



**Marinai v Awoi (Environment and Land Miscellaneous Application  
1 of 2024) [2024] KEELC 1832 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 1832 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 1 OF 2024**

**A OMBWAYO, J**

**APRIL 4, 2024**

**BETWEEN**

**KIPKEMBOI KIPTIM MARINAI ..... APPLICANT**

**AND**

**PAULINE AWOI ..... RESPONDENT**

**RULING**

1. Kipkemboi Kiptim Marinai (hereinafter referred to as the applicant) has come to court against Pauline Awoi (hereinafter referred to as the respondent) praying for orders that the firm of Kibo Mawenzi be granted leave to come on record for the applicant post judgment and that there be stay of execution of the honorable's court judgment in Molo CMELCCB NO 62 of 2018 between Kipkemboi Kiptim Marinai and Pauline Awoi delivered on the 25<sup>th</sup> April 2023 pending hearing and determination of this application. Moreover, that pending the hearing and determination of this application this honorable court be pleased to enlarge the time of appeal time and allow the Applicant to lodge an appeal out of time. There be stay of execution of the aforesaid judgment pending hearing and determination of such appeal as may be preferred against the judgment upon leave being granted by this honorable court. Costs of this application be provided for.
2. The application is based on grounds that Judgment was delivered in Molo CMELCC NO 62 of 2018 on the 25<sup>th</sup> of April 2023 in which the applicant was aggrieved. The applicant gave instructions to Roy Koimett and company advocates to pursue an appeal but the advocate never filed an appeal timely occasioning the lapse of time to appeal to date. Being aggrieved by the terms of the said judgment, counsel for the applicant has been instructed to appeal against the entire Judgment and has sought leave of this Honorable court to be allowed to file an appeal out of time which appeal if granted leave is competent and has appreciable chances of success and that if execution of the said judgment/decree is not stayed, the aforesaid intended Appeal for which leave is sought to be filed out of time will be



rendered nugatory thereby occasioning substantial loss to the Applicant. The Respondent is at liberty and may proceed to further execute the Decree subject matter of the intended appeal at any time.

3. In the premises it is only fair and just that there be stay of execution of the Judgment/Decree subject herein pending the inter-parties hearing and determination of the instant application and/or the hearing and determination of the intended Appeal should this honorable court be pleased to enlarge time and grant leave to the applicant to file the same, as the case would be. The Applicants are amenable to furnishing security pending Appeal as may be directed and has moved the Court timeously. In the premises it is only fair and in the wider interest of justice that the instant application be allowed.
4. In the supporting affidavit, the applicant states that he filed case number Molo CM ELC 62 of 2018 in which an *ex parte* judgment was delivered on the 25<sup>th</sup> April 2023 but he is yet to get a copy of the judgment. He instructed his advocate to file an appeal timeously but the same was not done. His current advocate now advises him that the mistakes of an advocate should not be visited on the innocent litigant. He states that there was no notice of entry of judgment served upon the applicant and that the respondent can execute the judgment or decree as there are no orders of stay. According to the applicant, the application has been lodged expeditiously.
5. In the replying affidavit of Pauline Awoi, she states that the applicant is vexatious, frivolous and incompetent and should not be entertained by the court since no cogent explanation has been given as to why from 25<sup>th</sup> April 2023 when judgment was entered to the date of filing of the application no action had been taken. The respondent states that there is no record of appeal no letter requesting for proceedings to demonstrate that the applicant is desirous of appealing. The respondent state that the applicant kept on changing advocates and the said Roy Koimett ceased acting before hearing. He states that the applicant testified as the plaintiff and that she also testified as the defendant. That Roy Koimett ceased acting before hearing and therefore he cannot be blamed for non-action.
6. The respondent further states that the applicant has not annexed proceedings, judgment and the letter requesting for proceedings to assist the court to decide whether the appeal has merit or not.
7. The applicant submits that the court should exercise its discretion to grant the orders sought by the applicant as he had demonstrated that he has a viable appeal which raises serious issues as demonstrated by the memorandum of Appeal and that the applicant has a right of appeal as enshrined in *the constitution* of Kenya 2010. That he has demonstrated substantial loss if stay is not granted. The applicant submits that he came to court as soon as was reasonable to him.
8. On reasons for delay in filing the appeal the applicant submits that at the time of defence hearing, he had no representation and therefore was not made aware of the judgment date. He submits that he became aware of the judgment one and half month later after the judgment and he instructed an advocate who failed to lodge the appeal. He submits that mistakes of an advocate should not be visited on a litigant.
9. The respondent on his part submits that the applicant has not sufficiently demonstrated the action the current advocates did because they represented him during trial. The current advocate Kibo Mawenzi represented the applicant during trial and the purported advocate instructed to appeal were not on record as they ceased to act.
10. The respondent further submits that there is no attached decree to march the grounds in the Memorandum of Appeal. There is no indication as to whether the suit was allowed or dismissed.



11. The respondent finally submits that there is no copy of certified proceedings or judgment or letter requesting for the same. The respondent submits that if the orders are granted there should be provision for security for costs.
12. I have considered the application and submissions on record and do find that the applicant has a right to be represented by an advocate of his choice as the same is underpinned in *the constitution* of Kenya 2010. On the second issue as to whether the applicant should be given leave to appeal out of time, Section 79 G of the *Civil Procedure Act* provides that an appeal can be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not having filed his appeal within the prescribed time.
13. Further, Order 50 Rule 6 of *Civil Procedure Rules* empowers the court to enlarge the time to do a particular act. It stipulates 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...”
14. The court finds that though in the supporting affidavit the applicant states that he came to learn of the judgment much later thus not disclosing the date, in the submission, his advocates states that it was one and half months after judgment. Judgment was delivered on 25<sup>th</sup> April 2023 and therefore it can be deduced that he learnt of the judgment on 15<sup>th</sup> June 2023. The application was filed on 20<sup>th</sup> February 2024, this is more than 7 months after learning that there was a judgment in the lower court matter. The applicant does not disclose the exact date he accidentally learnt of the judgment. Though the applicant states that the file is still at the typing pool, there is no evidence that he has applied for the typed proceedings or judgment. I do find that no explanation has been given for the 7 months delay in filing the Memorandum of Appeal and therefore this court cannot exercise its discretion in the extension of time of filing the appeal without proper grounds.
15. On the issue of stay of execution pending appeal the decree or judgment, appealed from has not been annexed. It is not possible to know whether the judgment was either negative or positive. Stay of execution pending appeal can only be granted where the judgment is positive. The upshot of the above is that the application is dismissed with costs. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 4<sup>TH</sup> DAY OF APRIL 2024.**

**A O OMBWAYO**

**JUDGE**

