



Lukwa (Suing on his Behalf as well as Legal Representative of the Estate of the Late Julius Muhambi Amayi (DCD)) v Imbusi (Environmental and Land Originating Summons 10 of 2020) [2025] KEELC 4361 (KLR) (21 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4361 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 10 OF 2020**

A NYUKURI, J

MAY 21, 2025

BETWEEN

AGNES NYALOYA LUKWA APPLICANT

**SUING ON HIS BEHALF AS WELL AS LEGAL REPRESENTATIVE OF THE
ESTATE OF THE LATE JULIUS MUHAMBI AMAYI (DCD)**

AND

ANTONY PANGA IMBUSI RESPONDENT

RULING

1. Before court is a Notice of Motion dated 24th March, 2025 filed by the Applicant seeking the following orders;
 - a. Spent
 - b. That the time within which the applicant was to deposit the taxed costs in compliance with the court order made herein on 20th June, 2024 be enlarged.
 - c. Spent
 - d. That the sum of Kshs. 187,664.00 deposited in this Honourable court on 20.3.2025 representing the taxed costs be deemed to have been so deposited in compliance with court's conditional stay order made on 20.6.2024.
 - e. That any execution of judgement and decree herein be halted and or lifted pending hearing and determination of the applicant's intended appeal.
 - f. That there be a temporary order of stay of execution of the decree issued by this honourable court on 23.11.2023 and or any orders made pursuant to the judgment of this Honourable



court delivered on 15.11.2023 pending the hearing and determination of this application. In the alternative the status quo currently prevailing on the suit land parcel no. Idakho/Shikulu/2339 be maintained pending the hearing and determination of the applicant's intended appeal.

- g. That costs of this application be provided for.
2. The application is premised on the grounds on its face together with the supporting affidavit of Alex Biketi, counsel for the applicant. The applicant's case is that upon the court's dismissal of her claim for adverse possession and allowing the respondent's claim for eviction, the court ordered conditional stay of execution in a ruling delivered on 20th June, 2024 pending appeal to the Court of Appeal. Further that costs of Kshs. 187,663.33/= were taxed in favour of the respondent.
 3. The applicant also averred that being unable to satisfy the condition for depositing taxed costs, she sought review of the conditional stay and that her application was dismissed on 27th February, 2025. She argued that she was a housewife, widow and the sole bread winner of her family with no known source of income constraining her to appeal to members of the public and her church to assist her in raising the sum for the taxed costs, which she deposited in court on 20th March, 2025.
 4. It was her argument that having complied with the order for depositing taxed costs in court, there was need for this court to extend the time required to deposit the said sum as time had lapsed. She contended that her determination to deposit the taxed costs demonstrate her tireless determination to move to the Court of Appeal to challenge the decision of this court and that the delay was not deliberate. That unless the Honourable court intervenes so that she is allowed to continue occupying the suit property, she will be evicted from the land which is her only home. That her application to the Court of Appeal to consider alternative security was overtaken by events. She attached copies of application for proceedings and judgment, receipt confirming deposit in court of taxed costs, an application to the Court of Appeal; warrants of attachment and eviction notice.
 5. The application was opposed. Antony Panga Imbusi the respondent herein, filed a replying affidavit dated 27th March, 2025. He stated that the applicant had brought the application after an inordinate delay of over eight months, yet the delay has not been explained. He further stated that the judgment herein was based on the evidence. Further that although the Notice of Appeal was filed on 21st November, 2023, 480 days had passed yet no record of appeal had been filed hence the notice of appeal is deemed as having been withdrawn as 60 days have lapsed as provided for in Rule 83 of the Court of Appeal Rules.
 6. The respondent further stated that in the ruling dated 20th June, 2024, the applicant was granted 21 days to deposit the taxed costs upon the same being taxed. That the applicant never sought for review of that order nor for extension of time. Further that the applicant ought to have complied with the orders of 20th June, 2024 on 20th August 2024 but failed to do so. That in the application seeking to vary and set aside orders of 20th June, 2024, the applicant never sought for enlargement of time to deposit costs.
 7. It was the respondent's further averment that the applicant filed Kisumu Court of Appeal Misc. Application No. E031 of 2025 seeking stay of execution of the order of 20th June, 2024 but that the same is pending determination. Further that while the application dated 28th February, 2025 was pending before the Court of Appeal, the applicant secretly deposited in court the sum of Kshs. 187,664/= and has now run to this court seeking enlargement of time and that therefore the applicant is engaged in forum shopping and abuse the court process.
 8. The respondent also stated that the fact that the applicant has deposited the taxed costs is not an automatic right for enlargement of time since the applicant is obligated to pay the taxed costs even after



lapse of conditional stay. He stated that he was a stranger to the applicant's inability to raise the taxed costs within the period granted by court and that the applicant should have moved the court earlier for orders of extension of time. In addition, he stated that there is no notice of appeal that forms the basis for hearing of any appeal and that the applicant has denied him the use of his land for very many years. He attached a copy of the ruling of 20th June, 2024 and application and directions in Kisumu CoA Misc. Appeal E031 of 2025.

9. In a rejoinder, Agnes Nyaloya Lukwa the applicant, filed another affidavit sworn on 5th April, 2025. She stated that her application had been made with a genuine desire for the court to exercise its discretion in granting her a chance to ventilate her case before the Court of Appeal, so as not to render the appeal nugatory. She also stated that she has been and continues to be in occupation of the suit property and that if time is not extended, she will be evicted before she is heard by the Court of Appeal.
10. The applicant also stated that it was within her rights to seek review of the orders of 20th June, 2024, as she held the view that the conditional stay was oppressive in view of the fact that she is in extreme poverty, a widow and with young children to solely fend for. She maintained that the instant application was distinguishable from her application for review which was dismissed on 27th February, 2025, hence res judicata does not arise. She stated that in the Court of Appeal, what was pending was not an appeal against the ruling of 27th February, 2025 but an application which can be allowed by the Court of Appeal in the exercise of its original jurisdiction. Further that the said application is pending withdrawal as he had filed a Notice of Motion dated 24th March 2025 before the instant application was filed.
11. The applicant argued that until the Court of Appeal pronounces itself on the Notice of Appeal being deemed as withdrawn, the same remains in force. She also stated that in determining an application for extension of time, factors of each case are critical in the court's exercise of discretion. She insisted that she had given reasons for enlargement of time which is inability to raise the taxed costs in view of her situation in life, which position has not been controverted and that the delay in filing the instant application has been well explained, without any challenge thereto.
12. The application was canvassed by way of written submissions. On record are the applicant's submissions dated 7th April, 2025 and the respondent's submissions dated 2nd April, 2025; both of which this court has duly considered.

Analysis and determination

13. The court has carefully considered the application, response thereto and parties' rival submissions. Three issues that arose for the court's determination are;
 - a. Whether there is good and sufficient cause for the court to enlarge time for the applicant's compliance with the orders of 20th June 2024.
 - b. Whether orders of status quo should issue.
 - c. Whether execution of the decree should be lifted pending intended appeal.
14. Order 50 Rule 6 of the Civil Procedure Rules provides for the power of the court to extent time as follows;

Power to enlarge time [Order 50, rule 6]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such



terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

15. The discretionary power of the court to extend time ought to be exercised judiciously by interrogating inter alia; the length of the delay; the reasons for the delay; the interests of justice and the prejudice likely to be suffered by the respondent if time is extended. Extension of time is not an entitlement of a party, hence an applicant seeking extension of time must explain the delay to the satisfaction of the court.
16. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] e KLR, the Supreme Court of Kenya stated the elements to consider in determining an application for extension of time 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 the 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.”
17. In the instant case, the applicant approached this court and sought stay of execution of the judgment in which her eviction was ordered. On 20th June 2024, this court granted stay of execution pending hearing and determination of her appeal before the Court of Appeal on condition that the taxed or agreed costs are deposited in court within 21 days of the date of taxation of such costs. The court further ordered that once the condition for deposit of taxed or agreed costs is complied with, the stay orders will remain in force for a period of two years unless otherwise extended by the Court of Appeal. Subsequently, the respondent’s bill of costs was taxed in the sum of Kshs. 187, 663.33/= on 3rd October 2024. This means that the applicant was expected to deposit in court the taxed sum by 24th October 2024. The applicant’s attempt to seek review of the conditional stay orders was unsuccessful as her application in that respect was dismissed by the ruling of this court dated 27th February 2025. That dismissal prompted her to deposit the taxed costs on 20th March 2025 and file the instant application.
18. In the instant application, the applicant averred that she is a housewife, widow and the sole provider of her young children with no source of income and her situation of extreme poverty constrained her to seek assistance of the members of public and her church to raise the money needed to cover the taxed costs. The applicant’s averment on her financial difficulties has not been denied, challenged or controverted by the respondent, who confirms that the applicant has for many years been in occupation of the suit property. This court is alive to the lived realities of many Kenyans who are struggling financially and facing serious difficulties in meeting their basic needs, leave alone raising costs taxed



against them in court, and therefore the court has no reason to doubt the averments made by the applicant in respect of her financial situation.

19. Considering the facts that; the taxed costs ought to have been deposited by 24th October 2024; that the applicant's application for review of the conditional stay order was determined by this court on 27th February 2025; the reason for non-compliance being the applicant's inability to raise the taxed costs within time due to her extreme poverty situation, and the fact that the taxed costs were deposited in court on 20th March 2025, I am satisfied that the length of the delay as viewed against the reasons for the delay is not inordinate. In addition, in view of the fact that the sum of Kshs. 187, 663.33/= is not a small amount of money to be raised at once by a widow who has no source of income, the court is satisfied that the reason given for delay in compliance is satisfactory. The applicant having redeemed herself by depositing in court the taxed costs albeit late, in my view, is a demonstration of good faith on her part and this court will grant her the chance to pursue her appeal as execution remains in abeyance as ordered by court on 20th June 2024. Besides, this court granted the applicant stay of two years from 20th June 2024, and the respondent has not demonstrated to this court's satisfaction that the prejudice he stands to suffer if extension of time is granted cannot be atoned by an award of costs. In the premises I am satisfied that the applicant deserves an order for extension of time. However, as the applicant is the one seeking extension of time, by dint of the proviso to Order 50 Rule 6 of the Civil Procedure Rules, the burden of costs in the instant application will be borne by herself.
20. Regarding the respondent's argument that the Notice of Appeal is deemed withdrawn, for the applicant's failure to file record of appeal in 60 days as provided for in Rule 83 of the Court of Appeal Rules, it is my view that since the record of appeal is filed in the Court of Appeal and the Court of Appeal rules define "court" as the Court of Appeal, it is my finding that the court that has jurisdiction to deem a notice of appeal as withdrawn is the Court of Appeal and not this court. I am fortified in my reasoning by the decision in the case of *Vishva Builders Limited v Moi University and 7 Others* where it was held as follows;

“...substantive issues pertaining to the validity or competence of a Notice of appeal are matters that ought to be properly canvassed by an application filed before the Court of Appeal under Rule 83 of the Court of Appeal Rules, seeking striking out of such appeal, and which mandate does not lie with the High Court.”
21. Therefore, the validity and competence of the appeal pending before the Court of Appeal is a matter that the respondent has opportunity to raise before that court and therefore, I will say no more on the same.
22. Besides seeking extension of time to comply with orders of 20th June 2024, the applicant also sought stay of execution pending appeal and maintenance of status quo. Since there are already in force clear orders of conditional stay of execution of judgment, dated 20th June 2024, which orders have not been vacated, reviewed or set aside, this court cannot again order stay of execution of judgment, hence the prayer for stay pending appeal is superfluous and need not be granted for the second time.
23. Regarding the prayer for maintenance of status quo, it is clear that the decree herein was for the applicant to vacate the suit property in 90 days from the date of the judgment dated 15th November 2023. The status quo as confirmed by the parties herein is that the applicant is in possession of the suit property. By its ruling of 20th June 2024, this court ordered stay of execution of the judgment herein for two years, hence effectively staying the applicant's eviction and allowing her continued occupation for the same period. In view of the fact that the orders of 20th June 2024 are to subsist for a period of two years, in the circumstances of this case, those orders suffice in ensuring that the applicant's appeal is



not rendered nugatory. But most importantly, an order of maintenance of status quo pending hearing and determination of an appeal, in so far as it stops parties from interfering with the obtaining status, in my view, are orders in the nature of a temporary injunction and should be distinguished from orders of stay of execution pending appeal.

24. Under Order 42 Rule 6 (6) of the Civil Procedure Rules, this court can only grant temporary injunction pending appeal, in a matter where this court sits as an appellate court regarding decisions from the subordinate courts. However, this court, in its original jurisdiction, having already made conclusive findings of facts and the law regarding the rights of the parties, on merit, has no jurisdiction to determine prayers sought in the nature of an injunction pending determination of an appeal to the Court of Appeal as no such jurisdiction has been provided for in law. Notably, and logically so, a court cannot make conclusions on merit on the rights of parties in a suit and at the same time make a finding within the same suit that the losing party has a prima facie case with high chances of succeeding on appeal to warrant grant of an injunction; as that will mean that the court is speaking from both sides of the mouth, which in my opinion amounts to jurisprudential duplicity. For those reasons, the prayer for maintenance of status quo pending appeal is declined.
25. In the end, I find and hold that the application dated 24th March 2025 is merited and the same is hereby allowed as follows;
- a. The time within which the applicant was to deposit the taxed costs in court in compliance with the order of this court of 20th June 2024 is hereby extended.
 - b. The sum of Kshs. 187, 664/= deposited in this honourable court on 20th March 2025 representing the taxed costs is hereby deemed to have been so deposited in compliance with the court's conditional stay order made on 20th June 2024.
 - c. For avoidance of doubt, the conditional stay order made herein on 20th June 2024 shall remain in force for the period stated in the said order.
 - d. The costs of this application are awarded to the respondent and the same shall be borne by the applicant.
26. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 21ST DAY OF MAY, 2025

A. NYUKURI

JUDGE

In the presence of;

Mr. Mamadi for the applicant

Ms Kadenyi for the respondent

Court Assistant: M. Nguyai

