



**Nakitare v Barasa (Environment and Land Miscellaneous Application
E009 of 2025) [2025] KEELC 5395 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5395 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E009 OF 2025
EC CHERONO, J
JULY 17, 2025**

BETWEEN

FRANCIS WALEKHWA NAKITARE APPLICANT

AND

FRED MULONGO BARASA RESPONDENT

RULING

1. Before me for determination is the Applicant's application dated 13/03/2025 seeking the following orders;
 - a. That this application be certified urgent and be heard on priority basis
 - b. That the applicant be granted leave to file the Appeal out of time.
 - c. That the Honorable court be pleased to issue an Order Staying the execution of the Judgment Decree, decreed by Honorable R.N.B Maloba, on the 23/02/2024 in the Chief Magistrate's Court ELC Case No. 70 OF 2018 pending hearing and determination of the intended Appeal.
 - d. That Costs of this application be in the cause.
2. The application is premised on the grounds set out on the face of the application supported by the affidavit of the Applicant where he deposed that judgment was delivered in Bungoma Chief Magistrate's Environmental Land Case (ELC) No. 70 of 2018 on 23/02/2024 by Hon. R.N.B Maloba. That his counsel on record before the trial court was ailing and eventually died and being of advanced age, he did not closely monitor the said suit until judgment was entered. That the Respondent is in the process of executing the said Judgment/Decree which will be very detrimental if the orders sought are not granted. He averred that it has been a year since the impugned judgment was delivered and that he wishes to lodge an appeal which he believes has high chances of success. He urged the court to exercise its discretion in his favour.



3. The Respondent in opposition thereto filed a replying affidavit sworn on 21/05/2025 and deposed that the application has been overtaken by events as the orders sought to be stayed have already been implemented. That the orders sought should not be allowed as he has stayed in the cold for many years and he deserves to enjoy the fruits of the judgment. He argued that no good explanation has been given for the delay and that litigation must come to an end and urged the court to disallow the application.
4. The Applicant filed a further affidavit sworn on 21/05/2025 where he deposed that the impugned judgment is yet to be executed and the assertion that the application has been overtaken by events is unsubstantiated. He reiterated that this court has the jurisdiction and discretion to grant the orders sought.
5. Directions were taken to have the said application canvassed by way of written submissions.
6. The Applicant filed submissions dated 24/05/2025 where he stated that he was not notified of the entry of judgment and that after the impugned judgment was entered, the file was archived making it difficult to retrieve for purposes of filing an appeal thus the said passage of time. Reliance was placed in the case of *Salat v. Independent Electoral and Boundaries Commission & 7 others* (Application 16 of 2014) [2014] KESC 12 (KLR). The Applicant submitted that the circumstances as explained warrant the grant of leave to file appeal out of time and cited the case of *Ngei v Kibe & Another* (Civil Appeal (Application) E359 OF 2021) [2021] KECA 243 (KLR). He further submitted that the delay was as a result of reasons beyond his control and urged the court to exercise its discretion in allowing the application.
7. The Respondent on his part indicated that he did not intend to file submissions.

Analysis and determination.

8. I have carefully considered the Application, the annexures thereto, the Replying affidavit in opposition thereto, the written submissions by the Applicant and relevant provisions of the law.
9. It is trite that the Applicant's undoubted right of Appeal must be balanced against an equally weighty right of the Respondent/Decree holder to enjoy the fruits of the judgment delivered in his favour. The Applicant herein seeks leave to lodge appeal out of time. Section 79G of the *Civil Procedure Act*, provides that an Appeal from the lower Court shall be filed within a period of 30 days from the date of Judgement. However, the said Section also provides that the court may grant leave or extension of time to file Appeal out of time, but the delay must be explained.
10. Courts have set the guiding principles to be considered when a party seeks the exercise of such discretion. The main consideration is that the delay must be explained. In the case of *Abdul Aziz vs Mungai Mathayo* (1976) Kenya LR 61,62, the Court of Appeal held: -

“We would like to state once again that this court's discretion to extend time under rule 4 only comes into existence after sufficient reason for extending time has been established and it is only that the other consideration such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered”
11. In the present case, judgment was entered on 23/02/2024 while the present application was made on 03/03/2025 which is a year and a few days thereafter. The Applicant has explained that his counsel on record passed away in the course of the trial and that he was not made aware of the entry of judgment. He further stated that due to his advanced age, he has been unable to actively follow up on the progress of the matter. He produced various medical documents in support of his assertions. The Respondent admitted that indeed counsel in conduct of the matter passed away and no evidence was shown on



who took conduct of the matter and that a judgment notice was served. Given the circumstances, I am inclined to allow the Applicant leave to file the proposed appeal out of time.

12. On the application for stay, the principles upon which stay of execution pending appeal may be allowed are now well settled from the authorities of the Superior courts. Generally, stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules as follows: -

(1) 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, an application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order of 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 that the application has been made without undue 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.”

13. It is trite that where an application is made for stay of execution, the Applicant must satisfy the court that substantial loss may result to him or her unless the stay is granted, that the application has been made without undue delay and that the Applicant has given security or is ready to give security for the due performance of the decree as may ultimately be binding on him/her

14. In the present case, judgment was entered on 23/02/2024 while the current application was made on 03/03/2025 which is more than one year. The Applicant has explained that the delay was occasioned by the demise of counsel in conduct of the matter, his advanced age and illness. In my view, the delay in bringing the application, though inordinate, has adequately been explained.

15. As to whether the Applicant will suffer substantial loss, the Court of Appeal pronounced itself in the case of Kenya Shell Limited Vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 107 where it was held as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay.”

The court in determining this aspect has to put into consideration the two competing interest of the decree holder to enjoy the fruits of his judgment and the Applicant who seeks to exercise his undoubted right of appeal.

16. In the present case, the Applicant merely asserts that his intended appeal has high chances of success but fails to demonstrate the specific loss or prejudice he stands to suffer should the stay of execution not be granted. It is a well-established principle that an Applicant seeking stay of execution must go beyond a mere assertion of success on appeal and establish substantial loss likely to result if the stay is not granted. It is important to note that a draft Memorandum of Appeal has not been annexed to this application for the court to consider its veracity on a prima facie basis.



17. Moreover, upon examining the annexed copy of the judgment albeit incomplete, it is evident that the trial court dismissed the Applicant's suit for lack of merit and awarded costs to the Respondent. The nature of the judgment is therefore negative, as it did not grant any positive relief capable of execution. There is no indication that the Respondent herein had filed a counter-claim which was eventually granted by the trial court. Consequently, there is effectively nothing to stay, since a dismissal order does not, in itself, warrant suspension through a stay. The prayer for stay of execution of the judgment of Bungoma Chief Magistrate Court CM- ELC Case No. 70 OF 2018 therefore fails.
18. In the result, I find that the Notice of Motion dated 13/03/2025 is partially allowed in the following terms: -
- a. Leave be and is hereby granted to the Applicant to file appeal out of time against the judgment of the Chief Magistrate's Court ELC Case No. 70 OF 2018 entered on 23/02/2024.
 - b. The appeal shall be filed within 14 days from the date of this ruling
 - c. Costs shall abide the intended appeal.
19. Orders accordingly.

DATED , SIGNED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF JULY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Wekesa H/B for Akenga for the Applicant.

Respondent-present.

Bett C/A.

