

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ELC CASE NO. 433 OF 2017

**MAURICE OKELLO
ONYANGO.....PLAINTIFF/APPLICANT**

VERSUS

**NELSON OMOLO
ACHOLA.....DEFENDANT/RESPONDENT**

RULING

The Application

1. The applicant filed an application dated 11th April 2025 under a certificate of urgency. The application is brought under Order 42 Rule 6 (1) and Order 51 Rule (1) of the Civil Rules 2010, Sections 1A, 3A, 65, 78G and 95 of the Civil Procedure Act, and Section 7 of the Appellate Jurisdiction Act. The Applicant seeks orders that:

- a) ...Spent.
- b) ...Spent.
- c) That this Honorable court be please to grant the Applicant leave to lodge a Notice of Appeal out of time against the whole judgment of this court delivered on 18/10/2022.
- d) That this Honorable court be pleased to grant orders stay of execution of Decree pending determination of the pending appeal.

- e) That the security of Kshs. 197, 350/= deposited in court on the 31/7/2024 be deemed as security for costs pending hearing and determination of the appeal.
- f) Any other orders that the court deems fit in the circumstances.
- 2.** The application is premised on the grounds set out on the face of the application as well as the supporting affidavit sworn himself, one Maurice Okello Onyango.
- 3.** The Applicant deposed that this court rendered its judgment on 18th October, 2022, which judgment was not in favour of the applicant. He added that he filed an appeal vide a notice of appeal dated 1st December 2022, but the same was not served upon the respondent within the stipulated owing to inadvertence. He deposed further that the respondent moved the court and the said notice of appeal was struck out for being defective. He maintained that he is still desirous of pursuing the appeal on merit.
- 4.** The applicant states that the respondent is keen on executing the decree against him by dint of the ruling of the court of appeal. He is afraid that should the respondent proceed and execute the said decree, he will suffer irreparable harm since his appeal will not have been heard on merit. It was his contention that the respondent trespassed into his land and without the protection of this court. He fears that the respondent will subject the said land to waste. The applicant also deposes that he has complied with orders of the court

since he has deposited security for cost in court, and is willing to have the same retained pending the hearing and determination of the appeal.

5. Lastly, the applicant maintained that the respondent would not suffer any prejudice should the prayers he seeks be granted. He adds the application has been brought timeously and that it in the best interest of justice that the orders he seeks granted.
6. The court has considered the content of the depositions in the supporting affidavit to the application and the content of the grounds in support of the application. They are similar, save for the additional information that the applicant added by way of annexures to the Affidavit. Thus, this court sees no point replicating its contents but will consider the content already summarized above as depositions that they are in the affidavit.
7. The applicant annexed the following copies of documents to which were affixed the stamp of the Commissioner for Oaths: a copy of the notice of appeal dated 1st December 2022, the ruling of the court of appeal dated 4th April 2025, a receipt of security for costs dated 31st July 2024, a letter dated 8th November 2022 requesting for proceedings and payment receipt for the same, two letters dated 8th March 2023 and 17th April 2023, both making a follow upon the requested proceedings.

The Response

8. The respondent filed a replying affidavit dated 22nd July 2025. He averred that the applicant's application is founded on

falsehoods and misrepresentation of facts and that the same was made for the purpose of defrauding the cause of justice.

- 9.** The respondent maintained that the applicant commenced a suit against him on 13th August 2015, and the same was heard and determined in his favor on 18th October 2022. He annexed a copy of the court's decree to substantiate his averment. He averred further that, after the court rendered its judgment, his advocates prepared a party and party bill of costs, assessed at KShs. 189,850/= and a certificate of costs issued to that effect. He annexed the said certificate of costs.
- 10.** Further to the foregoing, the respondent deponed that the applicant filed a notice of appeal as well as a stay of execution of the court's judgment and decree pending the applicant's intended appeal at the Court of Appeal at Kisumu. It was his further deposition that, on 19th June 2024, this court granted the applicant a stay of execution on the condition that the applicant deposits the taxed costs as security.
- 11.** The respondent acknowledged that indeed, the applicant deposited sh. 197,850/= on 31st July 2024 as security for costs. However, the applicant's appeal at the Court of Appeal was struck out with costs upon the respondent's application. To buttress this deposition, the respondent annexed a copy of the Court of Appeal's ruling to his affidavit.
- 12.** He maintained that, the fact of the applicant's appeal being struck out meant that the stay of execution granted by the court on 19th June 2024 stood extinguished. As such, the

respondent avers that the instant application seeking stay of execution is *res judicata* in view of the orders issued by this court on 18th June 2024.

13. It was also his contention that the applicant has not demonstrated how he stood to suffer should the orders he seeks not be granted. On the contrary, the respondent averred that he would be prejudiced should this court allow the applicant's prayer as he would be prevented from enjoying the fruits of his judgment.

14. Finally, the respondent deposed that, the fact of the applicant mounting an appeal does not in itself warrant the grant of stay of execution even if the appeal has chances of success. He deposed that stay of execution is granted at the court's discretion and added that the applicant had taken a period of three years to file the instant appeal, without explaining the reason for such inordinate delay.

15. On the basis of the foregoing reasons, the respondent prayed that the applicant's application be dismissed.

Submissions

16. The application was canvassed by way of written submission. The applicant filed his submission dated 11th August 2025. He framed two issues for determination by this court, being: Whether the applicant should be granted leave to appeal out of time and, whether Stay of execution orders should issue.

17. As to whether the applicant should be granted leave to appeal out of time, it was submitted that judgment was entered in his

favor on 18th October 2022. The applicant, being aggrieved by the said judgment lodged an appeal at the court of appeal dated 1st November 2022. He added that his notice of appeal was struck out on account of technicality and that the time for filing an appeal has lapsed except that he may file a fresh appeal with the leave of the court.

- 18.** The applicant further submitted that he is desirous of having his appeal heard on merit. He submitted that the jurisdiction of this court to grant the orders sought is discretionary and relied on **Ogola v Bob Morgan Services Limited [2025] KECA 1389 (KLR)** as well as the court of appeal decision in **Thuita Mwangi v Kenya Airways [2003] eKLR** to buttress that position.
- 19.** The applicant also submitted that he has case with high chances of successes since the same raises triable issues. He also submitted that the respondent shall suffer no prejudice should the orders sought be granted since he is already in occupation of the suit property. the respondent stated that he has already deposited security for costs in court. As such, he maintained that any inconvenience arising can be mitigated.
- 20.** On whether the applicant should be granted stay of execution orders pending appeal, the applicant cited the Court of Appeal decision in **Butt v Rent Restriction Tribunal [1979] eKLR** to outline the principles governing the grant of stay of execution orders.

- 21.** Accordingly, the power to grant or refuse to grant such orders is dictionary on the part of the court. Secondly, a stay of execution should be granted so as not render the applicant's appeal nugatory unless there is overwhelming hinderance against granting such an order. Thirdly, a judge should not refuse to grant stay of execution orders if there are good grounds for grant the same simply because he/she that the applicant may get a better remedy at the end of the proceedings. Lastly, the court should consider the special circumstances of each case.
- 22.** The applicant further submitted that he had met the requirements set out in Order 42 Rule 6 (2) of the Civil Procedure Rules 2010. He argued that he would suffer substantial loss and maintained that substantial loss is what is to prevented by preserving the status quo since such a loss would render the appeal nugatory. The applicant submitted that he is the registered owner of the suit property and that the trial court did not protect his interests as provided under section 26 of the land registration Act. he maintained that the impact of that order would be to make his loose his land.
- 23.** Further, the applicant submitted that there was need to grant the stay orders as the respondent continues to cultivate and use his land will all manner of malice and with undue regard to the rights of the applicant.
- 24.** Lastly, the applicant urged the court to order that each party occupies its respective land for purposes of preserving the suit

property pending appeal so that his appeal is not rendered nugatory.

- 25.** On whether the appeal was filed without undue delay, the applicant submitted that the court of appeal decision was rendered on 4th April 2025 and the instant appeal was filed on 16th April 2025 hence no delay was occasioned in the filing of the instant appeal.
- 26.** On the issue of security for costs, the applicant submitted that he had deposited Ksh. 197,350/= on 31st July 2024 in compliance with the orders issued by this court on security.
- 27.** On the question of the costs, the applicant prayed that the said costs abide the application.
- 28.** On his part the Respondent filed his submissions dated 14th November 2025. He framed two issues for determinations, that is: whether the applicant's application for leave to appeal out of time is merited and, whether application for stay of execution can be granted to a non-existent appeal.
- 29.** On whether the application for leave to appeal out of time is merited, the respondent submitted that the application in question relates to a suit filed before this court, albeit differently constituted at the time of filing the suit. The matter was presented as a claim for recovery of land and the court directed the land registrar and the county land surveyor to visit the suit property and file a report in court. the findings were that the dispute in question related to a boundary but the

nevertheless proceeded to hear and determine the matter on merit.

- 30.** The respondent submitted that the court rendered its judgment on 18th October 2022 and dismissed the applicant's suit with costs. The applicant, being dissatisfied, lodged a notice of appeal at the court of Appeal in Kisumu on 1st November 2022 and the said appeal was struck out on 4th April 2025. He submitted that the applicant's appeal was struck out for failure to seek leave to file the appeal out of time.
- 31.** The respondent submitted that the applicant filed the instant appeal, seeking leave to appeal against the decree of the court issued on 18th October 2022. He also submitted that the appellant an application for stay of execution before this court and same was conditionally granted on 19th June 2024.
- 32.** Further to the above, the respondent submitted that the applicant was bound to explain to the court why he did not file the appeal in time, considering that the is seeking an equitable remedy; more so considering that grant of the remedy is dependent on the court's discretion. The respondent emphasized that the courts have the power to extent time, but the exercise of this power must be exercised judiciously. He added that the court's discretion should be exercised on the basis of the circumstances of each case.
- 33.** On the issue of whether stay of execution could be granted on a non-existent appeal, the respondent reiterated that the nature of the dispute before the court relates to boundary issue

as opposed to being a claim for the recovery of land. He further submitted that despite this factual background, the court nevertheless proceeded and heard the case on merit and the applicant eventually lost. On 19th June 2024, the court granted the applicant a conditional stay of execution which, according to the respondent lapsed when the applicant's appeal was struck out at the court of appeal.

34. The respondent also maintained that the decree of the court issued on 18th October 2022 was negative in nature and as such, it was incapable of being stayed.

35. The respondent also submitted that it was improper for the applicant to seek a stay of execution absent an appeal; he should have sought leave to appeal out of time first and subsequently apply for stay of execution pending appeal.

36. Moreover, the respondent submitted that the issue of stay of execution is now res judicata, considering that the applicant had been granted stay of execution on 19th June 2024. He relied on **Maina Kiai & 2 Others v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR** to highlight to considerations that a court should have in determining whether a matter is res judicata or not.

37. The respondent concluded that the applicant's application is without merit and prayed that the same be dismissed with costs.

Issues, Analysis and Determination

38. This court does not apply the Appellate Jurisdiction Rules in applications such as the instant one or in others. Thus the citation of Section 7 of the Appellate Jurisdiction Act is misplaced. Be that as it may, this Court is guided by Order 51 Rule 10(1) of the Civil Procedure Rules to find that such an error does not render the application incurably defective.

39. That said, the instant application raises the following issues for determination:

- a) Whether the applicant's application for leave to appeal out of time is merited;
- b) Whether the applicant should be granted stay of execution pending appeal; and
- c) Who should bear the costs of the application.

40. This court proceeds to determine the issues sequentially.

a) Whether the applicant's application for leave to appeal out of time is merited

41. Appeals from the lower to this court must be filed within 30 days after the issuance of the decree against which the applicant wishes to appeal. However, this period may be extended where the appellant/applicant has a good cause for not filing an appeal within the requisite time and the same is explained to the court to its satisfaction. Section 79 G of the Civil Procedure Act provides for appeals from the lower court in the following terms:

"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.

42. In **Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**, the Supreme Court rendered itself on the issue of extension for purposes of filing appeals out time. The court determined that:

“It follows that when considering whether to grant an extension of time for an appeal against a final decision in a case of any complexity, the courts should consider “all the circumstances of the case” including:

- a) the interests of the administration of justice;*
- b) whether the application for relief has been made promptly;*
- c) whether the failure to comply was intentional;*
- d) whether there is a good explanation for the failure;*
- e) the extent to which the party in default has complied with other rules, practice directions and court orders;*

f) whether the failure to comply was caused by the party or his legal representative;

g) the effect which the failure to comply had on each party; and

h) the effect which the granting of relief would have on each party.

43. The decision against which the applicant intends to appeal was rendered on 18th October 2022. Reasons were given as to why in the Court of Appeal the appeal was struck out and the court considered the reasons the appellant did not comply with the Rules of the Court and determined the issue of the Notice on the merits thereof. This court will not venture into that issue. Its concern herein is whether the prayer for extension of time is merited.

44. The facts of the instant matter, as deposed by the parties and partly borne by the record are that the applicant lodged an appeal at the Court of Appeal on 1st December 2022 and the same was dismissed by the court for non-compliance on 4th April 2025. Seven days later, that is, on 11th April 2025, the applicant filed the instant application seeking among other prayers, leave to file an appeal out of time.

45. It is therefore absolutely false on the part of the Respondent to argue that the applicant is moving this court for leave to appeal against the decision of this court without an explanation for the delay. This court abhors arguments put forth by them against adverse parties for the sake of it or purposely to

mislead courts or keep them busy to write decisions over obvious uncontested issues. Parties to matters should be cautioned that it is absolutely unnecessary for them to vex the court with obvious arguments, especially those which they deliberately skew to favour their cases. A matter such as the instant one should have called for honesty on the part of the Respondent to the effect that indeed there was an appeal which had been struck out but perhaps that the delay of seven (7) days to bring the instant application was inordinate.

46. In **Jedida Alumasa & 3 others v S.S. Kositany {1997} KECA 248 (KLE)**, the Court of Appeal established that a party whose appeal has been struck out has the liberty of restarting the process a new, provided he or she seeks an order extending the time to appeal promptly. The court held that:

It is now established that a litigant whose appeal has been struck out has the liberty to restart the appellate procedures, provided he can be able to come to court promptly for an order extending time, at least to lodge a fresh notice of appeal. That is what the applicants did in this matter.

47. The respondent averred that there was delay in bringing the instant application and the said delay was not accounted for. In the **Jedida Alumasa decision (supra)** the court reasoned that the time of delay should be calculated from the date when the appeal was struck out and not when the judgment in question was delivered. It opined as follows:

Their appeal was struck out on 11th October, 1996, and on 8th November, 1996, they brought this application. The delay in bringing the application cannot, in the circumstances of this case, be regarded as inordinate. I take cognizance of the fact that the affidavit in support of this application is sworn by one of the applicants on her own behalf and on behalf of the other applicants. It is probable that their counsel had to write to them to require them to call at her chambers with a view to swearing the affidavit. It must, also, be noted that the respondent is not complaining of the delay from the date the applicants' appeal was struck out, but since the date of judgment. It will, in my view, be preposterous to accept the view the respondent's counsel put forward, that the steps the applicants took in their struck-out appeal should be ignored. Doing so will, in my view, be acting on the erroneous assumption that human beings never make mistakes and that all human errors are inexcusable.

Considering all the facts and circumstances of this matter I am persuaded to and hereby grant the extension prayed for. The applicants have five (5) days from the date of this ruling to lodge and serve a fresh notice of appeal and 15 days, thereafter, to lodge and serve a record of appeal. The costs of this application

will abide the outcome of the intended appeal.
(emphasis added)

- 48.** Accordingly, I find and hold that duration of seven (7) days from when the appeal was struck out and when the instant application was filed was a very short one. The applicant's action bespeaks a diligent party in pursuing justice. Thus, there was no delay in bringing the application herein, considering that the applicants brought the application 7 days after his appeal was struck out. The applicant's prayer for extension of time to appeal out time is therefore merited and is allowed.
- 49.** On the second issue of stay of execution, the respondent averred that the applicant should have sought the extensions of time to appeal the intended appeal out of them, and subsequently file the stay of execution application after the time had been extended.
- 50.** The period for filing the Notice of Appeal starts to run from the date of this Ruling. The rest if the Court of Appeal Rules apply. As to what and how the applicant does with the leave granted this day it is up to him since this Court is not in control of the process hereafter.
- 51.** This court now moves onto the next issue. The respondent also averred that issue of stay of execution was *res judicata*, considering that the same had been heard and determined by the court on 19th June 2024 when the court granted the applicant a conditional stay of execution pending appeal.

52. Order 42 rule 6 (1) of the civil procedure rules provides that:

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 such person aggrieved by such an order of stay made by the court whose decision the appeal is preferred may apply to the appellate court to have such order set aside (Emphasis added).

53. Further, **Order 42 rule 6 (2)** provides for the conditions that the court ought to factor when dealing with an application for stay of execution pending appeal, thus:

No order for stay of execution shall be made under sub-rule (1) unless -

- a) the court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without a reasonable delay; and
- b) such security as the court orders for the due performance of such decree of order may ultimately

be binding on him has been given by the applicant (emphasis added).

- 54.** There were arguments by the Respondent that the instant prayer was res judicata and therefore should not be granted. The applicant thinks otherwise.
- 55.** I have considered the arguments by both parties. I have also considered the submissions on the application. It is not in dispute that the applicant was granted a conditional stay of execution which was predicated upon the existence of the appeal which was struck out by the Court of Appeal. It was upon the striking out of the appeal that the stay lapsed, meaning the stay of execution granted herein earlier 'went' with the striking out of the previous appeal since it was attached to it. Res judicata is a doctrine that operates to bar same parties from litigating over the same issue in the same capacity when an issue has been determined on merits by a court of competent jurisdiction. That is what Section 7 of the Civil Procedure Act provides.
- 56.** In the instant matter, the applicant has sought a stay of execution pending the intended prosecution of the appeal, and not the former one. If, for argument's sake, the instant application is res judicata it would mean that the stay of execution which was granted earlier and which lapsed with the striking out of the previous appeal would not lapse irrespective of how many times the applicant moved to the court of appeal and lost the appeal he would have filed. This would be an

absurdity because one cannot tell how many times and when an applicant who moves the Court of Appeal and loses will move the court. The Respondents would wait endlessly for the day such applicants would be satisfied that they would have been through with seeking justice in the appellate courts.

57. By the same token if an applicant moved the court of appeal and lost the appeal by reason of a technicality such as he instant matter and then he was shut out from the seat of justice in his bid to seek a stay of execution upon filing a fresh application and appeal, it would be a sad day to expose him to lack of stay of execution if need be and render the subsequent appeal nugatory or an academic exercise. It is for these reasons that the law and justice envision a situation by which such an applicant would approach the same court for another stay because the subsequent prayer for stay of execution is in respect of a completely different appeal. The applicant herein has come before this court in a new capacity: a fresh appellant.

58. Given the above holding, I am inclined to find and I hereby do that the prayer for stay of execution pending appeal as prayed is merited. I have considered the prayer for execution with the prayer in the next limb that the deposit which had been made was to act as security for the intended appeal. The totality of the interest of justice is that there was an appeal filed earlier on in which there was a stay of execution and that was for purposes of the appeal not being rendered nugatory. This is because since the parties herein had intended earlier on

that there be a stay of execution pending appeal whose notice was struck out, and there was a deposit of security for costs. Granted that there is an appeal to be filed within the time the law stipulates, it would not be in the interest of justice deny the party a stay of execution as prayed. Thus, there is then granted a stay of execution pending appeal on condition that the security in the sum of Kshs. 197, 350/= which was deposited herein pending the determination of the previous Appeal be retained and used as security for costs pending the determination of the appeal to be filed forthwith.

59. The totality of it is that prayers c, d and e of the application dated 11th April 2025 are granted. Once more, leave to appeal to start running from today.

60. On costs of the instant application, they shall be in the Cause.

61. Orders accordingly.

Ruling dated, signed and delivered at Migori virtually via Teams Platform this 9th day of March, 2026.

HON. DR. IUR F. NYAGAKA
JUDGE

In the presence of:

Owino Advocate holding brief for Abisai for the Plaintiff/Applicant
Mulisa Advocate for the Defendant/Respondent.

