



**Owino (Suing as the Administrator of the Estate of Anditi Nyaongo- Deceased) v
Oluoch (Sued as the Administrator of the Estate of Domtila Atieno Okech- Deceased)
(Miscellaneous Application 1 of 2023) [2024] KEELC 334 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 334 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
MISCELLANEOUS APPLICATION 1 OF 2023
GMA ONGONDO, J
FEBRUARY 1, 2024**

BETWEEN

**HELLEN ATIENO OWINO (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF ANDITI NYAONGO- DECEASED) APPLICANT**

AND

**JOSEPH OGONDA OLUOCH (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF DOMTILA ATIENO OKECH- DECEASED) RESPONDENT**

*(Being an Application for stay of execution and leave of court to file the appeal out of time
from the judgment and orders of the trial court, Hon. T. M. Olando (Principal Magistrate)
in Homa Bay Chief Magistrate’s Civil Suit No. E016 of 2021 dated 27th July 2022)*

RULING

1. This ruling is in respect of an application by way of Notice of motion dated 15th March 2023 brought under, inter alia, Sections 1A and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya as read with Order 42 Rule 6 (2) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Article 159 of the Constitution of Kenya, 2010 by the applicant, Hellen Atieno Owino, in person, seeking the following orders:
 - a. Spent
 - b. That the applicant be granted leave to appeal out of time against the judgment and consequential decree delivered on the 27th day of July, 2022 by Hon. Tom Mark Olando (Principal Magistrate).
 - c. That this honourable court be pleased to allow the applicant to appeal against the said trial court’s judgment out of time and the annexed memorandum of appeal be deemed as filed upon payment of the requisite court fees.



- d. That this honourable court be pleased to order a stay of execution of the trial court's judgment, pending the hearing and determination of the intended appeal.
 - e. That costs of this application be bound (sic) by the outcome of the intended appeal.
2. The same is anchored on the supporting affidavit of twenty-two paragraphs sworn on even date by the applicant, Hellen Atieno Owino, alongside the annexed documents marked as HAO-1 to HAO-5 which include; a copy of judgment of the trial court, a copy of the decree, a copy of the plaint, a copy of the certificate of costs and a copy of the draft memorandum of appeal. There is also a further supporting affidavit filed herein.
 3. Briefly, the applicant laments that judgment of the trial court was delivered on 27th July 2022 in favour of the 1st respondent. That she became aware of the trial court's judgment after time for lodging an appeal had lapsed. That there is a high chance of execution of the trial court's judgment, in the absence of stay orders. That such execution would render the applicant's intended appeal nugatory.
 4. Further, the applicant averred that she has an arguable appeal which raises triable issues. That there has been no inordinate delay in lodging the instant application. That she stands to suffer irreparable loss and/or harm if the orders sought are not granted. That no prejudice will be occasioned to the respondent herein if the application is allowed. That she is willing to comply with any conditions set by the court in allowing the application.
 5. The respondent through Nyakwamba and Company Advocates, opposed the application by way of a Replying Affidavit sworn on 16th October 2023 and filed on even date. He deponed, inter alia, that the applicant had legal representation at the trial court and was well aware of the trial court's judgment. That the decree was extracted, three (3) months after judgment had been delivered. That assessment of costs was undertaken in the presence of the applicant's counsel after which a certificate of costs dated 2nd December 2022 was issued and served upon the applicant.
 6. Also, the respondent averred that there has been inordinate delay in lodging the instant application. That further, the applicant has not demonstrated any substantial loss she is likely to suffer should an order of stay not issue herein.
 7. On 25th October 2023, the court directed that hearing of the application be by way of written submissions.
 8. Accordingly, the applicant through Migele and Company Advocates, filed submissions dated 15th November 2023 and identified twin issues for determination, to wit:
 - a. Whether or not the applicant should be granted leave to appeal out of time against the judgment and consequential decree of the trial court; and
 - b. Whether or not the court should be pleased to order a stay of execution of the judgment in Homa Bay CMCC No. E016 of 2021, pending the hearing and determination of the intended appeal.
 9. Learned counsel submitted that the intended appeal is arguable. That delay of 7 months in lodging the instant application has been explained. That if the execution in Homa Bay CMCC No. 16 of 2021 proceeds, the intended appeal will be rendered nugatory and an academic exercise. That if the applicant pays the said costs, the same will not be easy to recover from the respondent. Thus, counsel urged the court to allow the application as prayed. To buttress the submissions, reliance was placed on various authoritative pronouncements including the case of Mombasa County Government -vs- Kenya Ferry Services & Anor. (2019) eKLR and Butt -vs- Rent Restriction Tribunal (1982) KLR 417.



10. The respondent's counsel did not file any submissions herein.
11. From the foregoing, has the applicant established her case for grant of the order sought in the application?
12. Notably, Section 75 of the *Civil Procedure Act* Chapter 21 Laws of Kenya sets out the orders from which appeal lies. Section 79 G of the same Act stipulates the time for filing of appeals from subordinate courts.
13. Order 50 Rules 4, 6, 7 and 8 of the Civil Procedure Rules, 2010 provides for when time does not run, power to enlarge time, enlargement of time and computation of days respectively.
14. It is trite law that an application for extension of time must show good and substantial reasons for the delay, and, prima facie good cause why the intended appeal should be heard. That the court has to balance the competing interests of the applicant with those of the respondent, see *M/S Portreizt Maternity v James Karanga Kabia Civil Appeal No 63 of 1997*.
15. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR*, the Supreme Court of Kenya set out the considerations to guide the court in exercising its discretion in cases of this nature. It stated: -
 - a. "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;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
16. On one hand, the applicant averred that whereas judgment of the trial court was delivered on 27th July 2022 in favour of the respondent, she only became aware of the same after time for lodging an appeal had lapsed.
17. On the other hand, the respondent stated that the applicant had legal representation at the trial court and was well aware of the trial court's judgment. That there has been inordinate delay in lodging the instant application.
18. So, is the delay excusable? In *Njoroge v Kimani [2022] KECA 1188 (KLR)*, the Court of Appeal stated that:

“...Excusable delays are delays that are unforeseeable and beyond the control of the party. Non- excusable delays are delays that are foreseeable or within the party's control...”



19. The court in Njoroge case (supra) cited the decision in National Union of Mineworkers v Council for Mineral Technology [1998] ZALAC 22 at para 10, where it was held that:

“...The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive...

There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused...” (Emphasis laid)

20. In the present application, I note that judgment of the trial court was delivered on 27th July 2022. The decree thereto was extracted on 7th October 2022. Assessment of costs was undertaken and a certificate of costs dated 2nd December 2022 duly issued. Thereafter, the respondent by way of a plaint dated 13th December 2022, instituted Homa Bay Chief Magistrates’ Court Environment and Land Case No. E061 of 2022 against the applicant herein and another, seeking among others, eviction orders against the 2nd defendant therein. The present application was filed on 16th March 2023. Throughout the suit at the trial court, the applicant had counsel on record.

21. In light of the foregoing, it is my considered view that a reasonable and acceptable explanation for the delay has not been advanced herein. Clearly, the instant application is an afterthought.

22. Therefore, I find and hold that the delay is inexcusable and that it has not been satisfactorily explained. Indeed, the application has failed to meet the test for the court to exercise its discretion in the applicant’s favour.

23. In the foregone, no order of stay of execution of the trial court’s judgment as sought in prayer 4 of the present application can issue herein.

24. Accordingly, the application by way of a Notice of motion dated 15th March 2023, be and is hereby dismissed with costs to the respondent.

25. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 1ST DAY OF FEBRUARY 2024.

G.M.A ONGONDO

JUDGE

Present

1. Mr. Migele, learned counsel for the applicant

2. Ms. Oriche holding brief for Mr. Nyakwamba, learned counsel for the respondent

3. Respondent

4. Luanga, Court Assistant

