



**Obonyo v Okech (Environment and Land Appeal E043 of 2024)
[2025] KEELC 5582 (KLR) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5582 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E043 OF 2024**

AE DENA, J

JULY 24, 2025

BETWEEN

CHARLES OWINO OBONYO APPELLANT

AND

JOHN OCHIENG OKECH RESPONDENT

RULING

1. This ruling is the subject of the application dated 22nd October 2024. The application seeks orders for stay of execution of the judgement of the Honourable L.N Sarapai [PM] Ukwala Principal Magistrate Court MCELC/82/2018 dated 9/11/2022. It also seeks for leave to appeal out of time.
2. The application is premised on the grounds on its face and the supporting affidavit of Charles Owino Obonyo the plaintiff in the trial court proceedings. The applicant avers that he became aware of the judgement on 20/6/2024 when he was served by Disney auctioneers with a copy of advertisement in the Star Newspaper and public auction documents. On inquiry from his lawyers Odhiambo Odero & Co. Advocates whose response was unsatisfactory he changed legal representation. He then filed an application before the trial court for stay of execution pending appeal.
3. It is further deponed those four months have lapsed since he became aware of the judgement due to errors by his previous legal counsel as well as illness on the applicant's part in August 2024 which resulted in financial hardship. That the application has been filed without undue delay. That the intended appeal has overwhelming chances of success. That he stands to loose irreparably if the respondent is allowed to proceed with execution as his home sits on the parcel East Ugenya/Kathieno B/1937. Further the substratum of the appeal would be rendered nugatory while the respondent will suffer no harm if the application is allowed.
4. The applicant undertakes to surrender the original title deed to the court as security pending hearing of the intended appeal.



5. Attached are copies of the Memorandum of Appeal, judgement dated 9/11/2022, Public auction & Star Newspaper advertisement and copy of title deed East Ugenya/Kathieno B/1937.
6. The application is opposed vide the replying affidavit sworn on 10/3/2025 by John Ochieng Okech the plaintiff in the trial court. It is averred that the applicant has failed to properly move the court for stay of execution orders pending appeal. That the conditions under 42 Rule 6 of the Civil Procedure Rules for grant of orders of stay under have not been met. There is an inordinate of 2 years since the lapse of the 30 days within which the appeal was to be filed. There is no evidence of the financial hardship and alleged illness. There was an opportunity to file appeal as pauper under Order 44 of the Civil Procedure Rules. There is no demonstration of how the execution will occasion irreparable loss or how it will alter the status quo.
7. The respondent asserts that the offer to deposit title does not suffice for a money decree as it does not translate to liquid funds readily available. That there is no demonstration that the respondent would be unable to refund the decretal sum in the event the intended appeal is successful. That there is no demonstration of the steps taken by the applicant by actively pursuing his case to remedy the mistakes of the advocate. That cases belong to litigants.
8. It is stated that litigation must come to an end. A similar application was dismissed by the trial court on 20/6/2024. It is deponed that the proceedings commenced in 2018. That the applicant failed to pay the decretal sum and execution was duly preferred. To circumvent execution the respondent subdivided the suit property into two, sold a portion to deny the respondent enjoyment of the fruits of his judgement.
9. it is urged that the grounds in the memorandum of appeal do not raise any arguable points of law. The application is not brought in good faith.
10. The application was canvassed by way of written submissions. The applicants' submissions are dated 21/5/2025 and the respondents 24/04/2025. I note that the respondents' submissions are filed in the name of the respondent in the absence of a notice of intention to Act in person. I will consider the same by dint of the Article 159[2][d] enjoining the court to render substantive justice devoid of undue consideration of technicalities.

Analysis And Determination

11. Having considered the application, the response in opposition thereto the main issue that commends determination is whether the orders issued should be granted.
12. There is a preliminary issue this court must address. The respondent contend the matter is not properly before this court but did not expound further on the same. However, the applicant addresses the issue in its submissions by contending that the matter was erroneously filed as a substantive appeal when it ought to have been filed as miscellaneous application. The court is urged to overlook the procedural defect and focus on substantive justice.
13. I think it is clear from the application, the grounds and the supporting affidavit that the applicant seeks stay of execution pending appeal and leave to file such appeal out of time. I will proceed to consider the application on its merits in the interest of justice.
14. I think the first order of the day would be to first consider whether leave should be granted to appeal out of time. I say so because should the court find in the negative then the second limb of stay of execution of the judgement of the trial court will be rendered otiose.



15. The law on time for filing appeals from subordinate court is Section 79G of the *Civil Procedure* 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 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.
16. Arising from the above, an applicant must give good and sufficient grounds for the delay
17. I must state the power to enlarge time under Section 79G is discretionary. It is now established that discretion must be exercised judiciously.
18. The Supreme court of Kenya in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* Application No 16 of 2014 [2014] eKLR also cited by the Respondent reiterated the court will consider whether the explanation given for any delay is reasonable and credible. That there must also exist extenuating circumstances to enable the court exercise its unfettered jurisdiction in favour of an applicant. The court however asserted inordinate delay cannot thus attract favourable exercise of discretion.
19. I will proceed to consider whether the application meets the requirements for grant of leave to appeal out of time. Has the applicant given sufficient and credible reasons for the court to exercise its discretion in his favor?
20. The reasons advanced by the applicant are firstly attributed to the error of the counsel on record for the applicant in the trial court. the applicant depones at paragraph 3 of his supporting affidavit he became aware of the judgement on 20/06/24 upon service of warrants of execution by way of Notice to auction the suit property. it is then that he sought an explanation from his advocates.
21. From the above what is not clear is the nature of the errors his advocates made with regard to the applicants knowledge of the judgement. There is also no disclosure of the efforts made by the applicant to follow up on his case. The filing of the application for stay of proceedings in the lower court in my view is not enough. What the court sees is a litigant who has been indolent. I say so because the my perusal of the judgement reveals the suit proceeded for hearing interpartes between 01/12/21 and 10/6/2022 and therefore any party in the suit would anticipate a decision on the same and make a follow up on his case.
22. It has also been contended that the applicant was unwell during the period August 2024. No evidence in terms of medical notes was provided and the court had nothing to vouch for the credibility of this deposition. Moreover, for purposes of why he did not follow up on the case this will not suffice. It is not enough for counsel for the applicant to state in the submissions that his client suffered misfortune occasioned by factors beyond his control. Submissions can never take the place of evidence – see *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR.
23. I have read the decision in *Wachira Karani v Bildad Wachira* [2016] eKLR cited by counsel for the applicant. In my view the applicant acted in a negligent manner by not following up on his judgement from the period he first attended the trial court for hearing on 1/12/21 – 9/11/2022 when judgement was delivered only to become aware of judgement in 2024 without an explanation of his indolence. Equity will never aid the indolent but the vigilant.



24. In the case of *Alice Mumbi Nganga v Danson Chege Nganga & Another* [2006] eKLR Kimaru J stated persuasively and aptly that:-

This Court has unfettered discretion to set aside any order which was entered ex parte. This discretion however, has to be exercised judicially. The Applicant must satisfy this court that she has good reasons why she failed to attend Court when the said application for dismissal was heard and determined in her absence...In the first place, she cannot blame her counsel who was then on record for failing to attend Court when the said application was listed for hearing. This court has ruled in several cases that a civil case once filed, is owned by a litigant not his advocate. It behoves the litigant to always follow up his case and check its progress. He cannot come to Court and say that he was let down by his Advocate when a decision adverse to him is made by the Court due to lack of diligence on the part of his Advocate. I think it has been ruled by the Court of Appeal that where an Advocate fails to prosecute a case to the satisfaction of his client then such a litigant has an option of suing such an Advocate for professional negligence. The mistake of counsel will not, per se, make this court to exercise its discretion in favour of an aggrieved litigant.”

25. This court makes a finding that no sufficient reasons have been given to warrant the exercise of this courts discretion for extension of time herein.

26. The other criteria is the timeliness with which leave is sought. I’m aware that there is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case see the holding in *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] eKLR . Having considered the circumstances of this case and in addition to my observations above I find the delay of almost two years inordinate in my view.

27. The upshot of the foregoing is that the prayer to file appeal out of time lacks basis and cannot be granted. Having made this finding, I find no reason to delve into the prayer for stay of execution pending appeal.

28. The application dated is hereby dismissed. Let each party bear its costs of the application.

29. Leave to appeal this decision is granted as a matter of right if required.

DELIVERED AND DATED AT SIAYA THIS 24TH DAY OF JULY 2025.

HON. LADY JUSTICE A.E. DENA

JUDGE

24/07/2025

Ruling delivered via CTS and email to the parties.

