



REPUBLIC OF KENYA



**Mwangi v Ikahu (Environment and Land Miscellaneous Application  
17 of 2023) [2023] KEELC 20708 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20708 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 17 OF 2023  
JG KEMEI, J  
OCTOBER 12, 2023**

**BETWEEN**

**FRANCIS KINYANJUI MWANGI ..... APPLICANT**

**AND**

**SARAFINA WANJIRU IKAHU ..... RESPONDENT**

*(Being an application for leave to appeal against the Judgment delivered by Hon. B. M. Ekhubi,  
PM on 30/4/2020 in the Chief Magistrate's Court at Thika in Civil Case No., 966 of 2013)*

**RULING**

1. The Applicant moved the Court by way of Notice of Motion brought under Section 1A, 1B, 3A & 65 of the Civil Procedure Act, Order 50 and 51(1) of the Civil Procedure Rules, 2010 seeking the following orders:-
  - a. Spent.
  - b. That this Honourable Court be pleased to grant an interim stay of execution of the Decree issued by the Magistrate's Court in Thika MCCC No. 966 of 2013 pending interpartes hearing and determination of this application and pending appeal.
  - c. That this Honourable Court be pleased to enlarge time within which to appeal against the Judgment of Hon. B. M. Ekhubi (PM) of 30<sup>th</sup> April 2020.
  - d. That costs of this application do abide the outcome of the intended appeal.
2. It is the Applicants case that the case in the trial Court was heard and Judgment delivered in his absence and only learned about it long after the period of filing Appeal had expired. That he then approached the High Court in Kiambu which Court, on application, granted him leave to file the appeal out of time. As fate would have it the said appeal was struck out on 28/2/2023 on grounds of lack of



- jurisdiction. That he has now been forced to file the application in the Environment & Land Court which he believes is the right forum to adjudicate the appeal.
3. In addition the Applicant argues that he acquired the land in question in 1994 and is apprehensive that if the Judgment is executed by the Respondent he stands to be rendered destitute. That he was not heard in the lower Court yet he has been in occupation of the land since 1994. In addition that the Respondent is not in possession therefore stands to suffer no prejudice if the orders are granted so that the matter is heard on merit.
  4. The application is opposed by way of Grounds of Opposition filed by the Respondent on the following grounds:-
    - a. That the application is a non-starter, frivolous, vexatious and incompetent.
    - b. That the application is bad in law and aimed at wasting the Court's Judicial time for the reason that Judgment in this case was delivered on 26<sup>th</sup> March 2020 by Hon. B. Ekhubi (P.M).
    - c. That the Applicant thereafter filed an application seeking leave to appeal out of time which application was allowed and the Applicant consequently filed his Appeal before the High Court in Kiambu which was dismissed on 28<sup>th</sup> February 2023 by Hon. Justice L. N. Mugambi.
    - d. That the Applicant already had his day in Court and his Appeal dismissed. The instant application amounts to abuse of Court process.
    - e. That the application is fatally incompetent as the Orders sought are appalling and untenable in law as the application is brought more than three years after Judgment was rendered.
    - f. That the application is a fishing expedition, entirety lacks merit and aimed at delaying this matter and denying the Respondent the right of enjoying the fruits of her Judgment.
  5. The Respondent further filed the Replying Affidavit on 18/4/2023 and stated that the application is an afterthought as well as an abuse of the process of the Court.
  6. She stated that despite notice of the delivery of Judgment and the Judgment having been served on the Applicant, the Applicant went into slumber only to wake up too late in the day to deny her the right to enjoy the fruits of her Judgment.
  7. That in any event the appeal was dismissed on 28/2/2023. That equity does not come to the aid of the Applicant because of the inordinate delay taken to file the application. That she stands to suffer prejudice as the rightful owner of the property in possession of a valid lease, a position that remained uncontroverted by the Applicant.
  8. On the 8/5/2023 parties elected to canvass the application by way of written submissions. By the time of writing the Ruling only the Applicant filed written submissions on the 13/6/2023.
  9. There are 2 issues for determination:-
    - a. Whether stay of execution should be granted.
    - b. Whether time should be extended to file appeal out of time.
  10. For obvious reasons I will start with the 2<sup>nd</sup> issue.



11. Extension of time is a discretionary remedy. Like all discretionary reliefs, the Court is guided by the case of *Mbogo Vs. Shab* [1968]EA, p. 15 where it stated as follows:-

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

12. The provisions of Section 79(G) and Section 16A of *Environment & Land Court Act* offer beacons of guidance for filing of an appeal. An appeal for the lower Court to this Court ought to be filed within 30 days. It states as follows:-

“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.”

13. In this case Judgment was rendered on 30/4/2020 and any appeal ought to have been filed by 30/5/2020.

14. The guiding principles in determining an application whether or not to grant leave out of time to file appeal was set out in the case of *Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission* [2014]eKLR where the Court stated 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 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.”

15. It has been explained by the Applicant that the hearing proceeded in his absence and only realized when the Judgment had been delivered. The Court finds that the Applicant has explained the delay in filing the application and in my view should not be denied the opportunity to be heard on appeal. I allow the application in terms of prayer (c).



16. With respect to prayer for stay of execution, the Court finds as follows; the delay in filing has been explained to the satisfaction of the Court; the Applicant has explained how he stands to be rendered destitute if the Judgment is executed; the Applicant has explained substantial loss.
17. In the end I grant stay of execution on terms that the Applicant to file his appeal within sixty (60) days in default the orders shall lapse automatically.
18. I make no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 12<sup>TH</sup> DAY OF OCTOBER, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Kariuki for Applicant

Ms. Mwangi for Respondent

Court Assistants – Phyllis & Lilian

