



**Kamau v Nazamdini (Environment & Land Case 37 of 2021)
[2023] KEELC 20462 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20462 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 37 OF 2021
LN GACHERU, J
OCTOBER 5, 2023**

BETWEEN

JOSEPH MAINA KAMAU APPLICANT

AND

NAZAKTALI NAZAMDINI RESPONDENT

RULING

1. This Court entered judgment in favour of the Applicant in the judgment of 25th May, 2023 against the Respondent. The Respondent thereafter filed the Notice of Motion Application dated 22nd June 2023, the subject matter of this ruling. He sought for orders
 1. That time to issue Notice of Appeal to the Court of Appeal from the judgment of this Court made on 25th May 2023, be extended for such time as this Court will find just.
 2. That stay of execution of this judgment/ decree be granted pending the hearing and determination of the intended appeal .
 3. That costs be provided for.
2. The application is premised on the grounds set out on the face of it and the Supporting Affidavit sworn by the Respondent/ Applicant – Nazaktali Nazamdini dated 22nd June, 2023. The Respondent / Applicant contends that there was an oversight on the part of his previous advocate who failed to file a Notice of Appeal on time. That he stands to suffer great prejudice should the application not be allowed, since the Applicant/ Respondent is keen on effecting the judgment of the Court.
3. The Applicant/Respondent filed Grounds of Objection to the application citing reasons that this Court is functus officio, and thus lacks jurisdiction; that the Applicant/Respondent herein is in possession of the suit property, and that generally the application is defective and incompetent.



4. The application was canvassed by way of written submission. The Respondent/ Applicant filed his submissions on the 10th July, 2023, through the Law Firm of J. N Mbuthia & Co. Advocates. He submits that Section 7 of the Appellate Jurisdiction Act grants this Court the power to extend the time for filing of the Notice of Appeal. Reliance was placed on the case of Kenya Commercial Bank v Mwanzau Mbaluka & Another {1997} eKLR.
5. On the issue of stay, it is the Respondent/ Applicant's submissions that there was a delay of 10 days which he submitted has not unreasonable, and that it has been explained. He submitted further that should the suit land be transferred to the Applicant/ Respondent, there will be an imminent danger and he would suffer substantial loss. He submitted also that Order 9 rule 10 of the Civil Procedure Rules allowed him to seek several orders and added that the issue of conflict of interest requires the calling of evidence which has not been made possible by the Applicant/ Respondent.
6. The Applicant/ Respondent filed his submissions on the 18th July 2023, through the Law Firm of Kirubi, Mwangi Ben & Co. Advocate and maintains that the application is not merited. He further submitted that the Respondent/ Applicant has not adduced any reason for the delay in filing the Notice of Appeal and this Court cannot entertain the application since the case is functus officio. Ultimately, the Applicant/Respondent submits that the prayers sought are not tenable in law and should be dismissed.
7. The instant application was filed on 22nd June, 2023 while Judgment was delivered on 25th May 2023, whereby the Respondent/ Applicant failed to attend Court. It appears to this Court that the Respondent/ Applicant was jolted to action by the Notice of Taxation. Prayer 2 of the application was allowed on 4th July 2023, with the authority of both parties and the Applicant/ Respondent cannot now raise an issue in his submissions.
8. Deducing from the application and the written rival submissions by the parties, together with the authorities cited the issues for determination; -
 - i. Whether time for filing the Notice of Appeal should be extended?
 - ii. Whether there should be stay of execution of the judgment/ decree of this Court?
 - iii. Who should pay the costs for the application ?

I. Whether time for filing the Notice of Appeal should be extended?

9. The discretion of this Court to extend time is unfettered, but the same should be exercised judiciously and within the confines of the law. It is a legal requirement that a Notice of Appeal be filed within 14 Days from the date of judgment. The filing of a Notice of Appeal is a jurisdictional prerequisite, as was expressed by the Court in the case of University of Eldoret & another v Hosea Sitienei & 3 others [2020] eKLR, where the Supreme Court observed that the filing of the Notice of Appeal signified the intention of parties to appeal.
10. In considering whether to extend time or not, this Court will be guided by the principles for extension of time as were set out by the Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, where the Court enumerated the principles as:
 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 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.
11. It should be remembered that he who seeks equity must do equity, and as a result, the Applicant has the duty in seeking the orders sought, to realize the anticipation of the overriding objective of the [Civil Procedure Rules](#) or the Oxygen Principles, on the just and expeditious disposal of cases. The Judgment of this Court was delivered on 25th May, 2023 and which meant the Notice of Appeal ought to have been filed by 9th June, 2023, unless there was anything that stopped time from running and in this case there was none.
 12. The order for extension is sought at least Thirteen Days from the end of the anticipated timeline for filing the Notice of Appeal and at least Twenty-Eight Days, from the date of judgment. Undoubtedly, this was delay considering that this is a land matter.
 13. Even though there is no measure of what constitutes delay, it cannot be difficult to deduce delay when it occurs. The Court of Appeal in the case of [Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another](#) [2014] eKLR, had this to say:

There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case.”
 14. Further, in the case of [Mwangi S. Kimenyi v Attorney General & another](#) [2014] eKLR, the Court had this to say about what constitutes Inordinate delay:

There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however, advised for courts not to take the word “inordinate” in its dictionary meaning, but to apply it in the sense of excessive as compared to normality.”
 15. The Applicant heaps blame on his previous counsel whom this Court notes was not present on the judgment date. While it is true that the mistakes of counsel should not be visited on his client, clients too have a duty to be vigilant in their pursuit for justice. These sentiments were well stated by the Court



in the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* (2015) eKLR, where the Court held:

It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

16. It is not clear to this Court whether there was a strain relationship between the Applicant and his previous advocate. The Court of Appeal in the case of *Pyramid Hauliers Limited v James Omingo Nyaanga & 3 others* [2019] eKLR declined to allow an application for extension of time to file a Notice of Appeal, where the Applicant blamed his erstwhile advocate. The Court held that the Applicant had a duty to show interest in his suit.
17. In the case of *Velos Enterprises Ltd v Paragon Electronics Limited* [2017] eKLR, the Court of Appeal found that a delay of Thirteen Days, was not inordinate and even though it did not allow the application on other ground. Similarly, in the case of *Njeri Njoroge v Joseph Maina Gichubi & another* [2018] eKLR, the Court found a delay of 45 Days was not inordinate.
18. This Court takes note of the explanation advanced by the Applicant for the delay in filing of the Notice of Appeal. While no material evidence was placed before this Court to show any step the Applicant took in protecting his interest as a litigant, this Court grants the Applicant the benefit of doubt.
19. In this regard the Applicant is granted leave to file his Notice of Appeal out of time. In the interest of justice, the Applicant to file his appeal within Thirty Days of this ruling.

II. Whether There Should Be Stay Of Execution Of The Judgment/ Decree Of This Court?

20. It is common knowledge that once judgment has been issued, execution is likely to happen at the anytime. A Judgment debtor if dissatisfied has the responsibility to, at the soonest, seek stay of execution of the judgment. The application was filed at least Twenty-eight Days from the date of judgment.
21. The law on stay is well settled under Order 42 rule 6 of the *Civil Procedure Rules*. The principles that must be satisfied are set out under rule 6(2) which provides:
 - (2) No order for stay of execution shall be made under sub-rule (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.
 - (3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
22. The foregoing principles have been echoed by many Courts. The Court in the case of *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR, had this to say on tying the above principles with



the provisions of Section 1A and 1B of the Civil Procedure Act when considering whether to allow an application for stay

To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions.”

23. In the advent of the 2010 Constitution, Supreme Court in Application No 5 of 2014;- Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR, while determining an issue of stay held;-

Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- (i) the appeal or intended appeal is arguable and not frivolous; and that
- (ii) Unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

(88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

- (iii) That it is in the public interest that the order of stay be granted

24. Applying the foregoing principles in the present application, the Appellant must demonstrate that:

- i. The application has been made without unreasonable delay
- ii. The Applicant will suffer substantial loss
- iii. The appeal is not frivolous
- iv. The appeal will be rendered nugatory
- v. Security of costs for due performance

25. The judgment of this Court was delivered on 25th May, 2023, whereas the instant application was filed on the 22nd June, 2023. This is about twenty-eight days after judgment. Is this application therefore timely?

26. In Eldoret ELC No. 200 of 2012 Jaber Mohsen Ali & another v Priscillah Boit & another [2014] eKLR, the Court observed that a delay even for a day is delay. In the above case the Applicant filed an application for stay pending an appeal, and the court considered that a delay for four days was inordinate delay.

27. In the case of, Utalii Transport Company Limited & 3 others v Nic Bank Limited & another [2014] eKLR, the Court in considering what amounted to inordinate delay had this to say

Whereas there is no precise measure of what amounts to inordinate delay, and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to



ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable”

28. Land is emotive, and therefore there is an anticipation that an aggrieved party ought to move the Court at the soonest, especially where one is bound to lose his/ her proprietary rights over a parcel. Time begun running when judgment was entered and nothing stopped it. Time only stops running within the provisions of Order 50 rule 4 of the *Civil Procedure Rules* or as directed by Court. This was not the case herein. Once judgment is delivered, there is an anticipation that execution can ensure anytime and even though the Respondent/Applicant might have filed the Notice of Appeal on time, there is no reason advanced for not filing the application at the soonest. It is evident from the Record that the Respondent/Applicant was jolted to action by the Notice of Taxation.
29. The Court of Appeal in the case of *Tamil Enterprises Ltd v Official Receiver and Provisional & another* [2010] eKLR, agreed with the learned judge that an application for extension of time to file an Appeal filed after seventeen days, amounted to inordinate delay. Further, the Court of Appeal in *Nakuru Civ’ App’ No. 1/07 William K. Too v Simion K. Langat* [2007] eKLR, declined to interfere with the ruling of the High Court where the learned judge found that an unexplained delay of forty-two days was inordinate. It is not enough for the Applicant to simply blame his advocate for the inadvertence. It is thus the findings of this Court that there was an inordinate delay in filing the application for stay of execution.
30. On second principle of substantial loss, the Respondent/Applicant claimed that there was imminent risk of execution of the judgment. It should be remembered that this was a claim for adverse possession and this Court was convinced that the Respondent/Applicant is utilizing the suit property. No evidence has been placed before the Court to show the loss that the Respondent/Applicant will suffer. It is not enough to allege that there is some imminent danger without placing any evidence to support this claim.
31. Substantial loss was defined by the Court in the case of *Tropical Commodities Suppliers Ltd and Others v International Credit Bank Limited (in liquidation)* (2004) E.A. LR 331 to mean

Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”
32. The Respondent/Applicant deponed in paragraph 7, of his Affidavit that the Respondent will execute the judgment of this Court, and will thereafter transfer the suit land thereby interfering with the substratum of the intended appeal. A mere apprehension cannot be the basis upon which this Court will grant an order for stay.
33. The Court in the case of *Samvir Trustee Limited v Guardian Bank Limited Nairobi (Milimani)* HCCC 795 of 1997 rightly held:

It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value, but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.”
34. It is thus the finding of this Court that the Respondent/Applicant has not sufficiently establish the substantial loss that he will suffer.



35. On whether the appeal is frivolous and/ or arguable, this Court considers the definition of what constitutes an arguable appeal as was determined in the case of *Kiu & another v Khaemba & 3 others* (Civil Appeal (Application) E270 of 2021) [2021] KECA 318(KLR), where the Court held:-

In law, an arguable appeal/intended appeal is one that need not succeed but one that warrants the court's interrogation on the one hand and the courts invitation to the opposite party to respond thereto”

36. Similarly, the Supreme Court in the case of *Kampala International University v Housing Finance Company Limited* (Petition (Application) 34 (E035) of 2022) [2023] when considering whether to grant conservatory orders pending appeal held:

on arguability of the appeal, this question does not call for the interrogation of the merit of the appeal and the court, at this stage, must not make any definitive findings of either fact or law. An arguable appeal is not one which necessarily must succeed but one which ought to be argued fully by the court.”

37. There is no Memorandum of Appeal that will benefit this Court. It is this difficult for this Court to know whether the appeal is frivolous or not.

38. On the nugatory aspect, the Respondent/Applicant ought to demonstrate that the Appeal if successful will be rendered nugatory. Preserving the subject matter of the intended appeal is important as not to render an appeal nugatory. The onus is on the Respondent/Applicant to demonstrate that the appeal will be rendered nugatory. The Court of Appeal in the case of when determining an application for stay held:

On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (supra) this Court stated that:

“ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

- 11) In determining whether or not an appeal will be rendered nugatory the Court has to consider the conflicting claims of both parties and each case has to be considered on its merits.”

39. There is no evidence on how the appeal will be rendered nugatory should it succeed. Save for alluding to possibility of transfer to third parties which was not supported by evidence, there is nothing that informs this Court that the outcome of the appeal, if positive will be difficult to execute.

40. This Court deduced from the proceedings that the Respondent/Applicant is in occupation of the suit property. Even so, there is no evidence that the Respondent/Applicant intends to interfere with the substratum of the appeal which is the suit property. Additionally, the Respondent/Applicant has not demonstrated, that should there be any interference, that the damage will not be reversible or that no amount of damages can compensate him. There is therefore no evidence that the appeal will be rendered nugatory. Having failed to satisfy the foregoing principles, an order for security for costs cannot issue at this point.

41. The upshot of the foregoing is that the prayer for stay is declined.



III. Who Should Pay The Costs For The Application?

42. It is trite law that costs shall follow the events and a successful party is entitled to costs. This Court has the discretion under section 27 of the [Civil Procedure Act](#) to award costs. Parties are here because of the delay occasioned by the Applicant and even though the application partially succeeds, this Court exercise the discretion in favour of the Respondent.
43. Having now carefully considered the Instant Notice of Motion Application dated 25th May 2023, the Court finds that it only succeeds in terms of prayer No. 3 on the extension of time to file Notice of Appeal.
44. However, the Court declines to allow prayer No. 5 on stay of execution and the said prayer is dismissed entirely with costs to the Applicant/Respondent.
45. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 5TH DAY OF OCTOBER, 2023.

L. GACHERU

JUDGE

