



**Mwaura v Waitherero & 5 others (Miscellaneous Application
E081 of 2024) [2025] KEELC 4645 (KLR) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4645 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION E081 OF 2024**

JM ONYANGO, J

JUNE 19, 2025

BETWEEN

PAUL GITAHU MWAURA APPLICANT

AND

JANE WAITHERERO 1ST RESPONDENT

HANNAH WAITHERA NJOROGE 2ND RESPONDENT

AYUB NJUGUNA MWAURA 3RD RESPONDENT

SAMMY WACHIRA MWAURA 4TH RESPONDENT

JOHN K NJATTA MWAURA 5TH RESPONDENT

JACOB KARANJA MWAURA 6TH RESPONDENT

RULING

1. The Applicant moved the court *vide* a Notice of Motion dated 14th November, 2024, seeking the following orders:
 1. Spent
 2. That this honourable court be pleased to grant leave and enlargement of time to the Applicant to file and serve their preferred Appeal late and out of time.
 3. That pending the hearing and determination of this application, this honourable court be pleased to stay the execution of its judgment dated 16th March 2022 and decree dated 27th March 2022 and/or issue a preservative order maintaining the status quo pending the hearing and determination of this Application on merit.



4. That pending the hearing and determination of the preferred appeal, this honourable court be pleased to stay the execution of its judgment dated 16th March 2022 and decree dated 27th March 2022 and/or issue a preservative order maintaining the status quo pending the hearing and determination of this Appeal on merit
5. That the costs of this application be provided for.
2. The Application is based on the Applicant's Supporting Affidavit sworn on the 14th November, 2024 in which he deposes that he became aware of the suit at the trial court and the impugned judgment dated 16th March, 2022, sometime in 2023 when he was served with the same together with the 1st and 2nd Respondent's application dated 15th March 2023, via WhatsApp. He further deposes that the said judgment affects his interest in Land Parcel Number Gatamayu/Kaaga/49, which he jointly owns together with other parties.
3. He contends that he immediately retained the services of his advocates on record who filed a Notice of Appointment dated 1st November 2023 at the trial court, together with a Notice of Motion application of even date filed under Certificate of Urgency seeking an order for stay of execution of the impugned Judgment. He also sought an order to set aside the Judgment. The trial court allowed the prayer for stay of execution on 2nd November 2023 pending hearing and determination of the application. He explains that the trial court delivered a ruling on 9th October 2024, dismissing the application dated 1st November 2023, prompting him to file the present

Application.

4. He contends that the delay in instituting an appeal against the Judgment dated 16th March 2022 was occasioned by the fact that proceedings were continuing at the trial court due to the multiple post-judgment applications filed.
5. He states that his advocates have filed a draft Memorandum of Appeal and have applied for typed proceedings at the trial court to facilitate the preparation of a Record of Appeal. He further states that he is ready to offer security against costs that this court may deem fit to impose.
6. He has annexed a copy of the judgment dated 16th March 2022, together with the resultant decree, extract of WhatsApp conversation depicting service of the impugned judgment, a copy of the notice of appointment dated 1st November 2023, a copy of a letter requesting for proceedings at the trial court, a copy of the order dated 2nd November 2023, a copy of the Applicant's application dated 1st November 2023, a copy of the ruling dated 9th October 2024, and the 1st and 2nd Respondent's application dated 15th March 2023 seeking execution of the judgment dated 16th March 2022.
7. The Application is opposed by the 1st and 2nd Respondents through the Replying affidavit of Jane Waitherero (1st Respondent) sworn on 17th December, 2024. In the said affidavit, she urges this court to dismiss this application on the ground that it is vexatious, frivolous and a gross abuse of the court process. She avers that the suit at the trial court was instituted vide originating summons as *Nairobi High Court ELC Case No.648 of 2012 (OS)*. She further avers that it was later transferred to the *Kiambu Chief Magistrate's Court and registered as Kiambu ELC No. 33 of 2018*.
8. She explains that the trial court vide a ruling delivered on 5th October 2022, issued a stay of execution order pending hearing of the appeal on condition that the Applicant and the 3rd to 6th Respondents herein furnish security by depositing the decretal sum of Kshs.1,300,804 within 30 days from the date of the ruling in a joint interest earning account in the names of the advocates at a reputable bank, in default of which the 1st and 2nd Respondents would be at liberty to execute. She adds that the said



order was not complied with, prompting her and the 2nd Respondent to file the application dated 15th March 2023 to facilitate execution of the judgment.

9. She contends that the Applicant and the 3rd to 6th Respondents sought leave to file an appeal out of time in *Thika ELC Miscellaneous Application No. E27 of 2022* through the firm of M/s Kimoriot Jemator & Company Advocates. She states that the Application was allowed by consent, and the Applicant and 3rd to 6th Respondents proceeded to file *Thika ELC Appeal No. E054 of 2022*.
10. She further contends that on 24th May 2023, Justice Eboso issued an order requiring the Applicant and the 3rd to 6th Respondents to file and serve the Record of Appeal in *Thika ELC Appeal No. E054 of 2022*, within 30 days, failure to which the appeal would stand dismissed. She adds that the court noted that the proceedings in the trial court had already been typed and that the trial court file had already been forwarded to the Thika ELC Court for purposes of admitting the appeal. She explains that as a result of the Applicant's and the 3rd to 6th Respondents' failure to comply with the aforementioned order, the Appeal was dismissed on 6th July 2023, and the trial court file was returned to Kiambu Law Courts.
11. She contends that she then instructed their Advocates to set down the application dated 15th March 2023 for hearing. She further contends that on 11th October 2023, the court directed that the Application be served personally upon all the parties, hence they effected service via WhatsApp.
12. She states that upon dismissing the Applicant's application on 9th October 2024, the trial court scheduled their application dated 15th March 2023 for directions on 6th November 2024. The application was served upon the Applicant and the 3rd to 6th Respondents, who are yet to file any response to the application. She adds that the application was scheduled for directions on 8th January 2025, as the subordinate court was not sitting on 6th November 2024.
13. It is her position that the Applicant only filed this application after the application dated 15th March 2023 had been scheduled for directions in the trial court, as an attempt to prevent them from enjoying the fruits of the Judgement. She is of the opinion that, if the Applicant was aggrieved by the ruling, he ought to have appealed against the ruling and not the Judgement, given that the Appeal against the Judgement had already been dismissed. In response to the allegation by the Applicant of forgery of his signature in the pleadings at the lower court, she contends that the Applicant should have attached a document examiner's report as proof of the alleged forgery.
14. The Application was canvassed through written submissions. The Applicant filed written submissions dated 15th February 2025, while the 1st and 2nd Respondents filed written submissions dated 5th March 2025, which I have keenly considered.
15. The only issue for determination is whether the Applicant should be granted leave to appeal out of time and if so whether execution ought to be stayed.
16. The principles for granting an application for leave to appeal out of time are now well settled. In the case of *Nicholas Kiptoo Arap Salat v IEBC & 7 Others* [2014] eKLR, it was held that:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:



- 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 extension of time has the burden of laying a basis, to the satisfaction of the Court;
 - c. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
 - d. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 - e. whether there will be any prejudice suffered by the respondents, if extension is granted;
 - f. whether the application has been brought without undue delay;”
17. In an application for extension of time, the Applicant must explain the delay in filing the appeal to the satisfaction of the court. The Applicant has deposed that he became aware of the suit at the trial court and the impugned Judgment dated 16th March, 2022, sometime in 2023 when he was served with the same together with the 1st and 2nd Respondents’ application dated 15th March 2023, via WhatsApp. He has explained that he immediately appointed his advocates who filed an application dated 1st November 2023 seeking a stay of execution against the impugned Judgment and order setting aside the same. The said application was dismissed by the trial court vide a ruling rendered on 9th October 2024. It is the Applicant’s position that the delay in instituting an appeal against the impugned Judgment was occasioned by the fact that proceedings were continuing at the trial court due to the multiple post-judgment applications filed.
 18. The 1st and 2nd Respondents have asserted that this application is vexatious given that the Applicant has sought similar prayers before via different applications which were granted. They have explained that vide a ruling dated 5th October 2022, the trial court issued a stay of execution order pending hearing of the appeal on condition that the Applicant and the 3rd to 6th Respondents furnish security by depositing the decretal sum of Kshs.1,300,804 within 30 days. They added that the said order was not complied with, prompting them to pursue execution proceedings.
 19. The 1st and 2nd Respondents have further contended that the Applicant and the 3rd to 6th Respondents sought leave to file an appeal out of time against the impugned Judgment in *Thika ELC Miscellaneous Application No. E27 of 2022*. The said Application was allowed by consent, and the Applicant and 3rd to 6th Respondents proceeded to file *Thika ELC Appeal No. E054 of 2022*.
 20. They explain that on 24th May 2023, the court [Justice Eboso] in *Thika ELC Appeal No. E054 of 2022* issued an order requiring the Applicant and the 3rd to 6th Respondents to file and serve the Record of Appeal within 30 days, failure to which the appeal would stand dismissed. They further explain that as a result of the Applicant’s and the 3rd to 6th Respondents’ failure to comply with the aforementioned order, the Appeal was dismissed on 6th July 2023. The Applicant did not respond to these allegations.
 21. A perusal of the Memorandum of Appeal attached to this application indicates that the Applicant seeks leave to appeal against the “decision” of the trial court delivered on 16th March 2022, the decree dated 27th May 2022 and any consequential orders therein. The said decision referred to is the impugned Judgment. Given that a similar application had already been filed in *Thika ELC Miscellaneous Application No. E27 of 2022* and an appeal against the decision filed in *Thika ELC Appeal No. E054 of 2022*, this court finds that the present application is *res judicata*.



22. Section 7 of the Civil Procedure Act defines the doctrine of Res Judicata as follows: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

23. The Supreme Court in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, while considering the provisions of section 7 of the Civil Procedure Act, held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked, that is: -

- “(a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

24. I find that the elements outlined in the aforementioned case have been met. Consequently, it is my further finding that this application lacks merit and it is hereby dismissed with costs to the Respondents.

DATED SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 19TH DAY OF JUNE 2025.

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J. M ONYANGO

JUDGE

In the presence of

Mr Muthomi for the Plaintiff/ Respondent

Mr Odoyo for the Defendant/ Applicant

Court Assistant: Hinga

