

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT SIAYA
ELCLA NO. E027 OF 2024

WANJIKU

GACHERU.....APPLICANT

=VS=

CHRISTOPHER SOM DIBOGO & ANOTHER.....RESPONDENT

RULING

1. What is before this Court is an application dated 7th August, 2024 by the Applicant seeking stay of execution and extension of time to Appeal. The Application is opposed through a Replying Affidavit sworn by the 1st Respondent on 4th February, 2025.
2. The Applicant vide her supporting affidavit sworn on 1st August 2024 and avers that she wrote to the Court in person requesting for a copy of the judgment and proceedings to enable her appreciate the reasoning of the Magistrate and thereafter make an informed decision on whether or not to lodge an Appeal. The lower court awarded to the 1st respondent among other orders; costs and she is at risk of being condemned to pay the said costs despite the fact that she

intends to appeal against the judgment delivered by the lower court. That the 1st respondent was in the process of executing the orders issued by the lower court.

3. It is deponed that the typed proceedings and the judgment have not yet been received yet and the time accorded to lodge an Appeal to High Court has run out. That she has good chances of success and the delay occasioned herein is NOT so inordinate so as to be inexcusable. She states that the Respondents will not be prejudiced if the said leave is granted. That if the stay of execution is not granted the appeal herein shall be rendered nugatory.

4. The Respondent by his replying affidavit sworn on 9th September 2024 avers that the Judgment was delivered on 29th May 2023 dismissing the Appellant's suit with costs to the applicant. That the Appellant herein had time to appeal the decision which the court clearly informed her of the same in a language she understands during the delivery of the judgment. That while the Appellant claims that the delay was as a result of sickness yet the hospital report indicates that her condition is not a recent one and there is no proof of being admitted or bedridden.

5. It is further contended that the Appellant has not proved that she indeed wrote a letter requesting for typed proceedings, certified copy of decree and judgment, and proof of payment of

the same, and the court has delayed issuing the same. That the Appellant decided to appeal the trial court decision delivered a year ago, only when the Respondent started developing the suit property being UGENYA/RANGALA/1245. That the Application is an afterthought and an abuse of the court process. That sufficient cause for the delay in filing the Appeal within the required time has been demonstrated. That the delay of over one year is inordinate.

6. That the Application has not proved that the Appellant is likely to suffer irreparable loss or damage or she has a prima facie case with high chances of success.
7. The Respondent states he shall suffer great prejudice if extension of time is granted since construction is ongoing and the application has been filed to stall the same and delay execution proceedings in the Lower Court. That the application should be dismissed with costs.

Submissions

8. The application was disposed by way of written submissions. The Applicants submissions are dated 10th October 2025 and the Respondents 29/10/2025.

Analysis and determination.

9. I have carefully considered the Application, Affidavit in support and in opposition thereto and submissions filed by counsel on

record for the parties. The following issues commend determination: -

- 1) Whether the court should exercise its discretion to expand time for filing of an appeal out of time.
- 2) Whether the application meets the requirements under Order 42 Rule 6 for grant of stay of execution.
- 3) Who bears the Costs of the application.

Whether the court should exercise its discretion to enlarge time for filing of an appeal.

10. The Applicant seeks expansion of time to file an appeal. She claims that the delay was occasioned by failure by the lower Court to supply her with certified copies of the judgement, decree and typed proceedings. She further submits that the other reason for the failure was due to her ill health.

11. The Respondent on the other hand objects to this Application. He avers that the delay was inordinate and occasioned by the Applicant and the Applicant should not blame it on the Court. That the judgement was delivered over one year ago. The judgement was delivered in a language that the Applicant understood and should have therefore file the Appeal in good time.

12. The Respondent further avers that the Appeal is an afterthought and an abuse of the Court process. That he has

already started construction on the suit property and any appeal will be prejudicial to him.

13. Jurisdiction to enlarge time is donated under the provisions of Section 79G of the Civil Procedure Act which reads; -

“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 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”.

14. In **Salat v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling)** the Supreme Court of Kenya outlined some elements which the Court must consider while determining a question of expansion of time.

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; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court, Whether the court should exercise the

discretion to extend time, is a consideration to be made on a case to case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; Whether there will be any prejudice suffered by the respondents if the extension is granted; Whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time.

15. The Applicant avers that she was sick during the time within which she was to file the appeal and also that the Court did not supply him with the required documents in good time to enable her file the Appeal. The Applicant has filed a letter from Rangala Mission Hospital dated 29th July, 2024 stating the health challenges that the Applicant underwent during that period.
16. The court has a human face. I do not think anyone would want to wish sickness upon themselves. Indeed, the book of proverbs warns us that life and death are in the power of the tongue and he who chooses it shall enjoy its fruit. Moreover no one choses to fall ill and the timelines within which to get better. It is this Courts considered view that the Applicant has afforded an excusable explanation for the delay.

17. The Respondent submits that he has already started construction on the said land and that any attempt to expand time to file appeal will be prejudicial to him. The Respondent has the right to enjoy the fruits of his judgement so does the Applicant right to appeal. It is a delicate balance and I must choose the lesser risk should I be found to be wrong. I will accord the opportunity for the intended appeal to be ventilated as opposed to burying it completely.

Whether the applicant/defendant meets the requirements under order 42 rule 6(2) for grant of stay of execution

18. The principles guiding the grant of a stay of execution pending appeal are laid out under Order 42 rule 6(2) of the ***Civil Procedure Rules*** which provide; -

“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.

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.

19. It is evident from the above provisions that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant. See **Amal Hauliers Limited Vs Abdulnasi Abukar Hassan (2017) eKLR & Butt Vs Rent Tribunal (1982) KLR 417 and Antoine Ndiaye v African Virtual University [2015] eKLR.**

20. As to what constitutes substantial loss, Aburili J in the case of **Nicholas Stephen Okaka and Another (2022) eKlr. Civil**

Appeal No. 3 of 2022 cited with approval the holding in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, which held that: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

21. In the instant case, the applicants aver that they stand to suffer substantial loss, if stay of execution is not granted. I have seen the decree dated 25/07/2024 issued pursuant to judgement of the trial court delivered on 29/05/2023. The suit was dismissed with costs to the Defendant. It is not clear whether the costs have been taxed. As to the title based on the

decree it would appear the defendant holds the same. The respondent states he is undertaking development on the suit property and in my view this is what needs to be stopped for purposes of maintaining the status quo to preserve the suit property so as not to render the appeal nugatory.

22. Based on the foregoing, this Court allows the Application in the following terms: -

- 1) An order for maintenance of status quo hereby issues stopping any further construction/developments on parcel Number South Ugenya/Rangala/1245.
- 2) That leave be and is hereby granted allowing the Applicant file an appeal against the judgement of Hon. L. N. Sarapai (PM) in MCELC 4 of 2019 delivered on 29th May, 2023.
- 3) The appeal shall be filed within 14 days of this ruling failure to which the orders above shall automatically be discharged.
- 4) Costs of this Application are awarded to the Respondent.

Orders accordingly.

Dated at Siaya this 26th h Day of February 2026

HON. JUSTICE A. E. DENA

JUDGE

26/02/2026

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Ms. Mbetere Holding Brief for Mr. Acheru for Applicant

No Appearance for the Respondent

Court assistant: Ishmael Orwa

ORIGIN