



**Ohira v Luchemo (Environment and Land Miscellaneous Case
E017 of 2024) [2025] KEELC 7576 (KLR) (4 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 7576 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND MISCELLANEOUS CASE E017 OF 2024**

AE DENA, J

NOVEMBER 4, 2025

BETWEEN

CALEB OTIENO OHIRA APPLICANT

AND

ZEBEDEE AKANGA LUCHEMO RESPONDENT

RULING

1. The subject of this judgement is the Notice of Motion dated 30/09/2024 seeking the following verbatim orders; -
 1. Spent
 2. That this Honourable Court be pleased to enlarge the time within which the Applicant may lodge his intended appeal against the judgement delivered on 19th June 2024 in Siaya Chief Magistrate Environment and Land Court Case No. E024 of 2020 delivered on 19th June 2024 and grant the applicant leave to appeal out of time.
 3. That the Honourable Court be pleased to issue orders for stay of execution of the judgment/decree of the Honourable L. Simiyu in Siaya Chief Magistrate Environment and Land Court Case No. E024 of 2020 delivered on 19th June 2024 pending the hearing and determination of this application;
 4. That the Honourable Court be pleased to issue orders for stay of execution of the judgment/decree of the Honourable L. Simiyu in Siaya Chief Magistrate Environment and Land Court Case No. E024 of 2020 delivered on 19th June 2024 pending the hearing and determination of the intended appeal.
 5. That the costs of this application be provided for.



2. The application is supported by the supporting affidavit of Caleb Otieno Ohira. It is deponed that judgment was delivered on 19/06/2024 which the applicant is aggrieved and desires to exercise her right of appeal. The applicant he has been sick for quite some time occasioning delay in filing the appeal and even instructing the advocates. That she has now instructed a firm of advocates. That she had misplaced his file containing the pleadings but counsel obtained them from the court file. He also applied for for typed proceedings and a copy of the judgment. A copy of the letter is attached.
3. It is deponed that upon obtaining the above a Memorandum of Appeal has been prepared but the statutory timeline for filing the appeal has since lapsed and leave of the court to file an appeal out of time is required. The deponent is also apprehensive the Respondent may proceed with execution having already obtained the decree, ruling of the party and party bill of cost and certificate of taxation ready for purposes of execution. The same are annexed. It is asserted that the appeal will be rendered nugatory and it would be futile to proceed. Execution will involve evicting the applicant from the suit property rendering her homeless as the suit property has been their home for many years. That they will suffer substantial and irreparable harm if orders for enlargement of time to allow filing of f the appeal out of time are not issued urgently.
4. The applicant believes that the appeal has overwhelming chances of success and the same should not be defeated by the Respondent imminent execution and is amenable to giving such security as the honourable court may deem fit or meet such conditions as the court may reasonably order for granting the stay of execution, including depositing sum in a joint interest earning account by the corresponding firm of Advocates. That no prejudice will be suffered by the respondent.
5. The application is opposed through the Grounds of opposition dated 11/11/2024. The application is termed an abuse of the process of the court, for failing to the mandatory provisions of Order 42 Rules 6 (1) and (2) of the Civil Procedure Rules. That the Applicant has not disclosed any proof that they are likely to suffer any substantial loss in the event that they settle costs of the suit to the Respondent or that the Respondent, who is a medical doctor will be unable to refund the costs of the suit in the event that the appeal is successful against him.
6. It is urged that the jurisdiction of this court to grant stay of execution mandatorily requires the Applicant to avail such security as would be necessary for the due performance of the decree, which he has not done. That Respondent, is not in the process of execution therefore the Applicant is not at risk of eminent execution. The Applicant has not demonstrated by way medical documents that he was unwell. That the appeal, if at all, as disclosed in the grounds of appeal on the Memorandum of Appeal, appears to be misconceived and does not disclose any reasonable prospects of success, thus rendering the exercise of discretion in the Applicant's favour to be in vain.

Submissions

7. The application was canvassed by way of written submissions.

Applicants Submissions

8. The applicants' submissions are dated 10/03/2025. The applicant submits that based on the facts he has not abused the court process nor/and delay the process but have exercised his right to seek the court's discretion to enlarge time within which he may lodge an appeal and exercise his right to appeal that is provided in the law. There is no demonstration to the court in any way that the present application is an abuse of the court's process in delaying the matter or coming to court with unclean hands as purported by the Respondent. The court is referred to the Stephen Somek Takwenyi & Another – Vs- David Mbuthia Githare & 2 Others Nairobi (Milimani) Hcc NO. 363 OF 2009, which



was cited in Chairman Co-Operative Tribunal & 8 Others Ex-Parte Management Committee Konza Ranching & Farming Co-Operative Society Ltd (2014) EKLK, on what constitutes abuse of court process.

9. It is contended that the Applicant merits the extension of time by the court to file the intended appeal and it is well within its discretion to order such extension. There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, as was observed in the case of Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76. That it is also in the interest of justice and fairness that application be allowed. Several authorities are cited including Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR on the application of the overriding objective principle.
10. Referring to the legal basis for grant of stay pending appeal as drawn from the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 it is submitted that Judgment was delivered on 19th June 2024 whilst the present application was made on 30th September 2024. There was thus no unreasonable delay on the part of the Applicant. On substantial loss it urged that it is a question to be answered from the circumstances of each given case. In the present case, the applicant is faced with eviction from where he resides with his family as his home for many years and stands to suffer a lot. On security citing the Court of Appeal in Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 the applicant rehashes the grounds upon which the application is premised and the effects of the impending execution.
11. On whether the appeal is arguable the applicant rehashes the grounds of appeal laid out in the Memorandum of appeal. On security the applicant reiterates the undertaking he has given as seen in the supporting affidavit and which he urges protects the rights of both parties.
12. In conclusion it is urged the respondent has not sworn an affidavit to rebut the sworn statements of the applicant and the grounds of opposition are therefore of little evidential value. The court is referred to the case of Globe Developers Limited Vs Nairobi City County & 6 others [2017] eKLR

The Respondents Submissions

13. The respondents' submissions are dated 17th March 2025. It is submitted that a delay of almost four months without any actual and truthful explanation offered for it, plausible or otherwise, disentitles the Applicant to the exercise of the court's discretion in his favour. That the Applicant has not demonstrated by way of medical records that he was unwell for over 4 months. That the appeal is an afterthought to circumvent payment of the party and party costs. Reliance is placed on the case of Grindlays Bank International (K) Ltd versus George Barbuor Civil Appln. Nai 257 of 1995; Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others – Nairobi Supreme Court Appl. No. 16 of 2014 and Reuben M. Muli T/a Konza Merchants vs Keshra Vishra T/a Alpesh Enterprises, Mombasa, Court of Appeal Civil Appl. No. 52 of 2006,
14. On the chances of success of the appeal, it is submitted the Applicant has attached a generally grounded Memorandum of Appeal that does not detail the grounds of appeal that would give this Honourable Court an opportunity to establish whether the appeal has any chances of success. The court would thus not be in a position to tell whether he has succeeded in proving by evidence that he has good chances of success, and therefore whether substantial loss is proved.
15. It is submitted that the order for stay of execution is sought to restrain the Respondent from paying the taxed costs. It is noted that the Respondent has not even commenced the process of execution to warrant the order of stay but even if he had, the Applicant must demonstrate that the Respondent will



not be in a position to refund the said amounts if this court will reverse the subordinate court order. The prayer is termed premature and Court order ought not to be issued in vain.

16. On security it is submitted that the applicant has not offered any security in the event that the appeal fails. The condition of security has therefore not been met.

Analysis and Determination

17. The court has considered the application, affidavits in support and opposition of the same together with the party's submissions. The issue for determination is whether the applicant has met the threshold for grant of the orders sought.

18. Section 79G of the *Civil Procedure Act*, provides as follows on the power of the court to extend time: -

“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:

- i. 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.”

19. Arising from the above provisions the court is thus required to be satisfied if there were good reasons for the delay. It is noteworthy that the power to enlarge time is at the discretion of the court. Guidance on the exercise of this discretion has been enunciated in many judicial decisions.

20. It is trite that the factors to be considered include the explanation for the delay, the merits of the contemplated action and whether the respondent will suffer irreparable loss that cannot be compensated by way of costs.

21. Odek JJA in *Edith Gichungu Koine Vs Stephen Njagi Thoithi* [2014] eKLR stated thus:

“... Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”) Emphasis is mine)

22. The Supreme Court stated in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR thus; -

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 either in certain cases, like election petitions, public interest should be a consideration for extending time. "
23. I will therefore proceed to consider if the delay was reasonable in terms of time and if the reasons for the same are satisfactory and then consider the degree of prejudice to the respondents if the orders are granted.
24. Is the delay reasonable in terms of time? In the present case the judgement of the trial court was delivered on 19/06/2024. The present application was filed on 10/10/2025 a period of about 4 months considering that the appeal was to be filed within 30 days. A delay of four months does not appear to be inordinate to me.
25. But the court must interrogate the reasons that made the applicant stay for these 4 months. The applicant states that he has been unwell for quite sometime. The court would ordinarily expect a medical report in this regard but no evidence was led in proof of this. The respondent takes great exception at this and rightly so. I'm inclined to give the applicant the benefit of doubt for the reason that no one should wish sickness upon themselves. We know the power of the tongue and what one wishes for themselves could easily befall them. I will leave this to the applicant and his Maker.
26. In *Branco Arabe Espanol vs. Bank of Uganda* [1999] 2 EA 22 it was held that:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.”
27. I have also seen the effort put at obtaining the proceedings and the requisite documentation for purpose of the appeal.
28. But of utmost importance is whether granting the leave herein would cause prejudice to the respondent which may not be compensable by costs. The respondent main contention in this regard is that the appeal is an afterthought to circumvent payment of the party and party costs. For me this argument should only apply to the application for stay and which I will discuss later in this ruling. I say so because the costs awarded may as well be upheld or not depending with the outcome of the appeal. I have not seen any demonstration of the prejudice to be suffered by the respondents that cannot be compensated by way of costs.
29. On whether the appeal is arguable, the respondent has stated that the grounds in the Memorandum of Appeal are too general to enable the court arrive at an informed decision. I will not get into the merits of the appeal at this stage. Moreover, an arguable appeal is one that need not necessarily succeed.
30. The upshot of the foregoing is that I will exercise my discretion in favor of enlarging time and granting the leave to file appeal out of time.
31. The court has also been invited to grant an order of stay of execution of the judgment/decreed herein.
32. 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.
33. 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 of the court. The applicant is apprehensive of execution especially on costs and that it will also involve evicting the applicant from the suit property rendering her homeless as the suit property has been their home for many years.
34. The respondent states that the application for stay is meant to circumvent the costs awarded by the trial court.
35. My perusal of the judgement of the trial court reveals that prayer b) of the plaint was allowed. This prayer is for orders of mandatory injunction directing the defendant and his agents to vacate the suit property and surrender vacant possession and order for eviction. The court made an order for eviction within 60 days. From the judgement I have noted the defendant's evidence was that his parents have established a home in the suit property. Therefore, were the applicant and his people to be evicted it would cause loss that cannot be compensated. It would also render the appeal nugatory.
36. I will therefore allow the prayer for stay of execution based on its merit.
37. What about security? Indeed, this is a requirement provided in law. The respondent states the prayer for stay is premature because they have not commenced the process of execution. I think what the court must consider is the purpose for security and the respondent has rightly cited the case of Arun C. Sharma Vs. Ashana Raikundalia T/A Raikundalia & Co. Advocates (2014) eKLR. It is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. The judgement awarded Kshs. 50,000 for unlawful possession. A certificate of costs dated 1/10/2024 taxed the costs at Kshs 96,660/-.
38. The applicant has deponed he is ready to giving such security or meet such conditions as the court may reasonably order for granting the stay of execution, including depositing a sum in a joint interest earning account with the corresponding firm of Advocates.
39. The Court of Appeal in Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 discussed the form of security 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...”
40. The upshot of the foregoing is that the application is allowed in terms of prayers 2,3, and 4.



41. The applicant shall also deposit Kshs. 45,000 in a joint interest earning account by the firms of Advocates on record or in the alternative issue a bank guarantee from a reputable bank of the same amount within 30 days of this order.
42. There shall be no orders as to costs.
43. The appeal shall be filed within 14 days of this ruling
Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 4TH DAY OF OCTOBER 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

04/11/2025

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

Mr. Mulinge for the Applicant

Mr. Kouko for Respondent

Court Assistant: Ishamel Orwa

