

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 813 OF 2015

BISHOP MARK K. KARIUKI

BISHOP JOHN B. MASINDE

BISHOP GEORGE GICHANA

PLAINTIFFS

(Suing as Registered Trustees of Deliverance Church)

VERSUS

NEW AGE DEVELOPERS

CONSTRUCTION CO. LTD 1ST

DEFENDANT

SAMUEL CEGE KIBUNJA 2ND

DEFENDANT

CHIEF LAND REGISTRAR 3RD

DEFENDANT CHASE BANK (KENYA) LTD

..... 4TH DEFENDANT

ATTORNEY GENERAL 5TH

DEFENDANT

CONSOLIDATED WITH

ELC CASE NO. 813 OF 2015

Ruling

ELC NO 557 OF 2016

BALIGA LIMITED

PLAINTIFF

VERSUS

NEW AGE DEVELOPERS

CONSTRUCTION CO. LTD 1ST

DEFENDANT

SAMUEL CEGE KIBUNJA 2ND

DEFENDANT

CHIEF LAND REGISTRAR 3RD

DEFENDANT

RULING

1. Judgement was entered in this matter on 6th February 2025. Subsequently two applications were filed, which are for determination before this Court.

Application dated 8th April 2025

2. It is filed by the 2nd Defendant who seeks the following Orders:

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- 1) Spent.**
- 2) Spent.**
- 3) That this Honourable Court be pleased to grant the 2nd Defendant leave to file a Notice Appeal out of time urgently as he stands to suffer irreparable damages if execution proceeds as per the judgement and decree delivered by Hon. Justice E. K. Wabwoto delivered electronically on 6th February,2025.**
- 4) That this Honourable Court be pleased to issue an order of stay of execution of its judgment and decree delivered by Hon. Justice E. K. Wabwoto delivered electronically on 6th February, 2025 and attached Notice of Appeal be deemed as filed.**
- 5) That, on 6th March 2025, when the judgment was being delivered electronically, the 2nd Defendant was and he was granted sick leave with further appointments on March 26th, 2025 leading to delays in filing Notice of Appeal.**

- 6) That this Honourable Court be pleased to grant a temporary stay of execution of the Judgment delivered electronically on 6th February 2025 by Hon. Justice E. K. Wabwoto urgently until the intended Appeal at Court of Appeal Nyeri is heard and determined.
- 7) That in the alternative of prayer 4 and 6 above, this Court be pleased to issue status quo to preserve the status of JUJA/KOMO BLOCK 1/30, JUJA/KOMO BLOCK 1/30, JUJA/KOMO BLOCK 1/31, JUJA/KOMO BLOCK 1/32, JUJA/KOMO BLOCK 1/33, JUJA/KOMO BLOCK 1/34, JUJA/KOMO BLOCK 1/35, JUJA/KOMO BLOCK 1/36, JUJA/KOMO BLOCK 1/37, JUJA/KOMO BLOCK 1/38, JUJA/KOMO BLOCK 1/39, JUJA/KOMO BLOCK 1/40, JUJA/KOMO all measuring 29 acres situate at Ndarug within the County of Kiambu, pending hearing and determination of the intended appeal at Court of Appeal Nairobi.
- 8) That this Honourable Court be pleased to issue a certificate of delay Urgently to enable the 2nd Defendant prepare Record of Appeal which is a

mandatory document to accompany the Memorandum of Appeal as per Court of Appeal directions and practice directions.

9) It is necessary for this court to intervene by way of a temporary stay orders and status quo orders to preserve and maintain the interests of the 2nd Defendant and to avoid the intended Appeal being rendered Nugatory and mere Academic Papers pending hearing and determination of appeal at the court of Appeal.

10) That the Applicant and or Appellant be granted leave for extension of stay orders so that he can get certified Court's document to file Record of Appeal within sixty days (60 days).

11) That, the Notice of appeal was not filed within 15 days as a result of the 2nd Defendant being unwell. Failure to file Notice of Appeal within prescribed period is not based on any malice and/or ill intentions.

12) That, the intended appeal has chances of success and the Application under urgency has been filed at this

Honourable Court with utmost good faith and without delay and the Respondent/Plaintiffs are not prejudiced.

13) That the costs of this application be provided.

14) That such other orders and/or further orders be made as this Honourable court may please.

3. The application is premised on grounds on its face and on the 2nd Defendant's supporting affidavit. He avers that following this Court's judgement of 6th February 2025, declaring that the suit properties belong to the Plaintiffs and further directing the 3rd Defendant to cancel his title and that he be evicted, he stands to lose his proprietary interest in the suit properties, which he has occupied since 2000.
4. He contends that his right to Appeal the said decision within fifteen (15) days lapsed when he was unwell, as he was unable to give instructions to his Advocate to pursue an appeal. To this end, he annexed a copy of Medical sick off leave dated 5th February 2025.

5. He claims that upon purchasing **JUJA/KOMO BLOCK 1/30**, he was issued with a title by the 3rd Defendant after following all the necessary procedure and that the Plaintiffs did not tender any evidence that would lead to his title being declared fraudulent thus he has an arguable case at the Court of Appeal to protect his interests as a bona fide purchaser. He attached a Notice of Appeal dated 8th March, 2025 and a draft memorandum of appeal and avers that his intended appeal has high chances of success.
6. He also avers that his advocates have applied for certified copies of judgement, order and proceedings in the matter for the purpose of preparing the Record of Appeal and seeks a certificate of delay awaiting preparation of the said Record of Appeal.

Response

7. The application is opposed by the Plaintiffs in 813 of 2015 vide the replying affidavit of Mark K. Kariuki. He avers that a sick off does not imply hospitalization thus the 2nd Defendant

could still have issued his advocates with instructions to pursue an Appeal within time. Further, that this Court's judgement was uploaded onto the e-filing platform the same day it was delivered and that even if the 2nd Defendant had been hospitalized between 5th and 9th February 2025, upon lapse of his sick leave on 9th February 2025, there was ample time to file the Notice of Appeal thus no reasonable explanation for the delay has been offered. He reiterates that the application is an afterthought and a ploy to delay the Plaintiffs' enjoyment of the fruits of their judgement. He points out that upon delivery of the impugned judgement, the Plaintiffs applied for the Decree which they served on all the parties, of which the 2nd Defendant did not object to the same.

8. On the 2nd Defendant's prayer for stay pending appeal, he avers that the 2nd Defendant has not demonstrated that he stands to suffer substantial loss and in any case, any loss suffered can be compensated by damages while on their part,

the Plaintiffs stand to suffer great prejudice by being denied the fruits of their judgment, which they have been pursuing in Court since 2015.

9. The application is also opposed by the Plaintiff in **ELC Case 557 of 2016** vide the replying affidavit of its director, Charles Waweru Gatonye, SC. He avers that the application is defective as the prayers sought specifically; leave to come on record and represent the 2nd Defendant, leave to appeal out of time and stay of execution of this Court's judgement should be sought in separate and individual applications.
10. Further, that the application is filed for the sole purpose of delaying execution proceedings as the 2nd Defendant has not given any good or sufficient cause for the delay in filing his notice of appeal. He points out that annexed sick of sheets do not explain the nature of the illness or its severity to justify delay of 46 days after the lapse of the 15 days statutory period of Appeal.

11. He contends that the 2nd Defendant has not met the threshold for issuance of stay of execution pending appeal and in any case their intended Appeal has no chances of success given that the Plaintiffs demonstrated how they acquired the suit properties from Mumo Estate Ltd while in contrast, the 1st and 2nd Defendants could not demonstrate how they got a title.

Application dated 12th May 2025

12. It is filed by the Plaintiffs in the main suit (813 of 2015) who seek the following Orders:

a) Spent.

b) That the Deputy Registrar of this Honourable Court be authorized to sign the transfers and Land Control Board Consent application forms for property Juja/Komo Block 1/ 3080, Juja/Komo Block 1/4939 and Juja Komo Block1/ 4940 and all necessary documents to give effect to the judgment of this court entered on 6th February, 2025.

c) That the Honourable Court do make such other and further orders as it may deem fit, necessary and expedient in the interest of justice.

d) That costs of this Application be provided for.

13. The application is premised on grounds on its face and on the 1st Plaintiff's supporting affidavit. He avers that following this Court's judgement in favour of the Plaintiffs and its declaration that the properties: **Juja/Komo Block 1/30, Juja/Komo Block 1/30, Juja/Komo Block 1/31, Juja/Komo Block 1/32, Juja/Komo Block 1/33, Juja/Komo Block 1/34, Juja/Komo Block 1/35, Juja/Komo Block 1/36, Juja/Komo Block 1/37, Juja/Komo Block 1/38, Juja/Komo Block 1/39, Juja/Komo Block 1/40, Juja/Komo Block 1/3079 and Juja/Komo Block 1/3080** all measuring 29 acres belongs to the Plaintiffs in **ELC NO. 813 OF 2015 & ELC NO. 557 of 2016**. The Court further directed the 3rd Defendant to issue provisional title deeds to facilitate the transfer of the aforementioned properties to the Plaintiffs. He avers that

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upon receipt of the Decree, herein, the 3rd Defendant retrieved the green cards and discovered that the 2nd Defendant had unlawfully subdivided property **Juja/Komo Block 1/3079** into two parcels: **Juja/Komo Block 1/4939** and **Juja/Komo Block 1/4940** and in order for the land registry to issue new titles in accordance with the Court's judgment, duly executed transfer documents and Land Control Board Consent forms are required, which he prays that this Court authorizes their execution by the Deputy Registrar of this Court.

14. The application is opposed by 2nd Defendant who contends that allowing the Plaintiffs' application will render his intended Appeal nugatory and mere academic. He asserts that he has a right to exhaust all the available appeal processes thus he stands to suffer irreparable loss if the application is allowed. Further, that he is ready to furnish such security as this Honourable Court may deem

appropriate for the performance of the Decree, to preserve the substratum of the dispute.

15. The application is also opposed by the 1st Defendant in **ELC Case No. 813 of 2015** vide the replying affidavit of Peter Muthee, whose averments mirror those of the 2nd Defendant.

16. The applications were canvassed by way of written submissions.

Submissions

17. The 2nd Defendant submits that there is no law that bars him from seeking stay orders as well as orders for extension of time to file notice of appeal in the same application as doing so saves limited judicial time. Further, that this Court has discretion to extend time and no serious objection has been raised concerning his explanation over the period of delay.

18. On stay of execution, he relies on the case of **Dilpack Kenya**

Limited v William Muthama Kitonyi [2018] eKLR to ELC CASE NO. 813 OF 2015 *Ruling*

submit that he has met the threshold for grant of stay, set under Order 42 Rule 6 (2) of the Civil Procedure Rules. He reiterates that he stands to suffer substantial loss if evicted from the suit properties which he has been in control of since 2002. Further, that if his application is not allowed, his intended Appeal shall be rendered nugatory and Article 50(1) of the Constitution which provides that every person has the right to have any dispute determined before a Court will be violated.

19. He also submits that if an order for security of costs is issued before he is heard, it will also be a breach to Article 50(1) of the Constitution. To this end, he relies on the case of **Westmont Holdings SDN BHD v Central Bank of Kenya (Civil Application 10(E017) of 2021) [2021] KESC 3 (KLR) (8 October 2021)**.

20. On their part, the Plaintiffs in **ELC Case 813 of 2015** submit that mere sick-off, without evidence of hospitalization or incapacity, does not demonstrate that illness prevented the

2nd Defendant from filing a notice of appeal within time, thus he is not deserving of this Court's discretion as he does not meet the conditions in **Salat v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling)**.

21. On stay of execution, they rely on the case of **RWW v EKW (2019) eKLR** to submit that in exercising its discretion on whether to grant or refuse stay, the Court must balance the Appellant's right to appeal against the successful party's right to enjoy the fruits of their judgment and ensure that no party suffers prejudice that cannot be adequately compensated by an award of costs.

22. They also submit that the three prerequisite conditions for granting stay of execution orders set out at Order 42 Rule 6 of the Civil Procedure Rules are not severable and must all be met before the orders sought are granted and, in this case, the 2nd Defendant has not met them. To this end, they

rely on the case of **Antoine Ndiaye v African Virtual University [2015] eKLR.**

23. On their application, they rely on the case of **Redempta Susan Chetembe v Alice Muhonja Kirambi [2020] KECA 464 (KLR)** to submit that if it is allowed, the 2nd Defendant's intended appeal will not be rendered nugatory since they have been in possession of the suit properties since 2015 while denying them the orders sought will leave a legal vacuum, exposing the properties to potential fraud and administrative difficulties at the Land Registry.

24. The Plaintiff in **ELC Case 557 of 2016** insists that the 2nd Defendant's application is fatally defective and submits that allowing it will be encouraging procedural confusion. Further, that the 2nd Defendant is not entitled to discretion to extend time as there is no sufficient cause for delay. It also submits that the intended appeal is not based on reasonable grounds deserving consideration, as the root of the Plaintiffs' title was proved to the required standards and that the

Appeal shall not be rendered nugatory as the Plaintiffs have been in occupation of the suit properties for over 15 years.

Analysis and Determination

25. Upon consideration of the two instant applications including the respective affidavits and rivalling submissions, the following are the issues for determination:

- **Whether the 2nd Defendant's Application is fatally defective.**
- **Whether the 2nd Defendant has demonstrated sufficient cause for extension of time to file Notice of Appeal.**
- **Whether the 2nd Defendant has met the threshold for grant of stay of execution pending appeal.**
- **Whether the Plaintiff's in ELC 813 of 2015 have established grant for prayers sought in their application.**

26. On the first issue, the Plaintiff in **ELC Case 813 of 2015** contends that the 2nd Defendant's application is defective as

the prayers sought specifically; leave to come on record and represent the 2nd Defendant, leave to appeal out of time and stay of execution of this Court's judgement should have been sought in separate and individual applications and that allowing the application would be encouraging flouting of procedures. In response, the 2nd Defendant contends that no law provides that such prayers should be filed separately. I note there is no procedure outlawing the joining of the said prayers in one application. In my view the Plaintiff seeks to rely on procedural technicalities which offends the provisions of Article 159 (2) (d) of the Constitution and I will decline to find that the 2nd Defendant's Notice of Motion application is fatally defective.

27. On the second issue, the 2nd Defendant seeks extension of time within which to file his Notice of Appeal. He contends that his intended appeal has high chances of success and that if leave is not granted, he stands to lose his proprietary accrued interests in the suit properties as a bonafide

purchaser. Further, that the intended Appeal will be rendered nugatory.

28. Order 50 Rule 6 of the Civil Procedure Rules provides that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the Court orders otherwise.”

29. The Supreme Court in **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** summed up the applicable considerations for extension of time as follows:

“I. Extension of time is not right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court; ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court; iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to- case basis; iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; v. Whether there will be any prejudice suffered by the respondents if the extension is granted; vi. Whether the application has been brought without undue delay; and, vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

30.Rule 77 (1) and (2) of the Court of Appeal Rules provides that:

‘A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the

superior court. (2) Each notice under subrule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.'

31. While Rule 4 of the Court of Appeal Rules stipulates that:

'The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.'

32. From these legal provisions, it is evident that it is only the Court of Appeal that is allowed to extend time for doing acts authorized by the said Rules. I note the 2nd Defendant seeks leave of this Court to extend time to file his Notice of Appeal and claims he was on sick off, hence failed to file the said Notice of Appeal on time. From the explanation provided, there is no indication that the 2nd Defendant was admitted in

hospital. From the facts before me, while relying on the legal provisions cited and associating myself with the decisions quoted, I find that this Court lacks jurisdiction to extend time to file a Notice of Appeal as it is the Court of Appeal that holds the primary jurisdiction to do so. I will hence decline to grant this prayer.

33. On the third issue, the 2nd Defendant seeks stay of execution of this Court's judgment pending determination of the intended Appeal. The Plaintiffs contend that he did not meet the threshold for grant of stay orders.

34. The legal provisions governing stay pending Appeal are contained in Order 42 Rule 6(2) of the Civil Procedure Rules which provides inter alia:

'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.'

35. In **RRW v EKW [2019] eKLR**, the Court of Appeal stated as follows:

"...The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent..."

36. In this matter, judgment was delivered on 6th February, 2025 in favour of the Plaintiffs wherein the Court ordered that the Plaintiffs were the absolute proprietors of the suit properties. The 2nd Defendant being dissatisfied with the whole of the said judgment seeks to lodge an Appeal but is yet to file a Notice of Appeal. From the facts before me while associating myself with the decisions cited, I find that the 2nd Defendant has not met the threshold for stay pending Appeal since no Appeal has been filed. In my view the 2nd Defendant has not demonstrated any sufficient cause or substantial loss. Insofar as the application was brought without unreasonable delay, the 2nd Defendant has even failed to furnish security. I will hence decline to grant an order of stay of execution pending appeal.

37. On the fourth issue, vide their application dated 12th May 2025, the Plaintiffs seeks orders authorizing the Deputy Registrar to sign the transfers and Land Control Board

Consent application forms for **Juja/Komo Block 1/ 3080, Juja/Komo Block 1/4939 and Juja Komo Block1/ 4940.**

38. They seek prayers to give effect to this Court's judgement of 6th February, 2025. In **Al Yusra Restaurant Limited v Kenya Conference of Catholic Bishops & another [2025] KEHC 7288 (KLR)** the Court stated that:

“A decree holder is entitled to enjoy the fruits of its judgement, and once any stay is lifted or lapses, the decree becomes enforceable..”

39. Based on the facts as presented in the Plaintiffs' application noting that they are the decree holders who should enjoy the fruits of their judgement, I find that their application which seeks to enable them enforce the judgement and decree of the court, is indeed merited.

40. In the foregoing, I find the 2nd Defendant's application dated 8th April, 2025, as unmerited and will disallow it. I find the Plaintiffs' application dated 12th May, 2025 as merited and will allow it.

41. Costs will be in the cause

**DATED SIGNED AND DELIVERED AT NAIROBI THIS
11TH DAY OF MARCH, 2026**

**CHRISTINE OCHIENG
JUDGE**

In the presence of:

Ms Onderi for Wafula for 1st Defendant

Ms Gichuhi for Plaintiffs in 557 of 2016

Ms Wafula for 2nd Defendant/ Applicant

Ms Gathoni holding brief for Mbaabu for Plaintiffs in 813 of
2015

Court Assistant: Joan