



**Njagi v Ragwa (Miscellaneous Civil Application E001 of 2025)
[2025] KEHC 5867 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5867 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS CIVIL APPLICATION E001 OF 2025**

RL KORIR, J

APRIL 24, 2025

BETWEEN

GRACE KANYUA NJAGI APPLICANT

AND

BERNARD MUTEGI RAGWA RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated 21st January, 2025 seeking orders that:
 - (a) Spent.
 - (b) That this Honourable Court be pleased to grant the Applicant leave to lodge an Appeal out of time against the decision delivered on 25th day of November, 2024 by Hon. Oscar Wakina.
 - (c) That this Hon. Court be pleased to order stay of execution of the Ruling delivered on 25th November, 2024 pending the hearing and determination of the intended appeal.
 - (d) That upon grant of leave to appeal out of time, the Draft Memorandum of Appeal lodged herein be deemed duly filed.
 - (e) That the costs of and incidental to this Application be costs in the intended Appeal.
2. The Application was brought under Section 1A, 3A, 7 and 63 of the *Civil Procedure Act*, and Order 22, Rule 22(1) of the Civil Procedure Rules. It was premised on the grounds on the face of the Application and further supported by the sworn Affidavit of the Applicant, Grace Kanyua Njagi dated 21st, January, 2025.



The Applicant's Case.

3. The Applicant stated in her Grounds of Appeal and Supporting Affidavit that the statutory period for filing the Appeal had run out. That judgement was delivered on 30th July, 2024 and that the delay in filing the appeal was inadvertent. That her advocates had closed their offices for Christmas holidays from 16th December, 2024 and only resumed on 20th January, 2024 when the time for filing an appeal had already lapsed. That the delay was not inordinate and that the intended appeal was meritorious.
4. The Applicant further stated that she stood to suffer irreparable damage if no stay was granted and the Respondent was allowed to proceed with the execution. That such execution would render her appeal nugatory.

The Respondent's Case.

5. The Respondent Benard Mutegi Ragwa opposed the Application through his Replying Affidavit dated 4th April, 2025. He stated that the Application lacked merit as it had been overtaken by events. That on 25th November, 2024, the trial court ruled that the applicant lacked locus to institute the Application dated 9th January, 2023 and struck out the said Application. That the Appeal was out of time and the Applicant had not provided sufficient reason for the delay. Further that the Ruling in the trial court did not grant a positive order capable of being stayed and any stay would prejudice the implementation of the Grant issued on 28th January, 2021. That the Application was an abuse of the court process and ought to be struck out with costs to the Respondent.
6. On 10th March, 2025, parties took directions to canvass the Application through written submissions.

The Applicant's Written Submissions.

7. The Applicant isolated two issues for determination as follows. Firstly, whether the Ruling dated 25th November, 2024 could be stayed pending the hearing and determination of the Appeal, and; whether the Applicant could be allowed to appeal out of time.
8. The Applicant submitted that she would suffer substantial loss as the subject matter of the Appeal was a decision on a succession matter on Land Parcel Karingani/Muiru/237 which if executed would see her locked out of the distribution and dispossessed of the land she resided in. She submitted that the intended Appeal was arguable as the main ground was whether the decision rendered by the trial magistrate was legally sound.
9. With respect to time, the Applicant submitted that the Application was brought without unreasonable delay. That there was a delay of only 26 days according to the computation allowed by Order 50 Rule 4 of the Civil Procedure Rules. She relied on the case of East and Central Africa Enterprises Limited & Another Vs. Dorcas Wairimu Ndirangu & Others (2016) eKLR.

The Respondent's Written Submissions.

10. The Respondent filed Submissions dated 7th April, 2025 in which he isolated two issues for the court's determination as follows. Firstly, whether the Honourable court should grant the Applicant leave to file Appeal out of time, and; whether the Applicant has met the prerequisites for stay of execution pending appeal.
11. The Respondent submitted that under section 79G of the Civil Procedure Code the time allowed for the filing of an appeal was 30 days. That the intended Appeal was an afterthought and only meant to frustrate the Administrator from discharging his duties as the Grant was confirmed three years prior



to the institution of suit in the trial court. The Respondent placed reliance on the case of Nicholas Kiptoo Korir arap Salat Vs. IEBC and 7 Others (2014) eKLR which set out the applicable principles in an application for extension of time. He submitted that litigation must come to an end and urged the court to dismiss the Application.

12. On whether the Application met the prerequisites for grant of stay, the Respondent submitted that there was no positive Order granted by the trial court capable of execution. That therefore this court cannot grant stay of execution of the said Ruling which was a negative Order incapable of execution. He relied on Co-operative Bank of Kenya Ltd Vs. Banking Insurance & Finance Union(Kenya) (2015) eKLR and Kenya Commercial Bank Limited Vs. Tamarind Meadows Limited & 7 Others (2016) eKLR.

Analysis and Determination

(i) Whether the Applicant deserves an order to appeal out of time

13. Section 79G of the *Civil Procedure Act* provides 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.

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.

14. The power to extend time for the filing of an appeal is discretionary. The Court of Appeal affirmed this position and set out the applicable principles in the case of *Omar Shurie vs Marian Rashe Yafar (Civil Application No. 107 Of 2020)* UR where it held as follows:-

“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 time are: first the length of the delay, secondly, the reason for the 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.” (Emphasis mine)

15. Further, in the case of Susan Ogutu Oloo & 2 Others vs. Doris Odindo Omolo (2019) eKLR the Court of Appeal held that:-

“In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in Nicholas Kiptoo Arap Korir Salat V. IEBC (2014) EKLR Sup. CT. Application No. 16 of 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted”.



16. The Applicant stated that she did not file her appeal on time because by the time she was ready to do so, she found that her advocates had closed their offices for the Christmas holidays and only reopened on 20th January, 2025. She computed the period of delay as 26 days.
17. I have considered the Applicant's submissions on the reason for the delay. As urged by the Respondent, the Applicant had sufficient time prior to the Christmas holidays to file her appeal. The reason that her advocates had closed for the Christmas holiday was however plausible. Taking into consideration the fact that time ceased to run during the court recess as allowed by Order 50 Rule 4 of the Civil Procedure Rules, I do not consider the period of 26 days' delay inordinate. I also find it satisfactorily explained.
18. In considering whether or not the Respondent would suffer prejudice, I have noted that the period of delay was negligible and that the Appellant's right of appeal would not have suffered any set back had she filed her appeal on time. I therefore see no prejudice to be suffered by the Respondent if the Applicant's right of appeal was safeguarded.

(ii) Whether the Applicant should be granted stay of execution

19. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -
 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
 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.
20. A reading of Order 42 Rule 6(2) of the Civil Procedure Rules, shows that an Applicant should satisfy the court that substantial loss may result to him unless the order is made; that the application has been made without unreasonable delay; and the Applicant must give such security as the court orders for the due performance of such decree.
21. The Court of Appeal aptly discussed the applicable principles in the case of *Butt vs Rent Restriction Tribunal [1979]* cited by Muchemi J in the case of *Jamii Bora Bank Limited & another vs Samuel Wambugu Ndirangu (2022) eKLR*, as follows: -
 - a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.



- c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order
22. The Applicant’s case is that she would suffer substantial loss unless stay was granted. Her argument is that the Ruling of the trial magistrate dismissing her Application should be stayed pending appeal. That she would suffer substantial loss if the same was not stayed.
23. The Respondent on the other hand has urged the position that the Ruling did not grant any positive order capable of being stayed. He relied on the case of Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union(Kenya)2015 eKLR where the court explained the purpose of stay as follows:-
- “ An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgement. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.”
24. In this case, both parties did not favour the court with sufficient background to the present Application. From what I could glean from the affidavits and submissions however, it appears that the impugned Ruling dated 25th November, 2024 and which is the subject of the intended Appeal was in respect of an Application for revocation of Grant. The trial court struck out the Application on the basis that the Applicant lacked locus to litigate in that succession cause. Technically therefore, and as urged by the Respondent, there was nothing to stay.
25. Perhaps the intention of the Applicant which was not manifest in the present Application, was to seek the court’s intervention to stay the implementation of the Grant earlier issued and confirmed, and which the Applicant sought to have revoked. A confirmed Grant, strictly speaking is an order of the succession court on how the property of the deceased should be distributed. The implementation of such a Grant indeed can be stayed. I however do not understand the present Application to be seeking such an Order. Indeed, there is no prayer to that effect. I agree with the Respondent that there was nothing to stay in the impugned Ruling.

Final Orders

26. In the end, the prayer for stay of execution of the Ruling dated 25th, November, 2024 cannot be granted and is dismissed.
27. The prayer seeking leave of the court to appeal out of time is merited and is hereby granted. The Draft Memorandum of Appeal annexed to the Application is deemed properly on record. The Applicant shall file the Record of Appeal within 30 days of today.
28. Each party shall meet their costs in this Application.
- Orders accordingly.



RULING DELIVERED, DATED AND SIGNED AT CHUKA THIS 24TH DAY OF APRIL, 2025.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr. Simiyu holding brief for the Respondent and in the absence of the Respondent. Muriuki (Court Assistant).

