



**Nthenge v Mulwa & 3 others (Environment and Land Miscellaneous Application E057 of 2025) [2025] KEELC 5710 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5710 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E057 OF 2025  
NA MATHEKA, J  
JULY 31, 2025**

**BETWEEN**

**MUTHAMA NTHENGE ..... APPLICANT**

**AND**

**PETER KIOKO MULWA ..... 1<sup>ST</sup> RESPONDENT**

**PIUS NOVI MUINDI ..... 2<sup>ND</sup> RESPONDENT**

**ESTHER MUTIO KYALO ..... 3<sup>RD</sup> RESPONDENT**

**KIMITI FARMERS CO-OP SOCIETY LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The application is dated 12<sup>th</sup> June 2025 and is brought under Order 42 Rule 6 of the [Civil Procedure Rules 2010](#), Section 1A, 1B, 3A and 79G of the [Civil Procedure Act](#), Article 159 of the [Constitution of Kenya 2010](#) seeking the following orders;
  1. That this Honourable Court be pleased to certify this Application as extremely urgent and fit to be heard *ex-parte* in the first instance.
  2. That this Honourable Court be pleased to grant the Applicant leave to file a Memorandum of Appeal against the Ruling dated 12<sup>th</sup> November, 2024 in ELC. Case No. 751 of 2017 out of time.
  3. That this Honourable Court be pleased to grant stay of execution of the Judgment dated 7<sup>th</sup> June, 2023 and Decree dated 4<sup>th</sup> of July, 2023, pending the hearing and determination of this Application.



4. That this Honourable Court be pleased to grant stay of execution of the Judgment dated 7<sup>th</sup> June, 2023 and Decree dated 4<sup>th</sup> of July, 2023, pending the hearing and determination of the Appeal.
5. That the costs of this Application be provided for.
2. It is further supported by the Affidavit of Muthama Nthenge and premised on the following grounds that the Applicant was sued by the 1<sup>st</sup> Respondent herein in ELC Case No. 751 of 2017 at the Chief Magistrate's Court at Machakos. That the suit proceeded for hearing in the absence of the Applicant. That on 7<sup>th</sup> June, 2023, Judgment was entered against the Applicant and on the 4<sup>th</sup> of July, 2023, a Decree was issued. That the Applicant's non-attendance and participation in the trial court's hearing proceedings was occasioned by his ill health, debilitating head injuries and subsequent memory loss. That the trial Magistrate, *vide* a Ruling dated 12<sup>th</sup> November, 2024, declined to set aside the *ex-parte* Judgment entered in the matter and grant the Applicant leave to defend the suit on merit. That the Applicant was desirous to lodge an Appeal against the said Ruling but was unable to file the Memorandum of Appeal within the statutory period due to the aforesaid health constraints. That the draft Memorandum of Appeal attached herein raises pertinent issues of law and fact and there are high chances of the Appeal succeeding if this Application is granted. That the Applicant has been unwell since November, 2024 and has been suffering from hypertension, diabetes, arthritis, memory loss, a heart condition, difficulty breathing and kidney failure. That the Applicant's health has deteriorated so much as to warrant repeated and intermittent admission at Tala Hospital. That consequently the health condition of the Applicant is what has caused the delay in bringing this Application for leave to file out of time. That this Application has been brought without undue or inordinate delay, especially considering the exceptional circumstances of the case. That there is a real and immediate threat that the 1<sup>st</sup> Respondent will execute the Decree issued by the trial court, which will cause the Applicant to suffer substantial loss, as he is an old and sickly man who will be deprived of his constitutional right to property. That execution of the Decree will result in the 1<sup>st</sup> Respondent herein being registered as the absolute and indefeasible owner of the disputed land *vide* the Judgment in a suit where the Applicant was not given a chance to be heard. This will render the intended Appeal nugatory. That the Applicant is ready and willing to offer security for the performance of the Decree. That the Respondents will not suffer any prejudice or harm should the orders prayed for herein be granted.
3. I have considered the Application and the supporting affidavit on record. The main issue for determination is whether this court should allow the Applicants to file the Appeal out of time.
4. The guiding provision on filing of Appeal is Section 79G of the [Civil Procedure Act](#) which provides that;

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."



5. The Supreme court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR stated as follows;

Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.”

6. On the second issue, stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* which provides as follows:

6.

- (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.”

7. For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

- (a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;
- (b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and
- (c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

8. The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties.

9. While taking into consideration the conditions above, the court will look into the conduct of the Applicant and whether he is coming to this court with clean hands. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court, the party must show good or sufficient cause why the orders sought should be extended. On 7<sup>th</sup> June, 2023, Judgment was entered against the Applicant and on the 4<sup>th</sup> of July, 2023, a Decree was issued. That the Applicant’s non-



attendance and participation in the trial court's hearing proceedings was occasioned by his ill health, debilitating head injuries and subsequent memory loss. That the trial Magistrate, *vide* a Ruling dated 12<sup>th</sup> November, 2024, declined to set aside the *ex-parte* Judgment entered in the matter and grant the Applicant leave to defend the suit on merit. That the Applicant was desirous to lodge an Appeal against the said Ruling but was unable to file the Memorandum of Appeal within the statutory period due to the aforesaid health constraints. He has produced medical evidence to prove this.

10. I have perused the pleadings before me and find that the Applicant was represented by an advocate all through until the defence when his Advocate filed an application to cease acting and he failed to appear in court thereafter. I find that from the documentary evidence he may have been incapacitated and unable to follow up on the proceedings. The ruling sought to be appealed against was delivered on the 12<sup>th</sup> November 2024 and this application is dated 12<sup>th</sup> June 2025. I also find that the applicant is not guilty of inordinate delay in the circumstances. I find this application is merited and I grant prayer 2 & 4 on condition that the appeal is filed and served within the next 30 days. Costs of the application to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 31<sup>ST</sup> DAY OF JULY 2025.**

**N.A. MATHEKA**

**JUDGE**

