



**Otieno (Suing as Legal Representative of the Estate of Isaiah Otieno Omondi alias Otieno Omondi - Deceased) v Murenga & 3 others (Environment and Land Appeal E026 of 2023) [2025] KEELC 7019 (KLR) (16 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7019 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E026 OF 2023  
AE DENA, J  
OCTOBER 16, 2025**

**BETWEEN**

**JOHN OCHIENG OTIENO (SUIING AS LEGAL REPRESENTATIVE OF THE ESTATE OF ISAIAH OTIENO OMONDI ALIAS OTIENO OMONDI - DECEASED) ..... APPELLANT**

**AND**

**ROSE NALIKA MURENGA ..... 1<sup>ST</sup> RESPONDENT  
POWERCHINA SYNOHYDRO ..... 2<sup>ND</sup> RESPONDENT  
WILLIAM OTIENO OGUTU ..... 3<sup>RD</sup> RESPONDENT  
STEPHEN OWUOR OKUMU ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The appellant vide a Notice of Motion dated 4/3/2025 seeks the following verbatim orders:-
  1. Spent
  2. Pending the hearing and determination of this application, interim stay of execution be granted restraining the Respondent from executing this court's Judgement delivered on January 24, 2025 in ELCA NO. E026 of 2023: John Ochieng Otieno (Suing as legal representatives of the estate of Isaiah Otieno Omondi alias Othieno Omondi).
  3. Leave be granted to the Appellant to lodge an appeal to the Court of Appeal from the judgment delivered by this honourable court (Justice A.Y Koross) on January 24, 2025.
  4. This court does enlarge the time to the Appellant to file and serve the notice of appeal against the judgement of this court delivered on January 24, 2025.



5. That pending the hearing of the intended appeal, a stay of execution of the judgment delivered January 24, 2025 in ELCLA E026 of 2023: John Ochieng Otieno (Suing as legal representatives of the estate of Isaiah Otieno Omondi alias Othieno Omondi) to the extent of executing on their costs.
2. The application is premised upon the grounds on its face and the Supporting Affidavit of John Ochieng Otieno.
3. Rehashing the particulars of the suit he filed in the trial court it is deponed as follows:-
4. That by a judgment dated 24<sup>th</sup> January, 2025, this honourable handed a judgement dismissing the appellants appeal with respect to the trial court's judgment delivered in CMELC E030/2023.
5. That the claim before the lower court was for general damages for civil trespass and costs for the wrongful entry and which was dismissed with costs for lack of locus standi to institute the suit for want of grant of letters of administration at the point of filing the suit.
6. That aggrieved by the decision of the trial court he appealed to this court through a Memorandum of Appeal dated 27<sup>th</sup> December, 2023. Revisiting the grounds of appeal it is deponed that the appeal was contested by the respondents.
7. That the judgement by this court found the appeal to be partly merited to the extent that the trial court erred in finding that the appellant lacked the requisite locus standi to institute the suit on behalf of the estate of the deceased. That the learned judge found the other grounds of appeal to be unmerited and lacking in magnitude as to warrant interfering with the decision of the trial court.
8. That the applicant depones he first learnt of the above judgement on 4<sup>th</sup> March 2025 (barely 2 days from the date of filing this application) as counsel on record delayed to update him on the outcome of the decision and share a copy of the same.
9. That the delay was occasioned by a delay on the part of his counsel despite efforts to seek for updates regarding the outcome of the appeal, considering that unlike the trial, he had no interaction with the appellate proceedings because at no point was he required to appear and give evidence. Otherwise, he would have known the judgment date for the appeal.
10. That due to his advanced years (80yrs) he was unable to catch up with the virtual proceedings in the Environmental and Land Court but was always present for the hearings of the suit in the trial court hence showing interest and seriousness in pursuing the matter.
11. That according to his former counsel the delay on his part was occasioned by the long time it took to have a copy of the decision to enable him share it with the applicant.
12. That upon getting information concerning the outcome of the appeal, he immediately instructed the firm of L.K Getanda & Associates to file and pursue his second right of appeal and his advice on the need for the present application.
13. That the 24 days delay in filing the Notice of Appeal is not inordinate considering the same was occasioned by inadvertence of the previous counsel.
14. It is deponed on advise of counsel that the second appeal should be predicated on the fact that having found the appellant had the requisite locus standi to institute the suit, the learned judge erred in law in misdirecting herself on the ingredients of the tort of trespass and in finding that the ownership of the suit property was not established.



15. That had the learned judge referred to the exhibits and evidence produced in the hearing of this matter, she would have found that the Appellant had sufficiently established his ownership/possessory right of the suit property.
16. That a hawk-eyed look at the record of appeal would reveal that the parcel number Siaya/Kalkada/718 and Siaya/Kalkada/718 referred to one and the same parcel land, being the suit property, contrary to the conclusion by the learned judge that the Appellant was confused as to what parcel he was referring to. That even the defendants (1st and 2<sup>nd</sup> Defendants) also described the property as Siaya/Kalkada Uradi/718 which position they restated in the cross examination.
17. It is urged that the conditions precedent upon enlargement of time set out by Leo Sila Mutiso vs Rose Hellen Wangari Civil Appeal No. Nai 255 of 1997 (UR) have been met. That that no prejudice will be occasioned to the Respondent in the event that the Appellant is granted leave to pursue the Appeal before the Appellate court. That the delay is not inordinate and/or inexcusable as to defeat this application.
18. That this Honourable court can exercise its discretion guided by Article 159 of *the Constitution* which mandates that substantive justice be given priority.

### **Replying Affidavit**

19. The application is opposed by the replying affidavit of Wang Xiaoxiao the Project Assistant of the 1<sup>st</sup> respondent. It is deponed that the 1<sup>st</sup> respondent is yet to file and tax its Party and Party bill of costs for the instant matter and the matter before the lower court. Therefore the orders of stay of execution sought herein are misplaced. There cannot be stay of execution of costs.
20. It is deponed that the appellant/applicant has not demonstrated that he is able and willing to provide security as he intends to pursue his appeal. That the appellant/applicant's advocate is improperly on record. That delay in filing the instant application has not been explained.
21. That it is only just and fair that litigation must come to an end and the respondent left to enjoy the fruits of his labour.

### **Submissions**

22. The application was canvassed by way of written submissions

### **Applicants Submissions**

23. The applicants' submissions are dated 11/04/2025. Citing the provisions of section 7 of the *Appellate jurisdiction Act* it is submitted the application is rightly before the court.
24. Referring to the parameters required set out in Leo Sila Mutiso v Hellen Wangari Mwangi (1999) 2EA 231 it is submitted that there is no maximum or minimum period of delay set out under the law. What suffices for grant of leave is that the delay leading to the non-filing the Notice of Appeal within the statutory 14 days, need not be inordinate.
25. That a period of 24 days upon the lapse of the 14-day window allowed for lodging the Notice of Appeal is not an inordinate delay considering the reasons advanced for the delay and the overwhelming chances of the appeal succeeding.



26. It is urged that mistakes/inaction/omissions of the counsel should not be revisited upon the client. Whereas a party bears the primary responsibility to follow up on their matters, the applicant herein presents a case where although he tried his best to be apprised of the outcome, the update came late.
27. That as a matter of justice and equity, the applicant can be seen as vigilant and proactive litigant, entitled to the aid of equity since equity aids the vigilant and not the indolent. Reliance was placed on the Court of Appeal decision in Yusuf & another v Muhamudo & another (Civil Application E102/2024] KECA 1043 (KLR) (May 28, 2024) where a delay for a period of 7 months way more than the 24 days in the present case was not found inordinate .
28. Regarding chances of Success (or otherwise) of the Appeal. It is urged that, all that an applicant needs is to demonstrate an arguable appeal. That an arguable appeal is not necessarily one that will succeed as held by the Court of Appeal in County Secretary of Kajiado & 47 others vs Salaries and Remuneration Commission & another (2021) eKLR.. Analysing the judgement of this court, it is urged the Applicant has an arguable appeal with good chances of success on the basis that the learned judge misdirected herself in considering the evidence of the parties against the ingredients of the trespass. That a hawk-eyed analysis of the record would guide a different bench to vindicate the Applicant’s claim and award damages as prayed.
29. As to whether the Applicant is entitled to the order of stay of execution , citing Order 42 Rule 6 and the respondents contention that the applicant has not offered any security for the grant of the reliefs, it is submitted that for an application for leave to appeal out of time to the court of appeal, the question of security should not be entertained at this stage by this court since of concern to this court is whether or not the leave to appeal out of time should be granted. The issue of security for costs should be entertained by the court to be seized by the appeal.
30. Counsel added that in an application for stay, what suffices is that there exists a substantial loss to be suffered by the applicant in the absence of the stay, and the willingness of the applicant to offer security for the decretal sum as the court may direct. Reliance is placed on Joseph Simiyu Mukenya vs Agness Naliaka (Misc App 41/2011).
31. It is urged that there is a decree dated 24<sup>th</sup> January 2025 already extracted and the respondents may be on course for the execution of the same to the detriment of the Applicant.
32. On the strength of the overwhelming chances of the appeal, it is posited that considering the applicant is representing the estate of the deceased, the estate is likely to suffer irreparable damages in the event stay is not granted.
33. It is reiterated that the applicant has indicated in both the Notice of Motion application and the supporting affidavit of his willingness to offer security for the decretal sum pending the appeal. That it is for the court to direct on the nature and terms of the security to be provided.

### **Respondents Submissions**

34. The Respondents submissions are dated 4/04/2025. It is submitted on behalf of the respondents that whereas the High Court has the power to extend time under Section 7 of the [\*Appellate Jurisdiction Act\*](#), it is incumbent upon the party seeking the extension to give sufficient and convincing reasons why they ought to be granted the extension. Factors to be considered when determining an application for extension of time are
35. Enumerating the principles that govern the exercise of discretion in applications for extension of time as set out by the Supreme Court in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and



- Boundaries Commission & 7 others [2014] eKLR, it is urged that the period for filing the notice of appeal lapsed on or about 7/2/2025 resulting into a delay of approximately 24 days.
36. Revisiting the explanation tendered by the applicant it is pointed that the appellant's conduct in the matter from his own admission appears indolent seen in his failure to interact with the appellate proceedings. The court is referred to the case of *Rajesh Rughani v Fifty Investments Limited & another* [2016] eKLR.
  37. It is asserted that the applicant cannot now turn back and blame everything on his counsel when his conduct during the pendency of the instant appeal smacks of carelessness. It is emphasised that extension of time is not a right of a party, but an equitable remedy only available to a deserving party at the discretion of the Court. That the applicant has failed to demonstrate the cause of the delay, there being no email or letter signifying the attempts made at inquiring on the case.
  38. Reliance is placed in the case of *County Executive of Kisumu vs County Government of Kisumu & 8 others*, SC Civil Appl. No 3 of 2016; [2017] eKLR where the Supreme Court of Kenya declined to extend time for filing a Petition of Appeal owing to indolence of the applicant.
  39. With regard to the prayer for orders of stay of execution of the decree emanating from the suit, it is stated that an applicant must satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules one being substantial loss will occur in the absence of stay. Highlighting the purpose of stay as set out in *RWW Vs EKW* (2019)eKLR it is submitted that the claim is for damages for excavation. That as the time of filing the suit backfilling had already been undertaken and in any event the applicant does not stay on the suit property. That there was no immediate threat of execution as only costs were awarded which the respondents have not started pursuing through taxation. That the suit parcel was intact and the 1<sup>st</sup> and 2<sup>nd</sup> defendant were not interested in it.
  40. It is further submitted should the respondents execute for costs the same is in monetary terms which the respondents can adequately refund in case the appeal is successful. In the alternative the court is urged to order a security deposit of Kshs.500,000/- should the application be allowed.

### **Analysis And Determination**

41. Having considered all the foregoing, the main issues for determination is whether the prayers sought in the application should be granted.
42. The application is brought under the provisions of Sections 1A,1B,3A and 95 of the *Civil Procedure Act*, Section 7 of the *Appellate Jurisdiction Act*, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules 2010.

### **Extension of Time for filing appeal to the Court of Appeal**

43. Section 7 of the *Appellate Jurisdiction Act* provides that the High Court may extend the time for giving notice of intention to appeal from a judgement of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired. The High Court also refers to Courts of equal status.
44. The power donated to the Court is discretionary. However, it is trite that discretion must be exercised judiciously. Guidelines to be deployed in exercising of the discretion were set out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR,



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. The delay should be explained to the satisfaction of the court;
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. Whether the application has been brought without undue delay; and ether in certain cases, like election petitions, public interest should be a consideration for extending time. "
45. The case of *Leo Sila Mutiso v Hellen Wangari Mwangi* (1999) 2EA 231 cited by the applicant laid down the parameters 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.’
46. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR the Court of Appeal stated:
- “The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
47. The burden is upon the applicant to explain to the satisfaction of the court the reasons for delay; and whether there will be any prejudice suffered by the opposing parties if the extension is granted.
48. Applying the above criteria to the present case the reasons for the delay are firstly attributed to Counsel on record at the time of the delivery of the judgement on appeal. It is alleged that he delayed in communicating the decision to the applicant. The same was communicated on 3<sup>rd</sup> of March 2025. By this time as rightly stated by both parties approximately twenty four days had lapsed from the time the 14 days for filing Notice of Appeal had lapsed. Guided by the case law above the law has not set minimum or maximum timelines upon which the court could benchmark. I have noted a period of 7 months delay was not rendered inordinate in the case of *Yusuf & another v Muhamudo & another* (supra).
49. Each case is decided on its own merits and based on the circumstances of this case I would not deem the delay of 24 days unreasonable. In any event it is clear that the instant application was filed on 21/3/2025 which is about 17 days (including) weekends upon the applicants learning of the judgement on 4/03/2025. I also note the change of counsel from his previous counsel which obviously would require the incoming counsel to familiarise with the matter and obtaining the relevant consent since he was coming on record post judgement.



50. The applicant then makes a candid disclosure that he did not interact with the appellate proceedings for he was not required to give evidence unlike in the trial court. I think considering how appellate proceedings are conducted mostly by way of written submissions, I would not impute indolence on the part of the applicant. What I see is a litigant who is not fully seized of the appellate processes. I also note the applicant was informed that it took long to get a copy of the judgement which position is misleading on the part of previous counsel for the reason that copies may be downloaded directly from the CTS in the first instance.
51. For the foregoing reasons this court is satisfied with the explanation given by the applicant on the reasons for the delay and also finds the delay of 24 days excusable.
52. The other parameter is on the prejudice to be suffered by the respondent. It is the respondent's case that he must be allowed to enjoy the fruits of his judgement. But what are these fruits considering the final orders of this court. Looking at the matter, costs were awarded to the respondent. It is clearly admitted that the respondents no longer has an interest in the suit property. The assistant project manager has also stated that they have not even started the process of execution.
53. On the flipside the applicant is desirous of appealing the decision of this court. Should this court drive him away from the seat of justice and the right to be heard on appeal? Clearly I would not as I see no prejudice to be suffered by the respondents were time to be extended.
54. I will steer off the arguments made to show the arguability of the appeal since the application has been made before the court that rendered the impugned judgement. It would be tantamount to the court commenting on the merits or otherwise of its own judgement.
55. The court therefore sees no hinderance in exercising its discretion in favor of allowing extension of time for the filing of the notice as well as the appeal to the Court of Appeal.

### **Stay of execution**

56. The applicant also craves for the stay of execution of the judgement delivered on 24/01/2025 to the extent of execution of the costs.
57. Order 42 Rule 6 of the Civil Procedure Rules, provides as follows;-
  - “(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 order set aside.
  - (2) No order for stay of execution shall be made under subrule (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.

58. Arising from the above substantial loss is the main parameter to be demonstrated by an applicant desiring orders of stay of execution of the decree. I have perused the judgement. It upheld the decision of the trial court and awarded costs of the appeal at 50% to the 1<sup>st</sup> and 2<sup>nd</sup> respondents that is Powerchina and Rose Naliaka.
59. It is important to note that the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss under Order 42 Rule 6 since execution is a lawful process. This was the position taken by the court in the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR. The court further enunciated that an applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.
60. Were there any factors that have been put forth in tandem with the above dictum. My answer is in the negative. I have not seen such a demonstration.
61. The respondent has extended an olive branch by requiring the deposit of Kshs 500,000/- as security. This is pursuant to Order 42 Rule (2)(b). The law has two limbs in this regard. Firstly that a party seeking stay either offers such security for the due performance of the orders as may ultimately be binding on the appellant. The other limb is for the court to order such terms as to security as it may deem necessary.
62. In *Nduhiu Gitahi vs. Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 the Court of Appeal expressed itself as follows:
- “The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. ....” (Emphasis is mine).
63. Guided by the foregoing I note that the applicant has not provided any proposal for the security. That notwithstanding the responsibility is on the court to set the terms. I have already noted the submissions on the part of the applicant. They have not yet taxed their bill. It is not clear the basis upon which



the figure of Kshs.500,000/- has been arrived at and in view of the fact that there was no monetary decree issued.

64. Based on the foregoing I will not order any security to be deposited by the respondents.
65. The upshot of the foregoing is that I find the Notice of Motion dated 4/3/2025 merited except on the stay on the order for costs awarded. The application is allowed in the following terms:-
  1. Leave be granted to the Appellant to lodge an appeal to the Court of Appeal from the judgment delivered by this honourable court on January 24, 2025.
  2. This court does enlarge the time to the Appellant to file and serve the notice of appeal against the judgement of this court delivered on January 24, 2025.
  3. The above shall be filed within 14 days of today's date failure to which leave granted shall automatically terminate.
  4. The Prayers for stay of execution of this court's Judgement delivered on January 24, 2025 in ELCA NO. E026 of 2023 to the extent of execution of the costs awarded is declined.
  5. The costs of the application shall be borne by the applicant/appellant.

Orders accordingly.

**DELIVERED AND DATED AT SIAYA THIS 16 DAY OF OCTOBER 2025**

**HON. LADY JUSTICE A.E. DENA**

**JUDGE**

**16/10/2025**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Ominde for the Applicant

Ms. Anyango for 1<sup>st</sup> and 2<sup>nd</sup> Respondent

No appearance for the rest of the parties

Court Assistant: Ishmael Orwa

