

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

MISCELLANEOUS APPLICATION NO. E033 OF 2024

HAMISI GUCHU HASSAN.....1ST APPLICANT

MIRIAM WANJIKU MBURU.....2ND APPLICANT

VERSUS

AMOS CHEGE KAMAU.....

RESPONDENT

RULING

1. What is before me for determination is the Applicants' Notice of Motion dated 12th June 2024 seeking a stay of execution of the orders issued in Thika CME&LC Case No. 63 of 2021 and leave to appeal out of time.
2. The application is premised on the ground that the Applicants applied for the ruling in time but the same was supplied after the period for filing the appeal had lapsed. This is explained in the Supporting Affidavit of Miriam Wanjiku Mburu, the 2nd Applicant herein.
3. The Respondent strenuously opposed the application through his Replying Affidavit sworn on 8th July 2024. The application was canvassed by way written submissions and the Applicants filed their

submissions dated 18th November 2024 while the Respondent filed his submissions dated 11th March 2025.

Appellants Submissions

4. In his brief submissions filed through the firm of Karuga Wandai & Company Advocates, learned counsel for the Applicants submits that no time was wasted in filing the appeal as the same was filed on 18th June 2024 after obtaining a copy of the Ruling on 10th June 2024. He explains that the ruling was delivered on 7th May, 2024 and he applied for the proceedings and ruling on 14th May, 2024. However, the same were not supplied until 10th June 2025, when the time for filing the appeal had already lapsed.
5. With regard to the prayer for stay of execution, counsel submits that the trial magistrate gave an order that had not been prayed for thus determining the suit prematurely without hearing the suit on the merits. It is therefore his submission that the suit has high chances of success.

Respondent's Submissions

6. Learned counsel for the Respondent submitted that the ruling delivered by the trial Magistrate on 7th May, 2024 was a negative order which was not capable of being stayed. She explained that in his ruling the Magistrate merely dismissed the Applicants'

application for review and no specific action was mandated. Counsel relied on the cases of **Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) (2015) eKLR** and **Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 others (2016) eKLR** for the proposition that a negative order is incapable of execution.

7. As to whether the Applicants should be granted leave to appeal out of time, counsel submitted that the Applicants had not met the grounds for review and therefore their appeal has no chances of success. She relied the case of **Githau v Kagiri & Another (Civil Appeal No. 314 of 2023) [2024] KEHC 6320 KLR (6 June 2024) (Ruling)**.

ANALYSIS AND DETERMINATION

8. I have considered the application, the supporting and Replying Affidavit and the rival submissions and the main issues for determination are twofold; whether leave ought to be granted to the Applicants to file their appeal out of time and whether a stay of execution should be granted.
9. The principles that guide the court in the exercise of its discretion to extend time for filing an appeal out of time were laid down by the Supreme Court in the case of **Nicholas Kiptoo Arap Salat v IEBC & 7 Others (2014) eKLR**, as follows:

“... 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:

- 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;***
- 5. whether there will be any prejudice suffered by the respondents, if extension is granted;***
- 6. whether the application has been brought without undue delay; and***

7. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied].

10. In an application for extension of time, the Applicant must explain the delay in filing the appeal to the satisfaction of the court. In the instant case, the ruling was delivered on 7th May 2024 while the appeal was filed on 18th June 2024 thus the period of delay is slightly over a month.
11. The Applicants have explained that they applied for the proceedings and ruling on 14th May 2024 and the same were supplied to them on 10th June 2024. In the circumstances, I am satisfied that the delay is not inordinate and the explanation is satisfactory. In any event the Respondent has not demonstrated what prejudice he would suffer if he Applicants were allowed to exercise their right of appeal.
12. I will now consider if the prayer for stay of execution is merited. Order 42 Rule 6 of the Civil Procedure Rules sets out the principles that should guide the court in considering an application for stay pending appeal. In particular Order 42 Rule 6(2) provides as follows:

13.(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.

14. The Applicants have not demonstrated that they will suffer substantial loss if a stay of execution is not granted. Their position is that the trial magistrate erroneously granted orders that were not prayed for which amounted to granting final orders before hearing the case on merit. The Applicants' subsequent application for review was dismissed.
15. On the other hand, learned counsel has submitted that by dismissing the application for review the court issued a negative order which is incapable of execution.
16. It is not in dispute that the order dismissing the Applicants' application for stay was indeed a negative order. In light of the decision in **Githau v Kagiri & Another (Supra)**, I am inclined to agree with counsel for the Respondent that the order of dismissal cannot be stayed.
17. In light of the above analysis, the application succeeds partially and I make the following orders:

a) The Applicants are granted leave to appeal out of time.

b) The prayer for stay of execution is declined.

c) In order to expedite the appeal, the Record of appeal shall be filed within 30 days.

Dated, signed and delivered virtually at Thika this 27th day of October 2025.

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J. M ONYANGO
JUDGE

In the presence of:

1. Miss Mwangi for Mr. Muchoki for the Appellants/Applicants
2. Mr Theuri for the Respondent

Court Assistant: Hinga