



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Maguta v Mugo (Environment and Land Appeal E051 of 2022)  
[2024] KEELC 6623 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6623 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E051 OF 2022**

**JG KEMEI, J**

**OCTOBER 9, 2024**

**BETWEEN**

**KIMANI MBUGUA MAGUTA ..... APPELLANT**

**AND**

**JULIUS MWANGI MUGO ..... RESPONDENT**

**RULING**

1. Vide his Notice of Motion dated 20/3/2024, the proposed Appellant/Applicant seeks the following Orders;
  - a. The proposed Appellant be granted leave to appeal out of time against the whole Judgement of the Honorable Lady Justice J.G Kemei delivered at the ELC Thika on February 22, 2024.
  - b. The notice of appeal filed on 13<sup>th</sup> March 2024 be deemed as duly filed.
  - c. Spent.
  - d. This Honorable Court be pleased to grant a temporary stay of execution of the Judgment of Hon. Lady Justice J.G Kemei delivered on 22/2/2024 pending the hearing and determination of the appeal.
  - e. The costs of the application be provided for.
2. The Application is based on the grounds annexed thereto and the supported by the Affidavit of even date of Kimani Mbugua Maguta, the Applicant. He deponed that his Advocate was unable to reach him after delivery of the impugned Judgement to discuss the next available options. The Applicant avowed that his mother has been seriously ailing as shown by annexures Kn1-Km4 and that it has taken a toll on him. That finally when he was able to get in touch with his counsel and preferred an appeal, he was six days beyond the statutory period. He urges the Court to allow his appeal.



3. Opposing the application, Julius Mwangi Mugo, the Respondent filed his Replying Affidavit sworn on 27/3/2024. He averred that the Applicant's appeal herein was dismissed whereas his (Respondent's) cross-appeal was allowed with an award of Kshs. 700,000/- for general and exemplary damages. That this Court is bereft of jurisdiction to entertain the instant application because it is *functus officio*. That the Applicant has not demonstrated any substantial loss he will suffer as required of him under Order 42 Rule 6 of the Civil Procedure Rules. That instead, it is the deponent who continues to suffer on account of the Applicant's trespass on the suit land, Ruiru/Township/895, since 2021 and therefore the Applicant's hands are tainted and undeserving of equitable remedies.
4. On 1/7/2024 directions were taken and parties agreed to dispose of the application by way of written submissions. None of the parties complied.
5. The germane issue for determination is whether the application is merited.

### **Leave to Appeal out of Time**

6. The relevant law in an application seeking leave To Appeal Out of time is anchored on the proviso of Section 79G of the Civil Procedure Act that:-

“79G. Time for filing appeals from subordinate Courts

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.”

7. A reading of the above proviso indicates that such extension of time is based on the discretionary powers of the Court. Section 95 of the Civil Procedure Act empowers the Court to enlarge such time as follows:-

“95. Enlargement of time

Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

8. The Supreme Court in the case of Nyamboki vs. Gathuru (Application 6 of 2019) [2019] KESC 44 (KLR) held as follows in determining an application seeking such extension;

“In determining such an application, the Court has to consider whether the explanation given for any delay is reasonable and credible; whether there also exist extenuating circumstances to enable the Court exercise its unfettered jurisdiction; and that the delay, in any event, should not be so inordinate as to leave no doubt, that an Applicant has been slothful, and filed such an application as an after-thought.”



9. Earlier on the Supreme Court had devised principles to be considered in an application for extension of time in the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral And Boundaries Commission & 7 Others* [2014] eKLR 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 should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  5. Whether there will be any prejudice to be suffered by the Respondents if the extension is granted;
  6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.” See also *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi* [1999] 2 EA 231.”
10. In this case the Applicant posits that he is aggrieved with this Court’s Judgment rendered on 22/2/2024. That due to his mother’s infirmity that took a toll on him, he was unable to reach his counsel to discuss the way forward in light of the outcome of the Judgment. He annexed Kmm1 - copies of the treatment notes which the Respondent has not disputed in his Replying Affidavit.
11. The impugned Judgment was delivered on 22/2/2024 and the statutory period to file appeal is 14 days of delivery of the Judgement. The 14 days lapsed around 5/3/2024. The instant motion was filed on 21/3/2024, around 16 days later which period in my view, is not inordinate. Absent any objection for the delay, I find the reasons advanced for the delay to file his appeal plausible and excusable.
12. In the interest of justice and to ensure that he gets his day in Court to exercise his constitutionally guaranteed right to a fair hearing, I grant the prayer for leave to appeal out of time.

### **Stay of Execution Pending Appeal**

13. The legal provisions for stay of Execution Pending Appeal are anchored in Order 42 rule 6 (1) & (2) of the *Civil Procedure Rules* that:-
- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.



- (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.”

14. The jurisdiction to grant stay lies at the discretion of this Court and is exercised on the basis of sound and settled principles, not arbitrarily or capriciously on a whim or in consideration of any extraneous matters. In the case of *Butt vs. Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal gave guidance on how a Court should exercise discretion in an application for stay of execution and held that: -

- “1. The power of the Court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle is granting or refusing a stay is: If there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge’s discretion. (*sic*) (trial Court Judgement).
3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the Applicant at the end of the proceedings.
4. The Court in exercising its powers under order XLI rule 4 (2) (b) of the *Civil Procedure Rules* can order security upon application by either party or on its own motion. Failure to put security of costs as ordered with cause the order for stay of execution to lapse.”

15. Has the Applicant satisfied the conditions set in Order 42 rule 6 (2) of the *Civil Procedure Rules* above? The Applicant contends that the Respondent may execute the Judgment against him which would entail demolition of permanent structures on the suit property. No evidence was tendered to support this contention. It is trite that execution on its own is does not amount to substantial loss because it is a lawful process. See the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR. In my view the Applicant has not demonstrated the substantial loss he stands to suffer if the order of stay is not granted.

16. On whether the application was timeously filed, I note that the application was filed on 21/3/2024, 18 days after delivery of the impugned Judgment. I find that the same is not inordinate. Lastly the Applicant deposed that he is ready and willing to abide by terms of security if so ordered by the Court.

17. The upshot of the forgoing is that the prayer for stay of Execution Pending Appeal is unmerited.

18. The application partially succeeds in terms of prayers a, and b only.

19. The Appellant is directed to file and serve the appeal within the next sixty (60) days in default the orders shall lapse automatically.



20. Each party to bear their own costs.

21. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 9<sup>TH</sup> DAY OF OCTOBER, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Kinyua for Appellant

Respondent - Absent

Court Assistants – Phyllis/Oliver

