



REPUBLIC OF KENYA



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**Wanonyi v Mauko; Mahava (Interested Party) (Environment & Land
Case 78 of 2005) [2025] KEELC 4958 (KLR) (13 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4958 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 78 OF 2005**

**EC CHERONO, J
JUNE 13, 2025**

BETWEEN

BENARD WAMALWA WANONYI PLAINTIFF

AND

FESTO MUNYASI MAUKO DEFENDANT

AND

VINCENT SAKWA MAHAHA INTERESTED PARTY

RULING

1. The plaintiff, Benard Wamalwa Wanyonyi moved this Honourable Court vide a Notice of Motion under certificate of urgency dated 29th January 2025 seeking the following orders;
 1. (Spent)
 2. That the Applicant be granted leave to file an appeal out of time.
 3. That there be a temporary stay of execution against the judgment herein and all consequential orders and/or proceedings arising therefrom pending the hearing and determination of this application interparties.
 4. That there be an injunction restraining the defendant through the Deputy Registrar of the High Court of Kenya at Bungoma in executing the necessary land forms in transfer of the said portion pending the hearing and determination of the appeal filed at Court of Appeal in Kisumu vide NO.-----of 2025.
 5. This Honourable Court pleased to set aside the judgment obtained by the defendant on the 11th day of October, 2024 and all consequential orders and/or proceedings arising therefrom.



6. This honourable court be pleased to rectify the date of the judgment delivered on the 11th day of October 2024 but on the judgment granted or delivered to the Applicant is dated 11th March 2024 erroneously printed and signed by honourable Justice E.C Cheron Environment and Land Court judge.
7. That the cost of this application be provided for.
2. The application is premised on six grounds apparent on the face of the said application supported by the affidavit of the plaintiff/Applicant sworn on even date.
3. The said application is opposed by Festo Muniyasi Mauko who is the defendant herein vide a Replying affidavit sworn on 21st February 2025. The Interested party also opposed the said application vide a Replying affidavit sworn on 18th March 2025.

Plaintiff/applicant's Summary Of Facts.

4. In his supporting affidavit, the Plaintiff/Applicant deposed that this Honourable court delivered judgment in favour of the Respondent for excision and transfer of 14 acres from his land parcel NO. E.Bukusu/W.Sang'alo/724. That he was dissatisfied with the said judgment and intends to prefer an appeal to the Court of Appeal at Kisumu. He stated that execution is imminent unless a stay of execution order is issued against the Respondent either by himself, his servants, agents or employees. He further deposed that the Respondent has even filed his bill of costs in further execution of the judgment of this court and unless the orders sought are granted, he will suffer irreparable loss and damage.

Defendant/respondents Summary Of Facts

5. The defendant/Respondent filed a Replying affidavit sworn on 21st February 2025 and stated that judgment was entered in his favour on 11/10/2024 in which this Honourable court awarded him 14 acres out of the suit land parcel NO. E.Bukusu/W.Sang'alo/724. He stated that the plaintiff/Applicant has failed to provide any reasonable explanation for the delay in filing the appeal and that this application is a tactic to frustrate him from enjoying the fruits of his judgment and that plaintiff/Applicant has been indolent by going to slumber instead of preferring the appeal on time. While opposing the application, the Respondent deposed that even if leave were granted to the plaintiff/Applicant to appeal out of time, the proposed appeal has no merit and that the same is not arguable. He deposed that allowing the application would cause him significant prejudice since he has been kept out of reach of the land for the last 18 years

Interested Party's Summary Of Facts

6. The Interested party on his part deposed that the application is devoid of merit and constitutes a clear abuse of the court process. He stated that the application is improperly before court as the Applicant has not sought leave to act in person under Order 9 Rule 9 CPR. He further stated that the Applicant has attached an erroneous document marked BWW1, specifically a Draft Memorandum of Appeal in an attempt to show his intention to appeal to the court of appeal. He deposed that the Applicant has not provided any proof to substantiate his allegation that he has initiated the appeal process nor made a formal request for typed proceedings nor certified copy of judgment. The Interested party also deposed that the Applicant has not provided security as required for the grant of stay pending appeal nor has he demonstrated any evidence of substantial loss unless the orders sought are disallowed. He stated that in deciding the application before court, this court must balance the interests of both the



plaintiff/Applicant and the Interested party to ensure that the 2nd Interested party enjoys the fruits of the judgment.

Plaintiff/applicant's Written Submissions

7. The plaintiff/Applicant submitted that he has set out a clear case to warrant the grant of stay pending appeal. He relied in the case of *Patel v East Africa Cargo Handling Services Ltd (1974) EA 75*

Defendant/respondent's Written Submissions.

8. The defendant/Respondent through the Firm of M/S J.O Makali & Co. Advocates filed their submissions dated 19th May 2025 in which they raised four issues as follows;
 - i. Whether the Applicant has satisfied the conditions for the grant of leave to appeal out of time?
 - ii. Whether the Applicant is entitled to a stay of execution?
 - iii. Whether injunctive orders restraining transfer of land should issue?
 - iv. Who should bear the costs of the application?
9. On the first issue, the learned Counsel cited the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral And Boundaries Commission & 7 Others (2014) KLR* where the Supreme Court outlined the following principles for extension of time to file appeal out of time;
 1. Length of the delay.
 2. Reasons for the delay.
 3. Whether the appeal is arguable.
 4. Degree of prejudice to the other party and
 5. Whether the application was made in good faith.
10. She argued that the Applicant falsely alleged that that judgment was delivered on 11th March 2024 when the same was in fact delivered on 11th October 2024. She submitted that this deliberate misrepresentation is a sufficient ground for this court to decline the exercise of its discretion in favour of the Applicant. She submitted that the Applicant has not offered any reasonable explanation for the delay of over three months and that equity aids the vigilant not the indolent.
11. On the second issue, the learned counsel submitted that in an application for stay of execution under order 42 Rule6 CPR, the Applicant must demonstrate the following;
 - i. Substantial loss may result if stay is not granted
 - ii. The application was made without unreasonable delay and
 - iii. Provision of security for the due performance of the decree has been given.
12. She submitted that the Applicant has not demonstrated any substantial loss he is likely to suffer if the orders are not granted and that the Respondent continue to suffer prejudice and deprivation of his property rights since 2005. She further submitted that the Applicant has not offered nor deposited any security and that the delay in bringing this application negates any urgency or bona fides.



Interested Party's Written Submissions.

13. The Interested party through the Firm of M/s Maina & Macharia Advocates LLP submitted on the following 4 issues;
 - i. Whether the application is properly before Court?
 - ii. Whether the Applicant should be granted leave to Appeal out of time?
 - iii. Whether a stay of execution should be granted against the judgment delivered on the 11th of October 2024 and
 - iv. Whether the Honourable Court should set aside the judgment dated 11th October 2024 and all consequential orders.
14. On the first issue, the learned counsel submitted that the Applicant's application is not properly before court as it fails to comply with order 9 Rule 9 CPR. He relied in the case of S.K Tarwadi v Veronica Muehlemann (2019) eKLR.
15. As regards the second issue, the learned Counsel cited the case of Mombasa County Government v Kenya Ferry Services & 2 Others (Application 29 of 2018 (2019) KESC 50 (KLR) (25 February 2019) (Ruling) and submitted that as set out in the aforementioned decision, extension of time is not a right that a party is entitled to but an equitable remedy and that the court exercises its discretion only to deserving cases. She submitted that the Applicant has not given sufficient grounds to justify an extension especially when the delay in filing the appeal is not adequately explained.
16. The learned counsel referred to the third issue and submitted that order 42 Rule 6 CPR sets out the conditions for the grant of stay pending appeal and that the Applicant has failed to show how they would suffer substantial loss unless stay of execution is granted. She also submitted that the Applicant has failed to file the application in a timely manner and has also failed to offer a reasonable explanation for the same. Lastly, the learned counsel submitted that the Applicant failed to provide security and therefore he is not deserving of the orders sought.
17. On the final issue, the learned counsel submitted that the Applicant has not demonstrated any error or injustice that occurred during the hearing or in the rendering of the judgment. She relied in the case of Helbling v Masha & Another (land case 157 of 2016) (2023) eKLR.

Legal Analysis And Decision.

18. I have considered the Notice of Motion application, the supporting affidavit, the replying affidavits, the proceedings in this case generally, the submissions by Counsel and the relevant law. The Applicant in the application under review is seeking six orders as follows;
 1. Leave to file appeal out of time.
 2. A temporary stay of execution of the judgment/decreed delivered on 11th October, 2024
 3. A temporary injunction restraining the Deputy Registrar of this Court from executing land transfer forms in favour of the Respondent.
 4. Setting aside the of this court delivered on 11th October 2024 and all consequential orders.
 5. This honourable court be pleased to rectify the date of the judgment to read 11th October, 2024 instead of 11th March, 2024



6. Costs of this application be provided for.
19. It is not in dispute that the leave to appeal out of time sought by the Applicant herein is in respect of the Judgment delivered by this Court on 11th October 2024. Rule 77 of the Court of Appeal Rules reads as follows;
 1. A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the Registrar of the Superior Court.
 2. Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.”
20. As stated hereinabove, this Court delivered its judgment on 11th October 2024 and the plaintiff had 14 days to lodge his appeal which lapsed on 28th October 2024. No reasons or explanations have been given by the Applicant for failing to file his appeal timeously. The principles guiding the extension of time to file an appeal were set out in the case of NICHOLAS KIPTOO ARAP KORIR SALAT V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS (2014) eKLR where the Supreme Court outlined the following factors to be considered;
 - i. The length of the delay.
 - ii. Reasons for the delay.
 - iii. Whether the appeal is arguable.
 - iv. Whether the opposite party would be prejudiced and
 - v. Whether this Honourable Court should set aside its judgment delivered on 11th October, 2024
21. In this case, the Applicant has not offered any reasonable or sufficient grounds for the delay which was over three months. I find the prayer for extension of time to file appeal not merited.
22. The Applicant is also seeking stay of execution of the decree pending appeal. The grant of an order for stay pending appeal is governed by order 42 Rule 6(2) CPR. Under the law, the Applicant is required to demonstrate that he would suffer substantial loss unless the order is granted. He is also required to show that the application has been filed without unreasonable delay and finally, give security as the court may require for the due performance of the decree. The Applicant has not demonstrated any of the three conditions. He merely stated that he will suffer substantial loss and damages without substantiating. In my view, the Applicant is not deserving the orders sought as the three conditions have not been established.
23. The third prayer is for the grant of a temporary injunction pending hearing and determination of the intended appeal. The plaintiff in his amended plaint dated 11th December, 2017 had sought orders for inter alia a permanent injunction against the defendants, his agents, representatives, assigns and any person whosoever claiming through him from interfering with his lawful occupation, use and possession of the suit land parcel NO. E.Bukusu/W.Sang'alo/3040 and E.Bukusu/W.Sang'alo/3041 respectively. In the impugned Judgment delivered by this Court on 11th October 2024, the plaintiff's suit was dismissed. Once a Court has rendered itself after hearing and determination on merits, it becomes inconceivable to grant the very same order it declined in its judgment. The order for a temporary injunction in my view is an abuse of the court process and must be rejected.
24. The fourth prayer is whether the opposite parties would be prejudiced if the orders sought are granted. From the judgment of this Court delivered on 11th October 2024, the plaintiff's suit was dismissed and judgment was entered in favour of the Defendant's counterclaim for 14 acres out of land parcel



NO. E.Bukusu/W.Sang'alo/724. This Court also cancelled the registration of the Interested Party as proprietor of land parcel NO. E.Bukusu/W.Sang'alo/3038 and ordered the plaintiff to refund him Kshs.2,140,000 plus interest thereon at court rates from the date of the judgment till payment in full. It is clear that judgment was entered in favour of the defendant and the interested party who would be prejudiced if the orders sought are granted. For that reason, the application must fail.

25. The fifth and last issue is whether this Honourable Court should set aside its judgment delivered on 11th day of October, 2024 and all consequential orders. I have looked at the grounds apparent on the face of the said application, the supporting affidavit and his submissions and note that the Applicant has not demonstrated any error or injustice that occurred during the hearing or in the course of the proceeding which would render the judgment irregular or void. The plaintiff/Applicant has therefore failed to demonstrate any ground to warrant the setting aside of the impugned judgment.
26. The upshot of my finding is that the Notice of Motion application dated 29th January 2025 is devoid of merit and the same is hereby dismissed with costs.

Orders accordingly.

READ, DATED DELIVERED AND SIGNED AT BUNGOMA THIS 13TH JUNE, 2025.

HON. E.C CHERONO

ELC JUDGE

In the presence of;

M/S Nekesa H/B for M/S Masengeli for the respondent.

Plaintiff/Applicant-present.

M/S Macharia for the Interested party.

Bett C/A.

