



**Madadi v Theuri (Environment and Land Appeal E054 of 2024)
[2025] KEELC 3916 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3916 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E054 OF 2024**

CK YANO, J

MAY 15, 2025

BETWEEN

SAMUEL ANYAMBA MADADI APPELLANT

AND

DAVID THEURI RESPONDENT

RULING

1. Vide a Notice of Motion Application dated 14th November, 2024, the Appellant sought the following orders: -
 - a. Spent.
 - b. That there be a stay of execution of the judgment/decree in Eldoret Chief Magistrates Court ELC No. 120 of 2018 – David Theuri v Samuel Anyamba Madadi pending the hearing and determination of the appeal herein.
 - c. That the time for appeal as against the decision dated the 27th August, 2024 in Eldoret Chief Magistrates Court ELC No. 120 of 2018 – David Theuri v Samuel Anyamba Madadi be extended and the appeal herein be admitted out of time.
 - d. That the extension of time does operate as a validation of the appeal herein.
 - e. That the costs of this application be provided for.
2. The application is anchored on the 7 grounds on the body of the application and supported by the affidavit sworn by the Appellant on even date.
3. The appellant avers that judgment was delivered in the trial court on 27.8.2024 but only learnt of the same sometimes on 15.10.2024 upon visiting his previous advocate. He outlined the terms of the judgment thereof, which was entered against him and issued an order of mandatory injunction and



- permanent injunction. That the said judgment directed that he should vacate the suit land within a period of 90 days and in default, he be evicted.
4. It is his claim that upon learning of the judgment, he retained his current advocates to undertake the appellate process. They filed an application for leave to effect the change of advocate, which was granted on 16/10/2024. The change of advocates was filed on 18/10/2024.
 5. Unfortunately, the advocate became bereaved immediately after the filing of the change of advocates and was therefore unable to proceed with the appeal process since he had to undertake the burial preparation. He deponed that his advocate was only able to resume duty on 11/11/2024.
 6. He further added that the appeal raises genuine issues which are arguable and not frivolous. It is therefore his contention that the delay was occasioned by valid grounds and thus urged the court to extend the time for appeal.
 7. On the issue of stay of execution, it was his contention that he stands to suffer substantial loss through eviction from the suit land, which he has been occupying for the past 18 years unless the orders of stay of execution sought is granted.
 8. He deponed that in the event the appeal succeeds after execution of the judgment and he has been evicted, then getting the land back would be a problem as the respondent may have dealt with it either by sub-division or through sale.
 9. He further averred that the application had been filed without delay, considering the steps taken of changing his previous advocate. He added that he is ready and willing to abide by such terms as to security for the due performance of the decree as the court may impose. He urged the court to allow the application as prayed.
 10. The application was opposed. The Respondent filed a Replying Affidavit sworn on 9th December, 2024. He dismissed the application as being incompetent, an afterthought, misadvised, misconceived, bad in law, baseless, frivolous, scandalous and an abuse of the court process aimed at delaying the execution process. It was his claim that the applicant has approached the court with unclean hands and is guilty of material non-disclosure.
 11. It is his contention that there has been inordinate and inexcusable delay in the filing of the application, the same having been instituted after about 3 months after judgment was delivered. It is his claim that the applicant has neither sufficiently explained the delay nor has he demonstrated that he has a good and sufficient cause for not filing the appeal within the strict statutory timelines.
 12. He further averred that the memorandum of appeal does not disclose an arguable appeal with a probability of success.
 13. He opined that the application has been filed to assist the applicant remain in occupation despite the judgment and decree of the trial court. He dismissed the allegations made by the applicant of subdividing the land or selling the same as mere apprehension and maintained that he does not intend to dispose off the suit land as alleged.
 14. It is also his claim that the applicant has not substantiated the loss he stands to suffer should the application be disallowed or whether costs would be adequate compensation for the alleged substantial loss.
 15. On the contrary, it was his contention that he stands to suffer great prejudice should the application be allowed as he will not be able to utilize the suit land.



16. Moreover, it was his assertion that the applicant has not met the principles that govern the issuance of orders of stay of execution pending appeal as envisaged in Order 42 Rule 6. He urged the court to dismiss the application in the interest of justice.
17. On 4/2/2025, this court issued directions that the Application be canvassed by way of written submissions. From a perusal of the court record, I have only seen the applicant's submissions dated 19th March, 2025 which I have read and considered. Be that as it may, I will proceed to determine the application as hereunder.

Analysis and Determination:

18. I have read and considered the grounds in the application, the supporting affidavit and the response thereto as well as the applicant's submissions and it is my considered opinion that the issues arising for determination include;
 - i. Whether leave should be granted to file the appeal out of time against the judgment in Eldoret CMC ELC Case No. 120 of 2018 dated 27.08.2024.
 - ii. Whether an Order for Stay of Execution can issue against judgment and decree issued on 27th August, 2024.
 - i. Whether leave should be granted to file the appeal out of time against the judgment in Eldoret CMC ELC Case No. 120 of 2018 dated 27.08.2024;
19. The governing law on enlargement and/or extension of time to file an appeal is section 79G of the [Civil Procedure Act](#) and which 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.”
20. Section 95 of the [Civil Procedure Act](#) further provides that: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
21. The above sections empower the court to enlarge the strict timelines of filing appeals, where the period had expired and allows the court to admit appeals filed out of the 30 days limit period. However, before the court considers such extension an applicant must satisfy the court that they have good and sufficient cause for filing the appeal out of time.
22. The Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR outlined the guiding principles that courts ought to consider in an application for enlarging time to appeal as follows: -

“We derive the following as the under-lying principles that a Court should consider in exercise of such discretion:



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.
5. The delay should be explained to the satisfaction of the Court;
6. Whether there will be any prejudice suffered by the respondents if the extension is granted;
7. Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time”.

[See also the Court of Appeal decision in Paul Musili Wambua v Attorney General & 2 Others [2015] eKLR].

23. It is the applicant’s contention that even though judgment was delivered on 27.8.2024, he only learnt of the same on 15.10.2024. That his previous advocate never informed him of the delivery of the judgment as soon as it was delivered. He went on to explain the steps taken on his part, including instructing his current advocate to the various application and the change of advocate.
24. He further explained that his current advocate became bereaved and was out of the office for some time until 11/11/2024 and hence the filing of the application on 14/11/2024. He thus maintained that his explanation was valid and sufficient to warrant the extension of time.
25. The respondent on the other hand has dismissed the application as an afterthought and a delay tactic. That the reasons for the inordinate delay had not been sufficiently demonstrated or explained, and that there was no sufficient or good cause why the appeal was not filed within the stipulated timelines.
26. I have considered the explanation tendered by the applicant; from the time he found out the judgment of the trial court to the steps taken in instructing his current advocate and the process that ensued thereafter.
27. While I appreciate that cases belong to the clients and that the onus was on the applicant to follow up on the progress of the matter promptly, I do also acknowledge the right of representation by counsel of choice and find the explanation tendered by applicant of the steps taken to be sufficient in the circumstances.
28. This court has further had an opportunity to look at the draft memorandum of appeal dated 14.11.2024 and I must state that the grounds set therein raise arguable points with probability of success. It is also my finding that no prejudice will be occasioned to the respondent as he will have the opportunity to prosecute the appeal on merit.
29. This court will therefore grant the applicant the benefit of doubt and find that the explanation tendered by the applicant is sufficient and satisfies the criteria set out in section 79G.



ii. Whether an Order for Stay of Execution can issue against judgment and decree issued on 27th August, 2024;

30. It is trite law that no appeal shall operate as an automatic stay of execution. The purpose of an order of stay of execution is to preserve the substratum of appeal and ensure that the appeal is not rendered nugatory.
31. Order 42 Rule 6[1] of the Civil Procedure Rules, 2010 empowers the court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal.
32. Order 42 Rule 6[2] further sets out the grounds to be considered and provides as follows: -
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.

[emphasis added]
33. Thus, the three prerequisite conditions to be satisfied to warrant the grant of an Order for Stay of execution are;i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered,ii. The application is brought without undue delay and,iii. Security for costs as the court orders for the due performance of such decree or order.
34. The first ground to be established is on substantial loss. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma v Abuoga* [1988] KLR 645 where their Lordships stated that:-
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
35. The applicant is under a duty to demonstrate the loss he is likely to suffer if the order for stay of execution sought is not granted. It is not merely sufficient to state that substantial loss may occasion on the applicant without demonstrating the same. [See *New Stanley Hotel Ltd v Arcade Tobacconist* [1980] KLR 757
36. It is the applicant’s claim that unless the orders sought are granted, the respondent would be at liberty to execute the decree in his favor, by evicting him. It is his contention that he had been in occupation of the suit land for a period of over 18 years.
37. Even though the respondent averred that the applicant had not substantiated the loss he stands to suffer should the orders sought not be granted, I find that the same was sufficiently demonstrated. Moreover, at paragraph 24 of his replying affidavit, the respondent correctly stated and admitted that there was nothing stopping him from executing the judgment in his favor and taking possession of the suit land.
38. I have carefully looked at the judgment of the trial court dated 27.8.2024 and its effect and I agree with the applicant that unless the orders sought are granted, there is nothing stopping the respondent herein from evicting the applicant from the suit parcel.
39. In view of the foregoing, I find and hold that the Applicant has sufficiently demonstrated the substantial loss he is likely to suffer to the required standard.



40. The second ground is whether the application has been filed without undue delay. The judgment in question was delivered on the 27th August, 2024 while the instant Application was filed on the 14th November, 2024, which is 2 months 18 days. Does the said period amount to an inordinate delay?
41. Courts have held that a delay of even one day may amount to an inordinate delay where no sufficient and satisfactory explanation has been tendered by an applicant. However, as held herein above, I have taken into account the explanation tendered by the applicant and I find that the same is sufficient. Consequently, I find that there was no inordinate delay in filing the instant application.
42. The final element is on the deposit of security for costs as the court may direct. The court in the case of *Arun C. Sharma v Ashana Raikundalia T/A Raikundalia & Co. Advocates and 2 others* [2014] eKLR, held that: -
- “The purpose of the security under Order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor....civil process is quite different because in civil process the judgment is like a debt hence the applicant become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the civil procedure rules acts as a security for the performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”
43. The applicant expressed his willingness and readiness to deposit the security for costs as the court may direct. The respondent on the other hand urged the court to dismiss the application and give him an opportunity to enjoy the fruits of his judgment.
44. This court however acknowledges that the subject matter in question is a parcel of land and not a money decree. I will therefore exercise my discretion in favour of the applicant and allow the application for stay but on condition that he gives security and further direct the applicant to expedite the appeal by filing the required documents.
45. In view of the foregoing, I find that the Applicant has satisfied the 3-limb test provided under the Civil Procedure Rules to the required standard.
46. In the upshot, I accordingly find that the Notice of Motion Application dated 14th November, 2024 is merited and is hereby allowed in the following terms: -
- a. Time be and is hereby extended for purposes of filing the appeal against the decision dated the 27th August, 2024 in Eldoret Chief Magistrates Court ELC No. 120 of 2018 – *David Theuri v Samuel Anyamba Madadi* and the memorandum of appeal dated 14th November, 2024 is hereby admitted out of time and deemed to be validly filed, subject to payment of the requisite court fees.
 - b. An order of stay of execution is hereby issued against the judgment dated 27/8/2024 and decree in Eldoret Chief Magistrates Court ELC No. 120 of 2018 pending the hearing and determination of the appeal herein.
 - c. The Applicant is hereby directed to deposit Kshs. 50,000/= in court as security for Costs for the due performance of the decree within 45 days from the date of this Ruling.
 - d. Failure to comply with orders [c] hereinabove, Order [b] hereinabove shall automatically lapse.
 - e. Costs of the Application shall abide the outcome of the appeal.



47. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF MAY, 2025.

HON. C. K. YANO

JUDGE

Ruling delivered in the presence of: -

Mr. Kagunza for Respondent.

Ms. Mua Wambua for Appellant.

Court Assistant – Laban

