



**Omollo v Odoyo (Environment and Land Miscellaneous Application
E004 of 2023) [2024] KEELC 5893 (KLR) (17 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5893 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E004 OF 2023
GMA ONGONDO, J
SEPTEMBER 17, 2024**

BETWEEN

PANCREAS NYAIDHO OMOLLO APPELLANT

AND

JOHN ALEGO ODOYO RESPONDENT

(Being an Application for stay of execution and leave of court to file the appeal out of time from the judgment and decree of the trial court, Hon. E. M. Onzere (Principal Magistrate) in Ndhiwa Principal Magistrate's Environment and Land Case No. 69 of 2018 dated 5th October 2022)

RULING

1. This ruling is in respect of an application by way of Notice of motion dated 7th March 2023 brought under, inter alia, Sections 79G and 95 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya by the applicant, Pancreas Nyaidho Omollo, through Odingo and Company Advocates, seeking the following orders:
 - a. Spent
 - b. That the proposed appellant be granted leave to appeal out of time against the whole judgment of the Hon. E. Onzere (Principal Magistrate), delivered in ELC No. 69 of 2018 on 5th October 2022 at Ndhiwa.
 - c. That meanwhile pending the said intended appeal there be a stay of execution of the lower court's judgment delivered by Hon. E. Onzere on 5th October 2022 in ELC No. 69 of 2018.
 - d. That the Memorandum of appeal annexed hereto be deemed as duly filed and served.
 - e. That the costs of this application be provided for.



2. The application is anchored on the supporting affidavit of fourteen paragraphs sworn on even date by the applicant, alongside the annexed documents marked as S.O 1 and S.O 2 which are; Discharge Summary and a copy of the draft memorandum of appeal herein.
3. Briefly, the applicant laments that he was represented before the trial court by learned counsel, Jacob Omwenga, who became unwell and admitted in hospital hence, occasioning a delay in issuing instructions to institute the prospective appeal. That such delay is not inordinate. That also, unless an order of stay of execution is granted, this appeal will be rendered nugatory. That the respondent will not suffer any prejudice if this application is allowed.
4. The respondent did not file a Replying Affidavit in opposition to the application.
5. On 14th March 2023, the court directed that hearing of the application be by way of written submissions.
6. The applicant's counsel did not file any submissions herein
7. The respondent's counsel filed submissions dated 12th June 2024 and identified two issues for determination namely: Whether the applicant's prayer for stay of execution pending appeal is merited and who should bear the costs of this application? Learned counsel submitted that following delivery of the judgment of the trial court on 5th October 2022, the decretal sum of Kshs. 171,766/- was partly settled by way of attachment and sale of the applicant's moveable assets. That the balance of Kshs. 133,516/- is yet to be paid. That as a result, the applicant has been committed and recommitted to jail hence, intends to lodge the appeal so as to circumvent the situation. Thus, counsel urged the court to disallow the application. To buttress the submissions, reliance was placed on the case of Machira t/a Machira & Co. Advocates -vs- East African Standard (No. 2) (2002) KLR 63.
8. From the foregoing, has the applicant established his case for grant of the orders sought in the application?
9. Notably, Section 75 of the *Civil Procedure Act* Chapter 21 Laws of Kenya sets out the orders from which appeal lies. It is further noted that Section 79 G of the same Act stipulates the time for filing of appeals from subordinate courts.
10. 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.
11. 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 Portreiz Maternity -vs- James Karanga Kabia Civil Appeal No 63 of 1997*.
12. In *Nicholas Kiptoo Arap Korir Salat -vs- 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."
13. The applicant averred that whereas judgment of the trial court was delivered on 5th October 2022 in favour of the respondent, counsel in attendance of the case, one Jacob Omwenga, was unwell and admitted in hospital. That therefore, it occasioned a delay in issuing instructions to the counsel to institute the prospective appeal.
14. So, is the delay excusable? In *Njoroge -vs- 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...”
15. In *Njoroge case (supra)* which cited the decision in *National Union of Mineworkers -vs- Council for Mineral Technology (1998) ZALAC 22* at para 10, the court further 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)
16. I bear in mind that the instant application was lodged on 13th March 2023, more than five months after delivery of the trial court’s judgment. The discharge summary of the applicant’s counsel Jacob Omwenga, which is attached to the applicant’s supporting affidavit and marked as S. O 1 indicates that counsel was admitted to Nyangena Hospital on 1st October 2022 and discharged on 5th October 2022, the same day that the trial court’s judgment was delivered.
17. 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.
18. Therefore, I find and hold that the decree has been partially satisfied and that the delay in mounting this application is inexcusable and 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.
19. In the foregone, no order of stay of execution of the trial court’s judgment as sought in prayer 3 of the present application can issue herein.
20. Accordingly, the application by way of a Notice of motion dated 7th March 2023, be and is hereby dismissed with costs to the respondent.



21. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 17TH DAY OF SEPTEMBER 2024.

G.M.A ONGONDO

JUDGE

Present

Luanga, Court Assistant

