



Philip v Mwatatei (Environment and Land Miscellaneous Application E010 of 2025) [2025] KEELC 6847 (KLR) (9 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6847 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E010 OF 2025
CK YANO, J
OCTOBER 9, 2025**

BETWEEN

LIMO KOECH PHILIP APPLICANT

AND

VINCENT KIMUTAI MWATATEI RESPONDENT

RULING

1. By Notice of Motion dated 25th March, 2025, the Applicant sought the following orders that: -
 1. Spent.
 2. Spent.
 3. There be temporary stay of execution of the orders of the trial court in the Chief Magistrate’s Court at Eldoret Civil Suit No. 193 of 2018; Limo Koech Phillip vs Vincent Kimutai Mwatate pending the hearing and final determination of the intended Appeal.
 4. The applicant be granted leave to file Appeal out of time against the Ruling and/or Orders made on 06.12.2024 in the Chief Magistrate’s Court at Eldoret Civil Suit No. 193 of 2018; Limo Koech Phillip vs Vincent Kimutai Mwatate.
 5. Costs be provided for.
2. The application is premised on 25 grounds on its face and supported by the applicant’s affidavit sworn on even date.
3. The applicant gave a brief background of his claim against the respondent and which led to the filing of the suit in the trial court vide Chief Magistrate’s Court at Eldoret Civil Suit No. 193 of 2018, between him and the respondent.



4. He also gave a detailed explanation of what transpired upon filing of the suit, the entry of the judgment in default, the assessment of the Bill of costs on 01.08.2018 and the subsequent execution process against the respondent through committal to civil jail.
5. Be that as it may, the ex-parte proceedings in the matter were set aside and the respondent was allowed to file his pleadings for the matter to proceed and be determined on merit. It was his contention that parties engaged in negotiations with a view of settling the matter and annexed various correspondences in support of the said assertions.
6. It is his claim that the trial court suit was fixed for hearings and mentions without notice to the parties and on 9/5/2024, the suit was dismissed for want of prosecution. That upon learning of the said dismissal, he filed an application for the reinstatement of the suit.
7. It is further his claim that the trial court delivered its ruling on the application for reinstatement of the suit on 06.12.2024 without notice to the parties. That he only came to learn of the status of the suit sometimes on 20.03.2025 when auctioneers served him with warrants of attachment.
8. He deponed that upon the dismissal for want of prosecution, the respondent secretly filed a bill of costs dated 12.03.2025 without service to him and the same was assessed at Kshs. 131,580/=.
9. On advice from his counsel, he averred that he was not able to file an appeal since the statutory period within which the said appeal is to be lodged has since lapsed hence the prayer for leave to file the same out of time.
10. It was his contention that the application has been made promptly without undue delay and any delay in filing the appeal is excusable and reasonable. He maintained that he is aggrieved by the decision of the trial court and intends to appeal against the same. He argued that he has a legitimate and meritorious appeal and urged the court to grant him an opportunity to ventilate the same.
11. He deponed that he stands to suffer substantial loss unless the orders sought are granted since the respondent has started the execution process for the payment of costs and further that the intended appeal may be rendered nugatory.
12. He stated that he is ready and willing to abide by any reasonable conditions for stay of execution as may be imposed by the court and further maintained that the respondent will not be prejudiced in any way if the orders sought are granted.
13. In conclusion, he urged the court to allow the application and grant the orders sought in the interest of justice and fairness.
14. The application was opposed. The Respondent filed a Replying Affidavit dated 19.08.2025 in response to the averments raised by the applicant. He accused the applicant of not being keen to prosecute his claim in the subordinate court vide Eldoret CMCC No. 193 of 2018, hence leading to the dismissal and that despite the two dismissals, the applicant has never paid any costs thus making him to suffer unnecessarily.
15. It was his claim that the issues and matters raised in the applicant's supporting affidavit are irrelevant to the grounds to be proved in an application for stay of execution.
16. In response to paragraphs 12, 13 and 14, he deponed that the alleged matters do not clearly outline the reason why the appeal was not filed in good time.



17. He further averred that the matters outlined in paragraphs 24, 25 and 26 of the supporting affidavit do not favor the orders for stay of execution as sought nor does it fulfill any of the requirements of Order 42 Rule 6 of the Civil Procedure Rules.
18. He dismissed the allegations raised in paragraphs 29, 30 and 31 of the Supporting Affidavit and stated that the bill was not secretly filed but open in the court record.
19. With regards to the prayer for leave to file the appeal out of time, the respondent deponed that the applicant has not properly explained the inordinate delay in filing the instant application. In conclusion, he urged the court to dismiss the application with costs.
20. The application was canvassed by way of written submissions. Both parties filed their rival submissions together with authorities which I have read and considered.

Analysis and Determination:

21. Having carefully considered the Application and the grounds therein, the Supporting Affidavit and the annexures and the Replying Affidavit thereto, as well as the rival submissions in totality, it is my considered view that the issues arising for determination are;
 - i. Whether time can be enlarged to file the intended appeal out of time.
 - ii. Whether an Order for Stay of Execution can issue against ruling and consequential orders issued on 6th December, 2024.

Whether time can be enlarged to file the intended appeal out of time;

22. Section 79G of the *Civil Procedure Act* requires that before the Court enlarges the time for appealing, the applicant must satisfy the court that he had good and sufficient cause for not filing the appeal in time.
23. The applicant has urged the court to grant him leave to file his intended appeal out of the statutory timelines. It is his claim that the trial court issued its ruling dated 06.12.2024 in relation to his application for reinstatement without notice to the parties.
24. He contends that he only learnt that the said ruling had already been issued when he was served with warrants of attachment from an auctioneer on 20.03.2025 in respect of the respondent's assessed bill of costs. He thus blames the failure to lodge his intended appeal within the statutory timelines on lack of service of the ruling notice/ ruling date by the court and he thus was not aware that the ruling had already been issued.
25. He argues that upon finding out that the ruling had been issued, he promptly filed the instant application without delay and maintained that he has given a sufficient and reasonable explanation of his failure to file the intended appeal within the required timelines. He further avers that the said appeal is arguable with high chances of success.
26. The respondent in his response did not comment on whether or not the ruling notice was given to the parties by the court or whether parties were duly informed and aware of the ruling date of 06.12.2024. He instead dismissed the averments by the applicant by stating that no reasonable explanation had been tendered by the applicant for his failure to file the appeal within the requisite timelines.
27. The grounds of enlarging time within which to appeal are now well settled. The Court of Appeal in the case of *Mwangi v Kenya Airways Ltd* [2003] KLR laid out the factors to be considered by the court



in exercising its discretion on whether to extend time to file an appeal out of time. These factors include the following:

- i. The period of delay;
 - ii. The reason for the delay;
 - iii. The arguability of the appeal;
 - iv. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
 - v. The importance of compliance with time limits to the particular litigation or issue; and
 - vi. The effect if any on the administration of justice or public interest if any is involved.
28. Guided by the above factors and taking into account the facts and circumstances of this case, the delay of almost 3 months has been sufficiently explained and has been attributed to the lack of service and knowledge of the ruling date.
29. I have also looked at the annexed draft memorandum of appeal marked “LKP- 19” and in my considered opinion the same raises arguable points with a chance of success.
30. Even though the importance of complying with statutory timelines cannot be overstated, this court has taken into account the explanation tendered by the applicant, which in my opinion is sufficient and accordingly, I proceed to exercise my discretion in enlarging time within which to file the intended appeal.

Whether an Order for Stay of Execution can issue against ruling and consequential orders issued on 6th December, 2024;

31. It is now well settled that no appeal shall operate as an automatic stay of execution. 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 while Rule 6(2) provides the conditions to be met in an application for stay of execution.
32. Order 42 Rule 6(2) 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 mine)
33. The three prerequisite conditions from the above are thus;
- 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. 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.



34. Before delving into the merits of the issue, it is important to first determine whether the order for stay is tenable and the order of 06.12.2024 is capable of being stayed. I have looked at the said order and it is not in dispute that the same was a dismissal order, dismissing the applicant's application for reinstatement. It is therefore common ground that the said order for dismissal is a negative order incapable of execution.
35. The Court of Appeal in the case of *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others* [2016] eKLR expounded on stay of execution of a negative order stating: -
- “In *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah* [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows: - “The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only. The same reasoning was applied in the case of *Raymond M. Omboga v Austine Pyan Maranga* (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter: -
- “The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order. The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....”
36. Associating myself with the abovementioned case law, it is evident that the order of the trial court issued on 06.12.2024 was a dismissal order and is therefore a negative order incapable of execution. Consequently, an order for stay of execution as sought herein cannot therefore issue as the decree cannot be executed.
37. Be that as it may, the applicant contends that upon the dismissal order, the respondent moved to secretly file a Bill of Costs, which was not served upon him neither was he aware of its existence. That the said Bill of Costs was taxed and assessed at Kshs. 131,580/=.
38. It is therefore his claim that the respondent is in the process of executing the said decree in relation to the payment of the assessed costs and he annexed a copy of the warrants of attachment from the auctioneer as “LKP – 18”. The question that follows is whether an order for stay of execution can be granted against costs of the suit.
39. As held in the above Court of Appeal case *Raymond M. Omboga v Austine Pyan Maranga*, Kisii HCCA No. 15 of 2010, there can be no stay of execution on the order for costs. This position was reiterated in the case of *Anthony Kiplangat Ngeno & Paul Kiprono Cheruiyot v Jonathan Ole*



Tankoi, Solomon Ole Tarakwa, Johana Kiptonui Cheruiyot & Joseph Tonui [2016] KEHC 5320 (KLR) where it was held as follows:-

“The above analysis brings me to the question of whether the court can grant an order for stay of execution in respect to costs. The answer to this question is to the negative because orders for stay of execution is generally and ideally granted only in instances where the appeal filed would be rendered nugatory unless the stay sought is granted.....”

40. Thus, in view of the foregoing, it is the finding of this court that an order for stay of execution in the nature sought is untenable and cannot issue in respect of the assessed costs.

Conclusion:

41. In the upshot, I accordingly find that the Application dated 25th March, 2025 is partially merited and is hereby partially allowed on the following terms: -

a. Leave be and is hereby granted to the applicant to file his intended Appeal out of time against the Ruling and/or Orders made on 06.12.2024 in the Chief Magistrate’s Court at Eldoret Civil Suit No. 193 of 2018 within 7 days from the date of this ruling.

b. Each party to bear their own costs.

42. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF OCTOBER, 2025.

HON. C. K. YANO

ELC, JUDGE

Ruling delivered in the virtual presence of: -

Mr. Kiboi for Applicants.

Dr. Chebii for the Respondents.

Court Assistant – Laban

