



**Rigu v Mwangi (Environment & Land Case 200 of 2017)  
[2022] KEELC 13352 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13352 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 200 OF 2017  
LN GACHERU, J  
OCTOBER 6, 2022**

**BETWEEN**

**JOHNSON KARANI RIGU ..... PLAINTIFF**

**AND**

**JOSEPH MWANGI ..... DEFENDANT**

**RULING**

1. By a notice of motion application dated January 10, 2022, the defendant/applicant sought for orders:
  1. That the law firm of Samuel Nyambane & Co Advocates come on record in place of law firm of T.M Kuria & Co Advocates;
  2. That upon granting the above prayers, this court enlarge the time for lodging the notice of appeal, memorandum of appeal and record of appeal against the judgment of this court made on February 21, 2019 in ELC No 200 of 2017;
  3. That the notice of appeal dated December 30, 2021 be deemed as duly filed;
  4. That this court issue stay of execution of judgment entered by this court on February 21, 2019;
  5. That this court extend time within which the applicant may file the record of appeal out of time;
  6. Costs of and incidental abide the results of the intended appeal.
2. The application is premised on the following grounds that:
  1. The applicant should not be denied his right of appeal because of the misfortune of the applicant's former advocates;



2. That it would be unfair to condemn the applicant who swiftly sought alternative representation to ensure that his appeal was heard;
  3. That the intended appeal is arguable with chances of success;
  4. That the respondent will not suffer any prejudice should the orders be granted;
  5. That the right to be heard is a constitutional right.
3. The application is supported by the supporting affidavit of the defendant/applicant herein Joseph Kinyi Mwangi, wherein he reiterated the contents of the grounds in support of the application.
  4. The plaintiff/respondent opposed the application through his replying affidavit dated February 18, 2022, wherein he averred that the application was brought with inordinate delay, with no sufficient reasons for the delay provided, and that the applicant has not demonstrated why no action has been taken by the applicant whatsoever. The respondent further stated that the application was filed 3 years after the judgement, and that he has already taken possession of the suit property and has developed the same during that period. He further stated that the defendant/applicant seeks the orders to restrain him, while he has already taken possession. Lastly he stated that it would be a tedious affair for the applicant to take possession. The plaintiff/respondent had also filed grounds of opposition dated February 16, 2022, wherein he stated;
    1. That applicant has approached the court with dirty hands as the application was filed on January 21, 2022, but served on February 15, 2022, with a hearing on February 17, 2022.
    2. No sufficient reason has been demonstrated by the defendant/ applicant to warrant the orders sought.
    3. The defendant/applicant has been indolent and guilty of laches.
    4. The applicant has taken 2 years and 11 months to make this application without any good reason.
    5. The plaintiff/respondent is already in possession and enjoying the fruits of his judgement.
  5. The application was canvassed by way of written submissions. The defendant/applicant filed his written submissions on July 13, 2022, through the law firm of Samuel Nyambane & Co Advocates. He relied on various authorities:
  6. On whether the applicant should be granted leave to file an appeal out of time, the applicant relied on section 79G of the *Civil Procedure Act* which provides for time for filing appeals from subordinate courts. It provides 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.



7. On the claim that the applicant's advocates failed to inform him on the judgement or outcome of the court, the defendant/applicant relied on the case of [\*Bakari Gakere v Mwana Idd Guchu & 3 others\*](#) (2022) eKLR, where the court held:-

“The court notes the mistake of counsel who was better placed to advise his clients and opines that such mistake should not be a bar to the applicant to sit on the seat of justice.”

8. Similarly, in the case of *Shah H Bharmal & Brothers v Kumar* (1961) EA 679, the court held that a mistake of counsel was sufficient cause to appeal out of time.

9. Further, in the Supreme Court application No 16 of 2014 – [\*Nicholas Korir Salat v IEBC & 7 others\*](#) (2014) eKLR, the court enumerated the principles that guide it in exercising discretion on application filed out of time. It held as follows:

- a) 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.
- b) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
- c) Whether the court should exercise its discretion is a consideration to be made on a case-by-case basis.
- d) Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
- e) Whether there will be any prejudice suffered by the respondents if the extension is granted.
- f) Whether the application has been brought without unreasonable delay.

10. On the issue of inordinate delay in filing the application, the applicant relied on the case of [\*Mwangi Kimenyi v AG & another\*](#) (2014) eKLR, where the court held:

“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 for the given delay and so on and so forth.

11. Further on the issue of whether a stay of execution should be granted, the applicant relied on the case of [\*RWW v EKW\*](#) (2019) eKLR, where the court held;

“...the purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the applicant who is exercising his undoubted rights of appeal are safeguarded and if the appeal is successful, is not rendered nugatory, however, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory.



However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

12. Lastly, the applicant relied on order 42 rule 6(2) of the [Civil Procedure Rules](#) which sets out the principles to be considered in an application for stay of execution.

It states:

- (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.

13. The plaintiff/respondent filed his written submissions through the law firm of Kimwere Josphat & Co Advocates, on April 21, 2022, and relied on the following authorities:

- a. [Mwangi v Kenya Airways Ltd](#) (2003), wherein the court held in relation to stay of execution, it ought to consider *inter alia* the length of delay, the chances of appeal and the degree of prejudice to the respondent.
- b. [Stanley Mwangi & 2 others v Kanyamwi Trading & Co Ltd](#) (2015) eKLR wherein the court held that a plausible and satisfactory explanation for any delay is the key that unlocks the courts discretionary favour.
- c. In [Sayers v Clarke Walker](#) (2002) EWCA Civ 645 where the court held as follows:

“It follows that when considering whether to grant an extension of time for an appeal against a final decision in a case of any complexity, the courts should consider all the circumstances of the case including: Interest of the administration of justice; Whether the application for extension has been made promptly; Whether the failure to comply was intentional; Whether there was a good explanation of the failure; The extent to which the party in default has complied with the rules, practice and directions and court orders; Whether the failure to comply was caused by his legal representative; The effect which the failure to comply had on each party The effect which granting the relief would have on each party.

- d. Lastly, he relied on the case of [Jasbir Singh Rai & 3 others v Tarlochan Singh & 4 others](#), where the court held that awarding of costs is not to penalize the losing party, but as a means for the successful litigant to be recouped for the expenses to which he has been put in fighting the action.

14. The court has carefully considered the pleadings and rival written submissions of the parties herein, and finds the issues for determination are two-fold:

- a. Whether the applicant should be granted leave to file an appeal out of time?
- b. Whether a stay of execution should be granted?



15. The application herein seeks two orders, namely that the time to file an appeal be extended and that a stay of execution pending appeal be granted against the judgment of this court made on February 21, 2019 in ELC No 200 of 2017.
16. The application was made on the grounds that the defendant/applicant is a layman who was not aware of the intricate nature of filing appeals, and that his previous advocates erred by failing to inform him of the trial court's determination, which was entered against him. He further averred that he sought the services of new advocates and then filed this application to file appeal out of time.
17. The plaintiff/respondent opposed the application on the grounds that the delay in filling the notice, memorandum, and record of appeal was inordinate, and the reason for the delay was not sufficient and that the application ought to be dismissed.
18. Section 79G of the *Civil Procedure Act* states 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.
19. The grant or refusal of an extension of time is a matter of judicial discretion, to be exercised in a principled manner in accordance with reasons and justice. (See the Supreme Court case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2013] eKLR).
20. The principles upon which this court determines an application for extension of time to file an appeal are well settled. The court considers the length of the delay; the reason for the delay; (possibly) the chances of success of the intended appeal; and the degree of prejudice that would be occasioned to the respondent if the application is granted. See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231; *Fakir Mohammed v Joseph Mugambi & 2 other* [2005] eKLR; and *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, civil application No 190 of 2019. (As was held by D.K Musinga, JA in Court of Appeal at Nairobi civil appeal (application) E444 of 2021).
21. From the above, the factors that the court is supposed to take into consideration in the determination of an application of this nature are; Firstly, the length of the delay. Secondly, reason for the delay. Thirdly, "possibly" arguability of the intended appeal and fourthly, any prejudice to be suffered by the opposite party should the relief sought by the Applicant be granted. (See Court of Appeal at Kisumu civil appeal (application) E270 of 2021 *Kiu & another v Khaemba & 3 others*).
22. Starting with delay, from the court record, it is evident that the impugned judgement was entered on February 21, 2019, while the present application was filed on January 10, 2022. This is a period of 2 years and 10 months.
23. In the case of *George Mwende Muthoni v Mama Day Nursery and Primary School*, Nyeri CA No 4 of 2014 (UR), extension of time was declined on account of the applicant's failure to explain a delay of twenty (20) months. While in the case of *Aviation Cargo Support Limited v St Marks Freight Services Limited* [2014] eKLR, the relief for extension of time was declined for the applicant's failure to explain why the appeal was not filed within sixty days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six months to seek extension of time within which to comply.
24. In the present case the delay is well over 2 years, which is clearly inordinate in the circumstances herein, and which inordinate delay would cause difficult and injustice to the respondent herein.



25. The next issue for consideration is the reason for the delay which the defendant/applicant states was due to his previous advocate's failure to inform the applicant of the court's determination and its contents and also being unaware of the appeal's process.
26. On this issue, the court will rely in the case of *Ruga Distributors Ltd v Nairobi Bottlers Ltd* (2015) eKLR, where the court held as follows:
- “Whereas it would constitute a valid excuse for a defendant to claim that she had been let down by her former advocates, failure to attend court on the date the application was fixed, it is trite that a case belongs to a litigant and not to her advocates. A litigant has a duty to pursue the prosecution of his/her case...it is the duty of the litigant to constantly check with his/her advocate the progress of their case.”
27. This court agrees, with the holding of the court in the above case and re-state that it is not enough for the defendant/applicant herein to blame his advocates. He ought to have shown tangible steps taken by him to follow up his matter, as the case belonged to him and not his advocate.
28. Thirdly, is the possibility that the intended appeal is arguable. The defendant/applicant herein has annexed a memorandum of appeal indicating the three issues he intends to address on appeal. These issues, are that the trial judge erred in her interpretation of the doctrine of lis pendens, that the judge erred in her apprehension of facts and law when she failed to consider the element of trust and adverse possession raised by the applicant in the trial court and that the trial judge erred by basing her analysis on the determination in civil suit No 324 of 2008, which proceeded undefended.
29. In law, an arguable appeal/intended appeal is one that need not to succeed, but one that warrants the court's interrogation on the one hand and the courts invitation to the opposite party to respond thereto.
30. Though the three grounds raised by the applicable are arguable, the fact that there was inordinate delay and that the plaintiff/respondent has taken possession renders the application impossible to grant.
31. The fourth and final matter is whether any prejudice would be suffered by the opposite party should the relief sought by the applicant be granted. The plaintiff/respondent having been the successful litigant is entitled to the fruits of his success and the relief sought in the present appeal would deny him the suit property and thus enjoyment of the fruits of his judgement.
32. On the totality of the above assessment and reasoning, the court is satisfied that the defendant/applicant has failed to satisfy the prerequisites for granting of leave to file an appeal out of time, and also for stay of execution.
33. Consequently, the court proceed to make orders as follows:
1. Leave of extension of time within which to file and serve a notice of appeal is denied.
  2. With leave to appeal so denied, so is the application for stay of execution pending appeal.
34. Having considered the instant notice of motion application dated January 10, 2022, and the above analysis, the court finds and holds that the said application is not merited.
35. For the above reasons, the said application is dismissed entirely with costs to the plaintiff/respondent.
- It is ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 6<sup>TH</sup> OF OCTOBER 2022.**



**L. GACHERU**

**JUDGE**

**Delivered virtually in the presence of;**

**Joel Njonjo - Court Assistant**

**Plaintiff/Respondent – Absent**

**Mr Gathaga H/B Nyambane for the Defendant/Applicant**

**L. GACHERU**

**JUDGE**

**6/10/2022**

