



**Kariuki v Gathige (Environment and Land Miscellaneous Application
E052 of 2024) [2025] KEELC 4032 (KLR) (21 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4032 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E052 OF 2024
MAO ODENY, J
MAY 21, 2025**

BETWEEN

ANASTACIA WAIRIMU KARIUKI APPLICANT

AND

JOHN GITHINJI GATHIGE RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion application dated 2nd December, 2024 filed by the Applicant seeking the following orders:
 - a. Spent
 - b. That leave be granted to the firm of Messers Obura Mbeche and Company Advocates to file an appeal out of time.
 - c. That this Honorable Court be pleased to issue an order staying proceedings in the Miscellaneous application filed by the Respondent herein seeking eviction orders against the Applicant herein, in respect of the suit property known as Solai/Nyakinyua/Kimunya Farm/962 pending the hearing and determination of the appeal.
 - d. That this Honorable Court be pleased to issue an order staying execution of the ruling delivered on 26th September, 2024 pending the hearing and determination of the appeal.
 - e. That cost of this application be provided for.
2. The application was supported by the Affidavit of Anastacia Wairimu Kariuki, the Applicant sworn on 2nd December, 2024 where she deponed that the Respondent filed a suit against her in CMELC No 108 of 2022 and obtained a judgment in his favor. She further deponed that she filed an application to review/set aside the ex-parte judgment but the same was dismissed necessitating the current application.



3. The Applicant deponed that she had to change her advocates, which contributed to the delay in filing the appeal and that the delay was not intentional. It was the Applicant's case that the Respondent had filed a miscellaneous application in Nakuru Misc. ELC No E108 of 2022 seeking orders to evict her from the property which is the subject of this appeal and if the Respondent's application is allowed, it will cause her irreparable harm as she will be evicted and her home demolished. She urged the court to grant her the orders sought in her application.
4. The Respondent, John Githinji Gathige, filed a Replying Affidavit sworn on 13th January, 2024 and deponed that the application does not disclose the decision the Applicant wishes to appeal against and further that the Applicant does not state or attach the application whose proceedings they wish to have stayed. It is the Respondent's deposition that prayer number four is overtaken by events since the orders therein were duly executed when the court issued a ruling in Nakuru CM ELC No E108 of 2022 as such the application is an abuse of the court.
5. The Applicant, Anastacia Wairimu Kariuki filed a Supplementary Affidavit sworn on 5th February, 2025 and deponed that the decision they intend to appeal is the ruling delivered on 26th September, 2024 issued by Hon. L. Akoth, Senior Resident Magistrate. She further deponed that she seeks a stay of proceedings in the Miscellaneous Application dated 2nd October, 2024 filed by the Respondent and that the issues raised in prayer number four of her application remain valid.

Applicant's Submissions

6. Counsel for the Applicant filed submissions dated 4th February, 2025 and identified the following issues for determination:
 - a. Whether there are valid grounds to grant leave to file an appeal out of time?
 - b. Whether the Applicant has demonstrated sufficient grounds to warrant the grant of a stay of proceedings in the Miscellaneous Application filed by the Respondent seeking eviction orders against the Applicant?
 - c. Whether there are valid grounds to stay execution of the ruling delivered on 26th September, 2024?
7. On the first issue, counsel relied on Section 79 G of the *Civil Procedure Act* and the cases of *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR and *Githau v Kagiri & Another* (Civil Appeal No 314 of 2023) [2024] KEHC 6320 (KLR) and submitted that the delay in filing the appeal was unintentional as it was caused by the transition in legal representation and the need to address complex legal issues. Counsel submitted that the Applicant faces irreparable harm if the eviction is granted before the appeal is heard which has a high likelihood of success.
8. On the second issue, counsel relied on Section 3A of the *Civil Procedure Act* and submitted that the Applicant has been in continuous possession of the property having purchased it in 1998 via an agreement for sale dated 27th November 1998. Counsel submitted that eviction before the appeal is heard would cause irreparable harm and there is a legitimate basis for contesting the eviction. Counsel urged the Court to grant a stay of proceedings to preserve the status quo and uphold the Applicant's right to a fair hearing in the appeal.
9. On the third issue, counsel relied on Order 42 Rule 6 (2) of the *Civil Procedure Rules* and the cases of *Butt v Rent Restriction Tribunal* [1979] eKLR and *Gulf Timber & Hardware Supplies Limited v Ngaruiya & 5 others* (Civil Appeal E203 of 2021) [2022] KECA 87 (KLR). Counsel submitted that



the Respondents will not suffer any loss or prejudice if the application is allowed and urged the court to allow the application as prayed.

Respondent's Submissions

10. Counsel for the Respondent filed submissions dated 12th February, 2025, relied on Order 42 Rule 6 (2) of the *Civil Procedure Rules* and submitted that the Applicant has not demonstrated the loss she is likely to suffer further that she has also not made any offer for security for due performance of such decree or order.
11. Counsel further submitted that a court could only issue a stay of proceedings in exceptional circumstances where such proceedings are likely to infringe on constitutional rights of one of the parties or prejudice the interest of justice. Counsel relied on the cases of *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR, *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR, *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No 43 of 2000) and *David Morton Silverstein v Atsango Chesoni* [2002] eKLR.
12. According to counsel, the Applicant has not demonstrated how their appeal will be rendered nugatory unless a stay of proceedings is granted as the threshold for stay of proceedings is high and it has not been met. Counsel cited the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR and urged the court to dismiss the application with costs.

Analysis And Determination

13. The issues for determination are:
 - a. Whether the Applicant has met the threshold for grant of leave to file an appeal out of time.
 - b. Whether the Applicant should be granted a stay of proceedings in the Miscellaneous Application filed by the Respondent seeking eviction orders against the Applicant?
 - c. Whether there are valid grounds to stay execution of the ruling delivered on 26th September, 2024?
14. On the issue whether the Applicant has met the threshold for grant for leave to file an appeal out of time. Section 79G of the *Civil Procedure Act* provides that:

“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.”
15. In the case of *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR the court stated as follows in regard to applications for extension of time:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”



16. Similarly in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2013] eKLR the Supreme 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 should 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. The delay should be explained to the satisfaction of the court.
- (5) Whether there will be any prejudice suffered by the respondent of the extension is granted.
- (6) Whether the application has been brought without undue delay; and
- (7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

17. The decision whether to extend time for filing an appeal out of time is discretionary and must be considered on a case-to-case basis. The application must be filed without undue delay and the same should not cause the Respondent to suffer any prejudice. The Applicant has explained that the reason for the delay of filing the Appeal was that she had to engage the current firm of advocates. Upon engaging the Advocate, the advocate had to peruse the file and make the necessary application dated 2nd December 2024. The application was made timeously as the impugned ruling was delivered on 26th September 2024.

18. In the interest of justice, in order not to restrict the Applicant’s access to justice, I will exercise my discretion and allow the Applicant an opportunity to file an appeal out of time. The Applicant to file and serve Memorandum of Appeal within 30 days failure to which the order lapses.

19. The Respondent had filed an application for eviction of the Applicant which in effect if allowed to proceed will render the intended appeal nugatory. Where the court issues an order of stay of execution it follows that the application for eviction cannot proceed as it is part of the execution process. Therefore there would be no need of granting an order of stay of proceedings if an order of stay of execution is in place. The purpose of an order of stay of execution is to preserve that substratum of the suit so as not to render the Appeal nugatory.

20. The principles to be applied in applications for stay of execution pending appeal are well settled as provided for under Order 42 Rule 6 of the *Civil Procedure Rules* and were restated in the case of *Butt v Rent Restriction Tribunal* [1979] what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:

- “ a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
- b. Secondly, the general principle in 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 the appeal court reverse the judge's discretion.

- c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 will cause the order for stay of execution to lapse."

21. The court also ought to determine whether the Applicant stands to suffer substantial loss unless the order of stay is granted. In the case of *Samvir Trustees Ltd. -v- Guardian Bank Ltd.* (Nairobi (Milimani) HCCC No. 795 of 1997, where the court held that:

“... For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss ...”

22. On the issue of security for the due performance of the decree, this court is guided by the case of *Arun C. Sharma v Ashana Raikundalia & Co. Advocates & Others* [2014] eKLR, where the court held that the purpose of security is not to punish the judgment debtor but for the due performance of the decree which is binding on the Applicant. Based on the Supporting Affidavit to the Notice of Motion Application dated 2nd December, 2024 and the Applicants submissions, the Applicant relies on the courts discretion and the danger of facing imminent eviction in order to be granted the orders sought.

23. The upshot is that the Firm of Obura Mbeche & Co Advocates are hereby granted leave to file an appeal out of time on behalf of the Applicant. Applicant to file an Appeal within 30 days failure to which the order lapses. Stay of execution of the ruling dated 26th September is hereby granted pending the hearing of the intended appeal. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 21ST DAY OF MAY 2025.

M. A. ODENY

JUDGE

