



**Pertet & 2 others (Suing as the Administrators of the Estate of Stephen
Leiyan Pertet) v Saika & another (Environment and Land Miscellaneous
Application 9 of 2019) [2025] KEELC 8080 (KLR) (20 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 8080 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 9 OF 2019
LN GACHERU, J
NOVEMBER 20, 2025**

BETWEEN

**SIMON SALAON PERTET 1ST APPELLANT
ANNE LANOI PERTET 2ND APPELLANT
EDWARD PARSINTEI PERTET 3RD APPELLANT
SUING AS THE ADMINISTRATORS OF THE ESTATE OF STEPHEN LEIYAN
PERTET**

AND

**JOHN MAITAMEI OLE SAIKA 1ST RESPONDENT
TOWN CLERK OF NAROK 2ND RESPONDENT**

RULING

1. The Intended Appellants/Applicants herein filed a Notice of Motion Application dated 18th October 2019, wherein they sought for the following Orders;
 1. Spent
 2. Spent
 3. That this court be pleased to grant the proposed Appellants/Applicants leave to file an Appeal out of time against the whole judgement of Hon. T. Gesora(Mr) SPM in Narok CMCC NO. 82 of 2007; John Meitamei Osaika vs Virginia Pertet & Others, which was delivered on 5th February 2019.
 4. That the Memorandum of Appeal annexed thereto be deemed as duly filed upon payment of the requisite court fees,



5. That pending the hearing and determination of the Appeal, the court be pleased to stay the execution of the judgement delivered on the 5th February 2019, by Hon T. Gesora(SPM) in Narok CMCC NO 82 of 2007; John Meitamei Oasika vs Virginia Pertet and the consequent Decree issued thereto;
6. That costs of the Application be provided for.
2. After the above Application was filed, the 1st Respondent filed a Notice of Preliminary Objection dated 8th November 2019, and claimed that the Applicants lacked the requisite locus standi to institute the suit under the *Civil Procedure Act*.
3. He further averred that the suit offends Sections 65 and 76 of the *Civil Procedure Act*, Order 1 Rule 10, Order 42 Rule 5, and Order 2 Rule 15 of the Civil Procedure Rules; and sought for the suit to be struck out with costs as it discloses no reasonable cause of action or Defence in law, is scandalous, frivolous, or vexatious, and amounts to an abuse of the court process. The objection was grounded on the above provisions of law and any further grounds that were to be adduced at the hearing.
4. The Preliminary Objection was canvassed through written submissions and vide a Ruling dated 5th May 2020, the Court did uphold the said Preliminary Objection, and proceeded to strike out wholly the Notice of Motion dated 18th October 2019.
5. However, vide a Notice of Motion Application dated 23rd October 2020, the Applicants herein sought for review of the Ruling dated 5th May 2020, on the ground that there was error apparent on the face of record, since by the time of entering the impugned judgment, the suit had abated by operation of law.
6. After inter-parties hearing, the court allowed the said Notice of Motion Application for Review, and also allowed stay of execution of the judgment of the trial court, pending the hearing and determination of the instant Application. The Application herein is for leave to file Appeal out of time and for stay of execution of the judgement that was delivered on 5th February 2019, by the trial court.
7. The Application is premised on various grounds stated on the face of the Application; Among the grounds cited are ; that in Narok CMCC No. 82 Of 2007; John Meitamei Osaika vs Virginia Pertet & Others; the 1st and 3rd Defendants being husband and wife died on 13th July 2010, and 3rd September 2016, respectively before the suit could be heard fully and determined.; further that on 20th November 2018, the Applicants raised a Preliminary Objection to the effect that one year had lapsed since the death of the 1st and 3rd Defendants(Respondents herein) and there was no substitution, and thus the suit had abated by operation of the law; that the trial court upheld the Preliminary Objection, and marked the suit as having abated; However, unknown to the estates of the 1st and 3rd Defendants(deceased), on 5th February 2019, the trial court entered judgment against the two deceased Defendants, though the said suit had abated; further, that the 3rd Defendant(deceased) is the registered owner of the suit property, but vide the said judgement of the trial court, the estate of 3rd Defendant has been deprived ownership of the suit property; that it was erroneous for the trial court to have entered judgement against the two deceased defendants while the suit was marked as having abated; and that was against the blatant violation of the express provisions of the law, and principles of natural justice. That there is threatened execution of the said Judgement, and the beneficiaries of the said estate are apprehension that the estates of the deceased Defendants might be deprived of the said property if the judgment is enforced;
8. The Applicants further averred that unless the judgment of the trial court is stayed, the Applicants stand to suffer and lose their rightful inheritance, and further rendering the intended Appeal nugatory; that the intended Appeal is meritorious and it raises an arguable case with overwhelming chances of



- success; that substantial loss will result to the Applicants unless the orders sought are granted, and this application has been brought without inordinate delay.
9. The Application is also supported by the Affidavit of Anne Pertet, one of the administrators of the estate of Stephen Leyian Pertet(deceased) , who was the 3rd Defendant, and who is aggrieved by the judgment of the trial court dated 5th February 2019, and intends to appeal against it. She reiterated most of the grounds in support of the Application; she also contended that the Applicants are willing to furnish such reasonable security as the court may direct.
 10. The deponent urged the court to enlarge time within which they can lodge an appeal for the end of justice to be met, since the application has been made without inordinate delay.
 11. The Application had been opposed through the Notice of Preliminary Objection dated 8th November 2019, which Preliminary Objection was initially allowed and later the said ruling was reviewed and set aside. The Respondent did not file any response to the Application, and this court finds that the instant Application is not opposed.
 12. Further, the court directed the parties do canvass the instant Application through written submissions. However, by the time of writing this ruling none of the parties had filed any written submissions in respect of the Notice of Motion Application dated 18th October 2019.
 13. Consequently, this court will rely on the pleadings, annexures thereto and relevant provisions of law to come up with a determination on whether the Applicants are deserving of the orders sought.
 14. The Application is anchored on various provisions of law, being Order 22 Rule 25, Order 50 Rules 1,5 and Order 51 Rule 1 of the Civil Procedure Rules, which this court has considered. Order 22 Rule 25 of CPR, deals with stay of execution pending between two decree holders and judgement debtor. The is a judgement issued against the 1st and 3rd Defendants who are now deceased in Narok CMCC No. 82 of 2007. However, the Applicants herein have filed the instant Application seeking to be allowed to file an Appeal out of time. Thus this provision of law is relevant.
 15. The Application is also anchored under Order 50 Rule 1 and 5, of the Civil Procedure Rules, which provisions of law deal with months and calendar months, and may not be relevant to this application. Further rule 5 of the same order deals with time for giving security for costs, and may also not be relevant herein.
 16. Further, this Application is premised under Order 51 Rule 1 of Civil Procedure Rules, which provides that all applications to court shall be by Motions and shall be heard in open court, unless the court directs otherwise. This Application was brought by way of Notice of Motion, and it has thus complied with this Order. The court directed the same to be heard by way of written submissions.
 17. This application is also anchored under Sections 1A,1B and 3A of the *Civil Procedure Act*, which sections of the law deal with the Overriding Objectives of the Act, which is to facilitate just, expeditious, proportionate and affordable resolutions of civil disputes before the court. The Applicants have alleged that though the suit at the lower court had abated, the said court still entered judgement against the deceased Defendants. Therefore, these provisions of law are relevant. Further, under Section 3A, of the *Civil Procedure Act*, the court has unfettered power to issue orders that are necessary for the end of justice to be met.
 18. The main provision of the Law, on the Applicants application is Section 79 G of the *Civil Procedure Act*, which provides as follows; “ 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.”

19. The Applicants also premised this Application under Section 95 of the same Act, which deals with enlargement of time. The Applicants have sought for enlargement of time to enable them file an Appeal out of time. This provision of law is relevant and it provides; Enlargement of time

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

20. The court has considered the above provisions of law, together with the pleadings herein and the annexures thereto, and renders itself as follows;

21. On stay of execution of the Judgement delivered on 5th February 2019, it is evident that from the Ruling of this court dated 22nd March 2023, which reviewed, it earlier Orders, the court granted Stay of execution pending the hearing and determination of the Appeal. Therefore, there is a stay of execution already in place, and this court will only proceed to confirm or not confirm the same, depending on the outcome of the prayer for enlargement of time.

22. There is indeed a judgement that was issued by the trial court on 5th February 2019, and in the said Judgement, the court entered judgement, for the Plaintiff (1st Respondent herein) as prayed in the Plaint, wherein the Plaintiff had sought injunction to restrain the Defendants either by themselves, servants or agents from trespassing, obstructing, constructing and /or interfering with the Plaintiff's quiet possession of Block 8 Plot 3 (light industry) situated within Narok town.

23. In essence, the trial court found and held that the suit property belongs to the Plaintiff (1st Respondent), therein. With the above finding, the Plaintiff (1st Respondent) is at liberty to do what he wishes with the suit property, as provided by Section 24 of the [Land Registration Act](#).

24. The Applicants herein have claimed that the suit property belongs to the estate of Stephen Leiyan Pertet(deceased). With this kind of claim, it is prudent to Stay execution of the judgement dated 5th February 2018(2019), until further orders of the court. A stay of execution is issued to temporarily pause the enforcement of a court judgment while a pending appeal is heard, preventing the appellant from suffering substantial loss that cannot be remedied if the appeal is successful.

25. To obtain a stay of execution, the applicant must establish that the Appeal is arguable and that substantial loss may result if the stay is not granted. In considering whether to grant stay of execution or not, the court is required to balance the interests of both parties. See the case of Salome Naliaka Wabwile –vs- Alfred Musinako (2021)eklr, where the court held;

26. On prayer No 3 of leave to enlarge time to file appeal out of time, it is not in doubt that the judgement in issue was delivered on 5th February 2018(2019). As provided by the law, Appeal against that judgment was due on 5th March 2019. The Applicants herein did not file the Appeal, as stipulated by the law. Thus their Appeal is out of time, but as provided by Sections 79 G and 95, of the [Civil Procedure Act](#), they have room or a right to apply for extension of time, and the court has discretion to enlarge time on sufficient grounds. This discretion has to be exercised judiciously. See the case of Nicholas Kiptoo Arap Korir Salat Vs IEBC & 7 Others SCK App. No. 16 of 2014. [2014] eKLR



27. Further, it is clear that leave to appeal out of time is an equitable remedy, which is granted at the court's discretion, but is not a right. Important principles to consider in such an Application include the applicant's duty to show a "good cause" for the delay; Applicant to demonstrate a reasonable explanation for the delay, to show there will be no prejudice to the Respondent, and bring the application without undue delay. See the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015]eKLR,
28. In the above case of *Nicholas Kiptoo Arap Korir Salat Vs IEBC & 7 Others*(supra), the Supreme Court set out the guidelines to be considered in an application for leave to enlarge time to file appeal and held as follows;
- “The court ought to consider the following principles in exercising the discretion to extend time for filing an appeal:
- i. Extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;
 - ii. A party who sought extension of time had the burden of laying a basis for it to the satisfaction of the court;
 - iii. Whether the court ought to exercise the discretion to extend time, was a consideration to be made on a case to case basis;
 - iv. Whether there was a reasonable reason for the delay, which ought to be explained to the satisfaction of the court;
 - v. Whether there would be any prejudice suffered by the respondents if the extension was granted;
 - vi. Whether the application had been brought without undue delay; and;
 - vii. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.”
29. From the above guidelines, it is clear that extension of time being a creature of equity, for one to enjoy such extension, or the equitable relief, he must have acted equitably: as it is trite that “he who seeks equity must do equity.” Therefore, an Applicant in a stay of execution application, he has a duty to lay a basis that he was not at fault so as to let time lapse.
30. Extension of time is not a right of a litigant against a court, but, it is a discretionary power of the courts for which litigants have to lay a basis where they sought to invoke the courts' discretion to grant it. See the case of *Nuthu vs Karanja Civil Appeal No. 263 of 2023*(2024)KEHC 10181 (KLR) where the court held;
- “The principles governing an ex-parte application in respect of leave to file a suit out of time were enunciated in the Supreme Court case of *County Executive of Kisumu v County Government of Kisumu and 8 Others* (2017) eKLR [Civil Application No. 3 of 2016] as follows: - 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;”
31. Further in the cases of *Thuita Mwangi v Kenya Airways Limited* (2003) eKLR and *Mombasa County Government v Kenya Ferry Services & Anor* (2019) eKLR, the courts observed that the Court should consider the factors of delay which include the period and reason for delay, arguability of the Appeal,



prejudice to the Respondent, compliance with the time limits and the effects on demonstration of justice.

32. The Applicants alleged that they had successfully filed and argued a Preliminary Objection before the trial court for the suit to be marked as having abated, and the said Objection and /or Application was allowed by the said trial court. However, the Applicants later learnt of entry of the judgement in favour of the 1st Respondent(Plaintiff) when they were threatened with execution. The Applicants referred to a Letter from SMS LLP Advocates, which had directed them to give vacant possession.
33. Further, by the time of receipt of the said Demand letter, the requisite time for filing the Appeal had lapsed, and thus the reasons for the delay. From the various determinations of the courts, it is not in doubt that this court has discretion to enlarge time to file Appeal out of time, but on sufficient reasons.
34. The Applicants have alleged that the trial court had already marked the suit as abated, and later a judgement was entered against the deceased Defendants. That the Applicants learnt of the said Judgement when they were served with a Demand Letter to give vacant possession. The explanation given by the Applicants herein is indeed sufficient reasons to warrant extension of time to file Appeal out of time.
35. In arriving at the above decision, this court is guided by the decision of the Supreme Court in the case of *Salat v Independent Electoral and Boundaries Commission & 7 others*(supra), wherein it referred to the Court of Appeal decision in the case of *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR, where the Court laid out the principles to be satisfied in the following terms: -

.... I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance

36. Further, in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997* (unreported), the Court expressed itself thus: -

.... 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.”

37. Being guided as above, and given that none of the parties herein filed their written submissions, this court finds and holds that the Intended Appellants Application dated 18th October 2019, is merited and the same is allowed entirely in terms of prayers No.3, 4, 5 with costs being in the cause.
38. Further, the Appellants are directed to file the said Appeal within a period of 30 Days from the date hereof. Failure of which the Orders granted herein will automatically lapse. The Appellants are directed to prepare the Record of Appeal and file the intended Appeal as ordered by the court.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 20TH DAY OF NOVEMBER 2025

L. GACHERU



JUDGE

Delivered online in the presence of

Elijah Meyoki - Court Assistant.

N/A for the Intended Appellants/ Applicants

Mr. Samini for the Respondents

