



**Kinaiya & 2 others (Suing as Personal Representatives of Joseph Sein, Deceased) v Elesondai & 2 others (Environment and Land Case E019 of 2021) [2026] KEELC 2304 (KLR) (16 April 2026) (Judgment)**

Neutral citation: [2026] KEELC 2304 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND CASE E019 OF 2021**

**J OMANGE, J**

**APRIL 16, 2026**

**BETWEEN**

**GEOFFREY MEITARON KINAIYA ..... 1<sup>ST</sup> APPELLANT**

**ALFRED NKOSHIMU KINAIYA ..... 2<sup>ND</sup> APPELLANT**

**JONATHAN KOIN KUITA ..... 3<sup>RD</sup> APPELLANT**

**SUING AS PERSONAL REPRESENTATIVES OF JOSEPH SEIN, DECEASED**

**AND**

**IBRAHIM LEI ELESONDAI ..... 1<sup>ST</sup> RESPONDENT**

**MARIAS OLE PAKINE TENKEYA ..... 2<sup>ND</sup> RESPONDENT**

**JACOB MWANTO WANGORA ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. On the 7<sup>th</sup> October 2020 Judgement was delivered in Kajiado CMELC No 44 of 2018. In the Judgement the court declined to order specific performance instead ordering that Joseph Sein ( now deceased ) repay the Respondents the sum of Ksh 5,105,00 plus interest from 16.9.2015.
2. Five and a half months after delivery of the Judgement the Appellants who were the Defendants in the lower court filed an application dated 17<sup>th</sup> March 2021 in which they sought leave to appeal out of time, stay of execution of the Judgement and or setting aside of the Judgement. The application came up for hearing before Hon I Kahuya on 31<sup>st</sup> March 2021 She directed that the Respondents be served and granted leave to the Applicant to file a Supplementary affidavit. She further gave directions on the filing of written submissions by both parties by 19<sup>th</sup> May 2021 and set a Ruling date for 24<sup>th</sup> May 2021. On the said date she delivered the Ruling as scheduled. The order arising from this Ruling is the subject of the present appeal.



3. In the memorandum of appeal the Appellant raises the following grounds of appeal:
  - i. THAT the Honourable Learned Magistrate erred in law and in fact by issuing impractical orders on 31<sup>st</sup> March 2021 by directing the parties to file Response, supplementary affidavit, written submissions, set matter for Ruling for 24<sup>th</sup> May 2021 and proceeded with the file for leave thus leaving the parties without any choice of filing the further pleadings as ordered. These occasioned is a miscarriage of justice.
  - ii. THAT the Honourable Learned Magistrate erred in law and in fact by proceeding with the file for leave hence denying the Applicant (now Appellant) the opportunity to file further certificate urgency and further supporting affidavit to demonstrate that there was an imminent threat of execution since the Court file was not available at the Registry to enable the Applicant support his case.
  - iii. THAT the Honourable Learned Magistrate erred in law and in fact by delivering the ruling on 24<sup>th</sup> May 2021 without according the parties an opportunity to file the ordered pleadings. The Hon. Magistrate ought to have arrested the ruling to allow the parties to comply with the ex parte orders she issued on 24<sup>th</sup> April 2021.
  - iv. THAT the Honourable Learned Magistrate erred in law and in fact by failing to grant the Appellant leave to file the Notice of Appeal out of time where the draft Memorandum of Appeal raised serious grounds of Appeal challenging the manner in which the trial Magistrate arrived at award of Damages.
  - v. THAT the Honourable Learned Magistrate erred in law and in fact by failing to grant the Appellant herein stay of execution pending the Hearing and determination of intended appeal as was demonstrated in our further certificate of urgency and supporting affidavit all dated 12<sup>th</sup> April 2021 which was not placed on Court Record due to unavailability of the Court file.
  - vi. THAT the Honourable Learned Magistrate erred in law and in fact as the ruling date 24<sup>th</sup> May 2021 is marred with contradictions and inconsistencies.
4. The court directed that the appeal be canvassed by way of written submissions. Counsel for the Appellants submit that the learned trial magistrate issued impractical orders as she directed that the parties file submissions but proceeded on leave with the file frustrating compliance with her orders. Counsel argues that this occasioned a miscarriage of justice as the Appellants were condemned unheard.
5. The Appellants fault the magistrate from proceeding to deliver the Ruling even though the parties had not complied with her directions on the filing of submissions. On the substantive prayers sought by the Appellant it is the argument of counsel for the Appellant that the learned magistrate exercised her discretion to the detriment of the Appellant by declining to grant stay of execution and further that the magistrate should have granted leave to appeal out of time. It is further the contention of the Appellant that the Ruling is marred with contradictions and inconsistencies. Counsel cited various authorities including; *Evans Odhiambo Kidero & 4 others versus Ferdinand Ndungu Waititu & 4 others (2014) eklr*
6. Ultimately it is the case of the Appellant that the Appellants were denied the Right to a Fair hearing as envisaged by Article 50 of *the Constitution* and if not set aside the Judgement is likely to greatly prejudice the estate of the deceased defendant.



7. Counsel for the Respondent too filed submissions for the courts consideration. Counsel argued that the Appellants had every opportunity to comply with directions on filing of submissions. They did not. Counsel stressed that no evidence had been presented before court to confirm that any attempt was made to file submissions. Indeed no draft submissions have been presented before court. It is the case of the Respondents that the Appellants were given a reasonable opportunity to be heard. They squandered this opportunity.
8. On the substantive prayers sought, counsel argued that the learned magistrate did not have jurisdiction to grant extension of time to file the appeal. This issue should have been raised in the Environment and Land Court. Counsel went further to argue that in any event the reason given for the delay in filing the appeal was not genuine as contrary to the assertion of the Appellant, the court had duly notified the parties of the Judgement date.
9. Regarding stay of execution, counsel for the Respondent submit that there was no legal basis to grant stay as the appeal had not been filed or leave granted to file out of time. Lastly counsel urges the court to dismiss the ground alleging contradictions and irregularities as these have not been pointed by the Appellants in the submissions.
10. As a first Appellate Court, this Court has the jurisdiction to consider the evidence, re- evaluate it and make its own conclusion, noting that it may only interfere with the lower courts findings where they were based on a misapprehension of evidence or was reached at as a result of acting upon wrong principles. This is the position held in the case of Abok Adere T/A A.J Adere & Associates versus John Patrick Machira T/A Machira & Co. Advocates, [2013] eKLR where the Court of Appeal emphasized the role of the first appellate court thus,

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

11. This being an appeal on an interlocutory application, this court is on a similar footing with the court of first instance which determined the matter on the basis of the affidavit evidence. I am also reminded that an appellate Court would not normally interfere with exercise of the discretion of the lower court unless it has not been exercised judiciously. As to what the term “discretion” means the Court in The Supreme Court of Uganda, in Kiriisa v Attorney-General and Another [1990-1994] EA 258 stated that: “Discretion simply means the faculty of deciding or determining in accordance with circumstances and what seems just, fair, right, equitable and reasonable in those circumstances.” This discretion being wide, the main issue before this court is for the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules of procedure. This court should however ask itself under what conditions, if any, it ought to set aside the Judgement and such conditions, if appropriate, must be just to both the Appellants and the 1<sup>st</sup> Respondent
12. Being mindful of the foregoing principles and considering the submissions by both counsels and the memorandum of appeal the court distills the following issues for determination; Whether the appellants were denied an opportunity to file submissions; Whether the absence of submissions vitiates the ruling; Whether the trial magistrate had jurisdiction to extend time to appeal; Whether the trial magistrate erred in failing to grant stay of execution pending appeal.



13. It cannot be gain said the Right to be heard is protected by Article 50 (1) of *the Constitution*. The Appellants aver that they were denied an opportunity to be heard as they could not file submissions in the absence of the file. Under Section 107 and 108 of the *Evidence Act*, the burden of proof is to be discharged by he who alleges. The Appellant did not adduce any evidence in the form of correspondence with the registry, neither were any draft submissions attached to their application. Furthermore they did not adduce any evidence to establish that the learned magistrate was on leave from 31<sup>st</sup> March 2021 to 19<sup>th</sup> May 2021 when the timelines for filing of submissions expired. The Appellants have failed to discharge the burden of proving this allegation.
14. The Appellants also needed to prove the prejudice that was occasioned by the failure to file the submissions. Submissions are only meant to aid the court and are not evidence which in this case the court was already seized of as the Appellant had already filed the application and a supporting affidavit. The Appellants did not establish such prejudice.
15. The application before the Magistrates court included a prayer for extension of time to file an appeal. Time for filing an appeal from a subordinate court to the Environment and Land Court is governed strictly by section 79G of the *Civil Procedure Act*, which provides a 30day statutory period from the date of decree or order. Section 79G vests the power to admit an appeal out of time in the appellate court, not the subordinate court. The learned magistrate therefore had no jurisdiction to grant extension of time and indeed did not consider the issue.
16. Lastly is the question of whether the learned magistrate erred in failing to grant stay of execution. The principles guiding the grant of stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:
  - 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.
17. The learned magistrate in refusing to grant stay considered the unexplained delay in filing the application, the fact that substantial loss had not been proved and that no security had been offered. I am unable to fault her findings on these elements. I agree with her findings that the Appellant failed to meet the threshold for grant of stay.
18. There was an issue raised that the Ruling had inconsistencies and contradictions. These were not pointed out by counsel for the Appellant in his submissions. Neither was the court on its own able to decipher these contradictions and inconsistencies
19. In the end I find that the appeal has no merit and is dismissed with costs.

conclusions

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 16TH DAY OF APRIL 2026.**

**JUDY OMANGE JUDGE**

**IN THE PRESENCE OF:\**

Mr.Ougo for the Appellant. Mr.Githuka for the Respondent. Peter – Court Assistant.

