



**Duba v Duba aka Mushilimu Dubai (Sued as the administratrix of the Estate of Duba Ali)
(Environment & Land Case 580 of 2016) [2023] KEELC 20672 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20672 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 580 OF 2016
A OMBWAYO, J
OCTOBER 12, 2023**

BETWEEN

GODANA UCHU DUBA PLAINTIFF

AND

**MUSHILIMU ALI DUBA AKA MUSHILIMU DUBAI (SUED AS THE
ADMINISTRATRIX OF THE ESTATE OF DUBA ALI) DEFENDANT**

RULING

1. Godana Uchu Duba, hereinafter referred to as the respondent has come to court asking for orders that this Honorable Court be pleased to grant leave to the applicant to file a notice of appeal in this matter out of time and the notice of appeal herein dated July 17, 2023 and filed on the same date be deemed as duly filed on time and properly on court record.

Moreover, that this Honorable Court be pleased to order stay of execution of the judgment issued on April 28, 2023 in Nakuru HC ELC No 580 of 2016 and all consequential orders therein pending the hearing and determination of the relevant appeal filed in the Court of Appeal. The costs of this application be provided for.
2. The application is made on grounds that Judgment in Nakuru HC ELC No 580 of 2016 was delivered against the applicant on 28th April, 2023.
3. The applicant is aggrieved by the said judgment and decree and prefers to file an appeal against the same in the Court of Appeal. The applicant was not present when the judgment was delivered, she has been unwell and obtained notice of the judgment much later.
4. The respondent is already in the process of execution and has been inspecting the suit parcel for purposes of subdividing the same and has also filed a party and party bill of costs for taxation.



5. Unless stay is granted herein the applicant stands to suffer substantial and undue loss since the respondent may execute the judgment in order to enter and occupy the applicant's land parcel.
6. The applicant has a good appeal with a high chances of success that is clearly evident in the memorandum of appeal and the applicant's documents and it is therefore necessary that this application be considered.
7. The filing of this application and the notice of appeal at this time is not in bad faith or intentional as the applicant has been unwell and lacking in finances and unfortunately could not file the application and notice of appeal as stipulated and prays for consideration and indulgence of the Honorable Court and that the applicant has filed this application without undue and or inordinate delay and is ready to deposit reasonable security for the costs of the appeal.
8. In the supporting affidavit the applicant states that reasons for delay in filing the notice of appeal as being sick and in hospital on account of high blood pressure and infection in the eyes. She was unable to follow up on the judgment. On June 21, 2023, she was informed of the decree. She received a copy of the judgment on June 26, 2023.
9. In the replying affidavit the respondent states that the applicant had knowledge of the date of judgment and therefore should have been in court. The judgment was delivered virtually and therefore the applicant should have attended court virtually. The applicant was served with judgment notice on March 29, 2023 hence had enough time to follow up with the same. The recommended rest for 7 days was well within the 14 days to file a Notice of Appeal. The applicant was indolent and underserving of the of discretion of court. The applicant was served with hearing notice and later decree. The respondent states that he has been in occupation of part of the land before the judgment. He states that the applicant has not demonstrated substantial loss.
10. I have considered the application and the affidavits together with the submission on record and do find that the applicant was served with a judgment notice. She did not attend court and therefore judgment was issued in her absence. She states that she was unwell and had been given 7 days sick off on April 28, 2023 which expired on May 5, 2023. The application was filed on July 20, 2023 approximately 80 days after judgment. The applicant has not explained the delay for the 80 days. The seven days sick off expired within the 14 days of filing of the Notice of Appeal. The applicant has admitted that she was aware that judgment was to be delivered on April 28, 2023 but does not explain the steps she took after the date of delivery of judgment.
11. This court observes that extension of time to file a notice of appeal out of time is the discretion of this court which should be exercised judiciously and not capriciously. The applicant must give good reason for the delay
12. The applicant is seeking equitable reliefs that are underpinned on well settled principles which guide the Court to decline or grant the applications.
13. In the case of *Salat v Independent Electoral & Boundaries Commission & 7 others* [2014] KLR-SCK, the Court held as follows on extension of time to file an appeal out of time:
 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 ought to 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, which ought to be explained to the satisfaction of the Court;
 5. Whether there would be any prejudices suffered by the respondents if the extension was granted;
 6. Whether the application had been brought without undue delay; and;
 7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.
14. The applicant has come to court with inordinate delay after the respondent has obtained a decree and is in the process of execution and has not explained the cause of the delay sufficiently. The respondent will suffer prejudice because of the delay.
15. In this regard, the Court of Appeal in *Paul Wanjobi Mathenge v Duncan Gichane Mathenge* [2013] eKLR while referring to other authorities observed:

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy and caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors states in previous decisions of this Court including but not limited to the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted and whether the matter raises issues of public importance. In *Henry Mukora Mwangi v Charles Gichina Mwangi-Civil Application No. Nai 26 of 2004*, this Court held:- “It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize his principle by referring to the decision in *Mwangi v Kenya Airways Ltd.* [2003] KLR 486 in which this Court stated: _ “Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing an application for extension of time under rule 4 of the Rules.

For instance, in *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi- Civil Application No Nai. 255 of 1997 (unreported)*, the Court expressed itself thus:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of the time are: first, the length of delay; secondly the reason for delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

16. I do find that the applicant has not given sufficient reasons to warrant this court to grant the orders for extension of time to file the notice of appeal and therefore the application fails. It follows that there is no appeal and therefore the order of stay of execution pending appeal cannot be granted.

Costs to the respondent.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 12TH DAY OF OCTOBER 2023.



A. O. OMBWAYO
JUDGE

