



REPUBLIC OF KENYA



**Amusala v Gavunjii (Environment and Land Miscellaneous (Reference)
Application E001 of 2025) [2025] KEELC 3877 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3877 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND MISCELLANEOUS
(REFERENCE) APPLICATION E001 OF 2025**

E ASATI, J

MAY 15, 2025

BETWEEN

WOSIKA SHIKAKA AMUSALA APPLICANT

AND

MBWANGA JAPHETH GAVUNJII RESPONDENT

RULING

1. This is ruling is in respect of the Notice of Motion application dated 16th January 2024 expressed to be brought pursuant to the provisions of sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and Order 42 Rules 5 & 6 of the Civil Procedure Rules and Articles 50(1) and 159(2) of *the Constitution* of Kenya 2010.

The application seeks for orders that: -

- a. Pending hearing and determination of the intended appeal in the ELC Court at Vihiga the Honourable court be pleased to issue an order of stay of execution of the decree in Hamisi ELC Case No. 23 of 2021 and the subsequent orders emanating there from vis- a- vis the imminent eviction of the applicant from L.R No. KAKAMEGA /SHIRU/126
- b. That the intended applicant be granted leave to appeal out of time against the whole judgment of Hon. Melanie Ochieng – Senior Principal Magistrate delivered on 30th August 2024 at Hamisi in Hamisi MCL & E Case No. 23 of 2021.
- c. That the draft Memorandum of Appeal annexed to the application be deemed as duly filed and served.
- d. Costs occasioned by the instant application abide the outcome of the appeal.



2. The grounds upon which the application was brought were that the applicant had just been made aware of the judgment and that he was aggrieved and dissatisfied by the judgment dated 30th August 2024. That his appeal has serious triable issues and that the appeal shall be rendered nugatory should the stay order not be granted. That no prejudice shall be occasioned to the Respondent if the stay of execution is granted.
3. The application was supported by the contents of the Supporting Affidavit sworn on 16th January 2025 by the applicant and the annexures thereto.
4. The application was opposed vide the contents of the Replying Affidavit of Mbwanga Japheth Gavunji, the Respondent, sworn on 7th February 2025. The Respondents case is that for the entire time that the case was in court the applicant never attended court despite service being effected upon the applicant's advocates. That the applicant has failed to demonstrate substantial loss and that the application does not meet the threshold for grant of orders of stay of execution.

The application was canvassed by way of written submissions.

5. Written submissions dated 11th February 2025 were filed on behalf of the Respondent by the firm of Emily & Associates, Counsel relied on the case of Nicholas Kiptoo Korir Arap Salat –vs- IEBC and 7 others (2014) eKLR on the principles to guide the court in determining an application for extension of time within which to file an appeal. Counsel submitted that there had been inordinate delay on the part of the applicant in bringing the application. That the judgment was delivered on 20th August 2024 but it was not until 4 ½ months later on 16th January 2025 that the application was brought. Relying on the case of Neeta Gohil- vs Fidelity Commercial Bank Limited High court of Kenya at Nairobi Civil Appeal No. 93 of 2013 where it was held that a delay of 5 months was inordinate, Counsel urged the court to dismiss the application.
6. Counsel submitted further that the applicant cannot use his advocate's failure to attend court as a basis of getting the order of stay of execution. That the applicant had not demonstrated what efforts he made as the principal to ensure that his advocate was discharging his duties as required.
7. That the applicant had not demonstrated what substantial loss he will suffer if stay is not granted. That the Respondent is the registered owner of the suit land to which the applicant has no right. That the applicant is occupying the Respondent's land illegally and should not be allowed to continue in his wrong doing. That the Respondent is entitled to the fruits of the judgment. Counsel relied on the case of Samvir Trustee Limited -vs - Guardian Bank Limited {2007} eKLR where it was held, inter alia, that the fundamental factor to bear in mind in deciding an application for stay of execution is that a successful litigant is prima facie entitled to fruits of his judgment.
8. No submission had been filed by the applicant as at date of writing this ruling. On 13/2/2025 the matter was adjourned to grant the applicant time to engage an advocate and file submissions. By 13/3/2025 when the date for the ruling was set the applicant had not filed his submissions. The court granted him 7 more days from 13/3/2025 to file written submissions. The 7 days elapsed on 20/3/2025.
9. Two substantive prayers are sought in the application, firstly; a prayer for extension of time within which to file the appeal and secondly, a prayer for stay of execution of the trial court's judgement pending appeal.
10. In the cases of Leo Sila Mutiso vs Rose Hellen Wangeci Civil Appeal No 255 of 1997 and First America Bank of Kenya Limited vs Gulab P. Shah & others HCC No 2255 of 2000 to [2002] IEA 65 the courts held that the grounds to consider in an application for leave to file appeal out of time include:



- i. the explanation, if any, for the delay,
 - ii. the merits of the contemplated action;
 - iii. whether the appeal is arguable.
 - iv. whether or not the Respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favor of the applicant.
11. The explanation given for the delay to file the appeal within the time provided by law is that the applicant's advocate failed him. That the advocate failed to attend court and to inform him of the progress of his case and even the outcome thereof. To prove that he had instructed Counsel, the applicant exhibited 2 receipts for fees paid to the firm of Ben Aduol Nyanga & Co Advocates totaling to 15,000/-. There is no indication on the receipt that the payments were for the case the subject matter of this application. The receipts show that the applicant owed the advocate a balance of Ksh 20,000/-. There is therefore no demonstration that the applicant gave instructions to Counsel. Instructions to Counsel, as I understand it, entails inter alia payment of agreed professional fees and provision of all the requisite information and material to enable the Advocate defend the party's interest in the case. A party who wants to lay blame on his/her Advocate for some failure must demonstrate that the Advocate had full instructions but failed to act in the best interests of the client.
12. The court is not satisfied with the explanation given for failure to file appeal within time.
13. The application was brought after delay of more than 4 months which I find unreasonable in the circumstances of the case.
14. The suit in the trial court proceeded ex parte. The applicant's evidence, if any is not on record. The court is not satisfied that this is a matter for appeal. The applicant has recourse to the trial court, subject to the discretion of the trial court and any time limitations, to seek review and/or settling aside of the judgment so as to enable him adduce his evidence, if any.
- The prayer for leave to file appeal out of time therefore fails.
15. And as the prayer for stay of execution is dependent on the prayer for leave to file appeal out time being granted, the same also fails.
16. For the foregoing reasons the application is hereby dismissed. Each party to bear own costs of the application.

Orders accordingly.

RULING, DATED AND SIGNED AT VIHIGA AND READ VIRTUALLY THIS 15TH DAY OF MAY 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Ajevi Court Assistant.

Kundu h/b for Chitwah for the Applicant.

Kadenyi for the Respondent.

