08.2022 in which they are seeking the courts assistance in executing the decree.
7. In the 2<sup>nd</sup> application dated 30.08.2022, the 1<sup>st</sup> & 5<sup>th</sup> Plaintiff's sought to have the Orders issued by this court on 27.07.2020 granting stay of execution of the judgement to be marked as having lapsed; they also sought to have the inhibition registered against the suit parcels of land therein removed and to have the O.C.S Siakago police station provide security during distribution of the suit parcels to the rightful beneficiaries of the Kere Clan according to the courts judgment dated 14.05.2020. The application was supported by the grounds on the application and the supporting affidavit sworn by Alexander Nyaga on behalf of the 5<sup>th</sup> Plaintiff. He deposed that the subject matter of this suit was parcel of land no. Nthawa/Riandu/1568, 1569, 1570, 1571, 1793, 1794, 1796, 1797, 1798, 281, 287, 5916 & 5917.
8. He deposed further that the court in its judgement on 14.05.2020 ordered that he should be registered with the aforesaid parcels of land in trust for all the rightful beneficiaries of the Kere Clan and thereafter individual titles issued to the ultimate beneficiaries upon allocation. That the 1<sup>st</sup> & 3<sup>rd</sup> Defendants were subsequently granted an order on 27.07.2020 staying execution of the aforesaid decree for a period of two years from the said date or upon conclusion of their intended appeal whichever came first. That the Defendants only served their advocate on record with the Notice of Appeal and that they are not aware of any appeal that was filed thereafter. That the two year period which the courts orders were to last, lapsed on or about 28.07.2022 and the Defendants have not taken any steps to extend the said period. That it's only fair and just that they get to enjoy the fruits of the judgement herein and that security is provided at the time of distributing the suit property as per the decree since the Defendants and members of their family have remained very hostile to them.
9. The 1<sup>st</sup> & 3<sup>rd</sup> Defendants opposed the application through a Replying affidavit sworn on 16.11.2022 by the 1<sup>st</sup> Defendant John Mwaniki Makenga which is a replica of their Supporting Affidavit in their application dated 14.09.2022. It bears not repeating. He also filed a further affidavit on 27.04.2023 in response to the Plaintiff's Replying Affidavit where he deposed; that they were able to obtain a copy of the typed proceedings in December 2022; that *the constitution* guarantees justice for those who can afford legal counsel as well as those who have to raise funds in order to afford counsel; that the description of indolence is regretted and a mis characterization because their only mistake was the lack of legal fees to prosecute the appeal which they have now remedied; that their families have lived on the suit properties for generations and are in danger of being rendered homeless and destitute; that they stand to lose as they have largely made developments on the suit parcels of land; that they have a reasonable apprehension that an illegal sale might take place as a search at the registry revealed that the 1<sup>st</sup> Defendant illegally caused his name to be registered in the land register as a trustee of the suit property on 17.06.2022 a time when the stay orders were still in force; that he did so by misrepresenting that the impugned judgement of 14.05.2020 warrants that right; that the 1<sup>st</sup> & 5<sup>th</sup> Plaintiffs have not demonstrated the loss they stand to suffer if the orders are granted and that they do not stand to be



- prejudiced as there are inhibition orders issued alongside the stay orders; that they are willing to pay any decree related charges or security as and when the court orders.
10. It was agreed that the applications be disposed of by way of written submissions. The 1<sup>st</sup> & 3<sup>rd</sup> defendants filed their submissions on 27.04.2023 while the 1<sup>st</sup> & 5<sup>th</sup> Plaintiffs filed their submissions on 13.06.2023.
  11. The Defendants submitted that this court should invoke the provisions of Articles 48, 50 and 159 (2) (d) of *the Constitution* of Kenya and section 1A of the *Civil Procedure Act* and not dismiss the suit on procedural technicalities. That the delay in filing the appeal is not inordinate, is explainable and excusable in the circumstances as the family underwent difficulty in raising legal fees to clear the former advocates fees owed, lack of funds to pay for new legal representation and to lodge the appeal due to tough economic times caused by the covid-19 pandemic. They urge that they have prepared all documents to lodge the appeal as soon as the renewal/extension of stay orders is granted. They cited the case of *Banco Arabe Espanol v Bank of Uganda* [1999] 2 EA 22 to support this position.
  12. They further submitted that the appeal has good chances of success as demonstrated in their draft Memorandum of appeal. That the test whether to grant stay of execution was laid down in the case of *Housing Finance Company of Kenya v Sharok Kher Mohammed Ali Hirji & Anor* [2015] Eklr. That their Memorandum of Appeal shows that they have an appeal that is arguable, not frivolous and with a good chance of success. That if the renewal/extension of the stay orders is not granted, the intended appeal will be rendered nugatory. It was submitted further that the 1<sup>st</sup> & 2<sup>nd</sup> Defendants have a right to be heard under Article 48, 50(1) and 159(2)(d) of *the Constitution* 2010. That the denial of this right will injure the 1<sup>st</sup> & 3<sup>rd</sup> Defendants and subvert the intention of *the constitution*. They cited the case of *Stecol Corporation Ltd v Susan Awuor Mudemb* (2021) Eklr to support this position.
  13. It was submitted further that the 1<sup>st</sup> & 5<sup>th</sup> Plaintiffs did not demonstrate the loss they stand to suffer if their application is allowed. That if the stay orders are not extended, they will be greatly prejudiced since they will be rendered homeless and destitute if the decree is executed. That this court has a duty to exercise its discretion in a manner that promotes the interest of justice and right of parties to be heard. They further cited the cases of *APA Insurance Ltd v Michael Kinyanjui Muturi* [2016] Eklr, *Stanley Kaiyongi Mwenda v Cyprian Kubai* [2000] Eklr to support their positions.
  14. The 1<sup>st</sup> & 5<sup>th</sup> Plaintiff's on the other hand submitted that judgment in this case was entered in favour of the 1<sup>st</sup> to 5<sup>th</sup> Plaintiff's on 14.05.2020. That the defendants sought stay of execution of the judgement which was granted on 27.07.2020 for a period of 2 years from the said date or upon conclusion of the appeal whichever came first. That after the order for stay was granted, rather than file an Appeal they instead sought to have the judgement reviewed which was not successful as their application was dismissed. That it is their submission that at the point at which the Defendants sought to challenge the judgement by way of review instead of an appeal, the order of stay issued by the court on 27.07.2020 automatically lapsed since the same were issued conditional to the Defendants appealing against the judgment.
  15. That despite the foregoing, the 1<sup>st</sup> & 5<sup>th</sup> Plaintiff's sought to wait out the 2 year period of stay granted to the defendants by the court. That the 2 year period lapsed on or about 28.07.2022 and on 31.08.2023, they filed an application seeking for removal of the inhibition placed against the suit properties at the time the stay was granted. That at the time that the plaintiff's filed the aforesaid application, the defendants had not taken any other step in the matter. That upon the plaintiff's filing the application on 31.08.2022, the defendants rushed to court with an application dated 14.09.2022 seeking stay and/or extension of the orders of stay of execution of the judgment.



16. They submitted further that ‘renewal’ and ‘extension’ has a similar meaning and that the orders of 27.07.2020 can neither be renewed nor extended since they had already lapsed. They cited the case of Mohamed Shally Sese (Shah Sese) v Fulson Company Ltd & Anor [2006] Eklr where the court reiterated the factors that a court should consider in determining whether to extend time as pronounced in the Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat v The Independent Electoral & Boundaries Commission & 7 others [2014]. It was their submission that the Defendants have not met the requirements therein.
17. That for a period of over 2 years since the orders of stay of execution were issued, the defendants who were well aware of the judgment of the court have not taken any steps to institute an appeal. That the delay is inordinate and the defendant’s reasons for failing to file the appeal indicate that their only interest is to prevent the plaintiff’s from enjoying the fruits of their judgement at whatever cost and they have no interest in appealing against the judgement of this court. That further, an appeal is not automatic since the defendants are required to seek leave to file an appeal out of time, and to them, the possibility of such leave being granted is remote. It was their submission that, granting a further stay to the Defendants will be greatly prejudicial to the Plaintiff’s who have been denied a chance to enjoy the fruits of a judgement entered in their favour over 2 years ago and which judgement remains unchallenged to date.
18. They cited the case of Amina Karama v Njagi Gachagua & 3 Others [2020] Eklr where the court held;
- “It has been held that equity aids the vigilant and not the indolent. It has also been held that delay defeats equity. In the case of Ibrahim Mungara v Francis Ndegwa Mwangi (2014) Eklr the court quoted the following passage from Snell’s Equity by John MC Ghee Q.C (31<sup>st</sup> Edition) at page 99:
- The court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing.”
- It was their submission that the defendants herein are not deserving of this courts discretion. They have been indolent for too long and without reasonable cause. They ask that the court dismisses the Defendants application and allow their application dated 30.08.2022.
19. I have looked at the two applications, the respective responses, and the submissions by the parties. The point in contest is whether, the Plaintiff’s should proceed to execute the courts judgment or whether the said judgment should be stayed further as the defendants file an appeal on the same. I will consider the Defendants application first as I believe its outcome will determine the fate of the Plaintiff’s application.
20. As has been correctly pointed out by the Plaintiff’s in their submissions, the power to extend time within which an act ought to have been taken by a party is purely a discretionary one. Order 50 rule 5 of the Civil Procedure Rules provides for enlargement of time as follows;
- “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.”

21. The plaintiff’s have also correctly pointed out that the factors that the court has to take in considering an application for extension of time are found in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the Court held as follows;

- “ 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 for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is reasonable reason for the delay, which ought to be explained to the satisfaction of the Court;
5. Whether there would be any prejudices suffered by the respondents if the extension was granted;
6. Whether the application had been brought without undue delay; and;
7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.”

22. The Supreme Court in the *Salat* case supra, also observed that;

“ 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.”

23. Similarly in the case of *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR as cited in the *Salat* case Supra the Court of Appeal while referring to other authorities observed (at paragraph 12):

“ The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In *Henry Mukora Mwangi v Charles Gichina Mwangi- Civil Application No. Nai. 26 of 2004*, this Court held:-

“ It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in *Mwangi v Kenya Airways Ltd. [2003] KLR 486* in which this Court stated:-

“ Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules.



For instance in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997* (unreported), the Court expressed itself thus:-

“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.”

24. The above authorities demonstrate that it is a balancing exercise between the need for there to be a good reason for the delay and the prejudice that may be caused to the other party if the extension were granted. In the present application, judgment in the suit was delivered on 14.05.2020 in favour of the plaintiff's. The Defendants thereafter made an application seeking for stay of execution as they intended to file an appeal on the said judgement. The said application was allowed with the court granting a stay of execution of the judgement for a period of 2 years from the date of the judgement or upon conclusion of the intended appeal whichever came first. The Defendants were also directed to collect copies of proceedings and other documents for purposes of the intended appeal within 14 days.
25. The orders for stay of execution having been granted on 27.07.2020 means that they were to expire on or about 27.07.2022. The defendants filed their application for extension of the said orders on 19.09.2022. The reasons they gave for delay was that they faced financial constraints caused by the Covid -19 pandemic which resulted in them being unable to raise the legal costs owing to their previous advocate which were to be cleared first before they could give instructions on the appeal. They explained further that in March 2022, they were able to instruct their current advocates to lodge the appeal but given the historical background surrounding the appeal and the voluminous nature of the documents and pleadings their new advocate was forced to acquaint themselves with, the intended appeal could not be filed upon taking instructions. They further explained that the advocate whom they instructed to file the appeal is heavily involved in the electoral dispute process which is regulated by laws with portend timelines on hearing and determination.
26. From the foregoing, the cumulative delay period for filing the application for extension of time is about a month and 23 days which may be considered inordinate. The reasons for the delay leading to the expiry of the stay period granted by the court have been explained by the Defendants and may be excusable given the Covid –19 pandemic and its financial effect to the country. Though no evidence has been produced by the Defendant's advocates of their involvement in the post electoral dispute resolution, it is not lost to this court that the previous elections were conducted around August of 2022.
27. This court has to also balance the prejudice that will be occasioned to the plaintiff's if the orders are granted against the prejudice that will be occasioned to the defendants if the orders are not granted. I find that the Defendants stand to be more prejudiced should the orders for stay not be extended, as the same has the implication of denying them an opportunity to be heard on merit on appeal as the plaintiff's are anxious, and rightfully so, to execute the judgement. However, this does not mean that the Defendants will get away with it. I am of the view that it is in the interest of fairness and justice that the Defendants pay to the Plaintiff's throw away costs of Kenya Shillings twenty thousand to paid within the next 21 days.
28. The upshot of the above, is that I allow the application dated 14.09.2022 in terms of prayer (No. 3) on condition that;



- a. The Defendants shall pay to the Plaintiff's throw away costs of Kshs. 20,000 within the next 21 days.
  - b. The appeal to be filed within the next 60 days.
29. This therefore means that the Plaintiff's application dated 30.08.2022 is dismissed. Given the circumstance of this case, the Defendants shall bear the costs of this application.

**A. K. KANIARU**

**JUDGE**

**13.2.2024**

