



**Njoki & another v Goko (Environment and Land Appeal
E077 of 2025) [2025] KEELC 5404 (KLR) (16 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5404 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E077 OF 2025**

JG KEMEI, J

JULY 16, 2025

BETWEEN

JANE NJOKI 1ST APPELLANT

CHANTELE NYOKABI 2ND APPELLANT

AND

JOHN BRIAN KIARIE GOKO RESPONDENT

*(In respect of Appellants' Application Dated 16/4/2025
and the Respondent's Application Dated 30/5/2025)*

RULING

1. What is coming up for determination is the Intended Appellants' application dated 16/4/2025 expressed to be brought under the provisions of Section 1A, 1B and 3A and 65 of the [Civil Procedure Act](#), Order 42 of the [Civil Procedure Rules](#) and Article 50 (1) and (3) of the [Constitution](#). The Intended Appellants substantively prays for the following orders;
 - a. That this Honourable Court be pleased to grant stay of execution of the Orders made on 11/03/2025 in MCELC No. E030 Of 2022, pending the hearing and determination of this application and the Intended Appeal.
 - b. That the Draft Memorandum of Appeal herein annexed be deemed duly filed by the Appellant upon payment of requisite fees.
 - c. That this Honourable Court grants costs of this application.
2. The application is premised on the grounds on the face of it and further supported by the Jane Njoki, the 1st Intended Appellant, sworn on 16/04/2025. The deponent avers that the Learned Magistrate entered Judgment on 11/03/2025 granting the prayers sought in the Plaintiff dated 5/02/2022 and



further directed that any eviction, in execution of the Judgment of this case must strictly be as per the provisions of the Land Act 2012 governing evictions.

3. She deposes that at the delivery of the Judgment, the Honourable Court declined to grant the Intended Appellant a stay of execution even when the same was not opposed and there was no prejudice whatsoever on the Respondent. She asserted that the Intended Appellants stands to suffer irreparably should the impugned orders be executed.
4. The Applicants argue that they intend to prefer an appeal against the whole decision which they believe is an arguable appeal with high chances of success. That the intended appeal shall be rendered nugatory if the stay orders sought are not granted. The Applicants attached a Draft Memorandum of Appeal and contend that the stay orders shall prevent them from suffering irreparable loss, pending the hearing of the intended appeal.

The Respondent's Application

5. Upon service of the Appellant/Applicants' application, the Respondent filed the application dated 30/5/2025 anchored on Sections 1A,1B, 3A and 79G of the Civil Procedure Act, Section 16A of the Environment and Land Court Act, Order 2 Rule 15, Order 51 rule 1 of the Civil Procedure Rules. The Respondent prays for orders that;
 - a. The Honourable Court be pleased to strike out the Appellants' Notice of Motion application dated 16/4/2025 in its entirety.
 - b. Costs of this application be provided for.
6. The application is premised on the grounds on the face of it and further supported by the Affidavit of Omondi T. Ochieng', the Respondent's Advocate, of even dates. Counsel contends that the orders sought by the Appellants are not tenable in law as the same are based on a non-existent Appeal. The application is therefore incompetent, a nullity in law.
7. Counsel avers that the Judgment in the lower Court was delivered in the presence of parties but the Appellants failed to lodge their appeal within 30 days statutorily provided. He deposes that the Appellants have not pleaded or sought a prayer for leave to file an appeal out of time. Further, that no justifiable reasons have been stated to justify the delay in filing the appeal out of time. He contends that the ex-parte stay orders so granted to the Appellants were thus obtained through material non-disclosure and should be thus set aside for being an abuse of Court process and non-compliance with the procedural law.

The Applicants' Supplementary Affidavit

8. Counsel for the Applicants, Kahama Michael Nturo filed a Supplementary Affidavit dated 26/06/2025 allegedly to clarify and seek the Court's indulgence concerning certain procedural lapses, which he takes full responsibility. He avers that due to an inadvertent miscalculation of time, he delayed the lodging of an appeal.
9. Counsel avers that unfortunately, the Memorandum of Appeal was not filed as a stand-alone document and there is no explicit prayer made for leave to appeal out of time in the main body of the application. He avers that he deeply regrets the oversight and seeks the Court's indulgence to;
 - a. deem the annexed Memorandum of Appeal as duly filed
 - b. grant leave to file the Appeal out of time; and



- c. allow the same to be filed independently within a time frame the Court may deem fit.
10. He argues that the Respondent has not suffered any prejudice as the draft appeal was duly served as part of the original application and they have had an opportunity to respond. He further argues that the Court is empowered under Article 159 (2) (d) of the *Constitution*, Section 95 of *Civil Procedure Act* and Order 50 Rule 6 to grant the above mentioned orders. That in the interest of preserving the Applicant's right to be heard on appeal, he prays that the orders sought be granted.

Direction

11. On 16/7/2025, the Court directed parties to file and serve their responses to the applications as well as written submissions within 15 days. None of the parties filed responses to the other party's application. They however filed their respective submissions. The Appellants' submissions are dated 26/6/2025 whereas the Respondent's submissions are dated 10/6/2025.
12. The Court has had occasion to read through the submissions by parties and considered them in its determination.

Analysis and Determination

13. I have considered the Applications, Supporting Affidavits, the Supplementary Affidavit and the respective submissions thereto, the following issues arise for determination;
 - a. Whether the Appellants/Applicants Memorandum of Appeal annexed to the Supporting Affidavit should be deemed as duly filed.
 - b. Whether an order of stay of execution should be granted pending the hearing and determination of the intended appeal.
 - c. Who should bear costs of the application.

Whether the Appellants/Applicants Memorandum of Appeal annexed to the Supporting Affidavit should be deemed as duly filed.

14. Section 79G of the *Civil Procedure Act*, provides that an Appeal should be filed within a period of 30 days from the date of Judgement. However, the proviso to the said Section provides that the Court may grant leave or extension of time to file Appeal out of time, but the delay must be explained. The above section states as follows:

“79G. Time for filing appeals from subordinate Courts

“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.”



15. Section 95 *Civil Procedure Act* empowers the Court to enlarge such time as follows; -
- “Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
16. The Appellants/Applicants are seeking orders that their Memorandum of Appeal dated 16/4/2025 attached to the Supporting Affidavit be deemed as duly filed. In the Supplementary Affidavit Counsel avers that he inadvertently miscalculated the time hence the delay in lodging the appeal. Further, that the Memorandum of Appeal was not filed as a stand-alone document and there is no explicit prayer made for leave to appeal out of time in the main body of the application. He avers that he deeply regrets the oversight and seeks the Court’s indulgence to; deem the annexed Memorandum of Appeal as duly filed, grant leave to file the Appeal out of time and allow the same to be filed independently within a time frame the Court may deem fit.
17. Section 16A of the *Environment and Land Court Act* mirrors Section 79G of the *Civil Procedure Act* which sets out the statutory timeline of 30 days upon which an aggrieved party can file an appeal to the Environment and Land Court. The Judgment which the Appellants to appeal against was delivered on 11/03/2025. Therefore, the appeal, which is lodged through the filing of a Memorandum of Appeal ought to have been filed on or before the 11/04/2025. The application herein was filed on 16/04/2025, a delay of Five (5) days.
18. The Intended Appellants herein are yet to file the Memorandum of Appeal. The Memorandum of Appeal herein is attached to the Supporting Affidavit as an annexure. It follows that without filing a Memorandum of Appeal, there is no pending appeal. A Memorandum of Appeal is the pleading at an Appellate stage.
19. Counsel for the Intended Appellants has sought a number of orders in the Supplementary Affidavit. The orders include that the Intended Appellants be allowed to file the Memorandum of Appeal as a stand-alone document and that leave be granted to file an appeal out of time. It is trite law that parties are bound by their pleadings and an Affidavit is not a pleading. An Affidavit is a disposition of facts and cannot be used to seek orders from the Court.
20. Even if the Appellants had filed the Memorandum of Appeal, could the same be deemed as duly filed? The Court of Appeal in *Charles Karanja Kiiru –vs- Charles Githinji Muigwa* [2017] eKLR, stated that an appeal filed out of time can be admitted as being properly on record once extension of time is granted. The Court cited with approval the decision in *Gerald M’ Limbine –vs- Joseph Kangangi* [2009] eKLR Emukule J. (as he then was) stated that:
- “My understanding of the proviso to Section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of Court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the Court’s permission to admit a non-existent appeal out of the stipulated period to do so would actually be an abuse of the Court’s process under Section 79B.”
21. The Intended Appellants should have first and foremost sought leave of the Court to file their intended appeal by way of a miscellaneous application before seeking the other orders. The applicant, metaphorically speaking, literally put the ‘cart before the horse’.



22. Although the Court has discretion to grant leave to file Appeal out of time, the intended applicant must formally move Court for extension of time and reasonably explain the reason for the delay.
23. Therefore, it is the holding of this Court that in the absence a prayer seeking leave to file an appeal out of time and a filed Memorandum of Appeal, there is no appeal before Court for determination. The Memorandum of Appeal can therefore not be deemed as duly filed.

Whether an Order of Stay of Execution Should be granted pending the hearing and determination of the Intended Appeal.

24. The law relating to stay pending Appeal is Order 42 rule 6 (2) of the *Civil Procedure Rules*. The provision anticipates that there is a filed appeal that is pending such that an order of stay of execution of the Judgment and/or decree is predicated on the hearing and disposal of such appeal. Where a party has not filed an appeal, an application under Order 42 Rule 6 of the *Civil Procedure Rules* would not lie. Having found that there is no pending appeal, the prayer for an order for stay of execution becomes moot. The order for stay of execution as sought herein cannot be granted. It would be absurd to stay a judgment where no appeal has been lodged. In my view, the Applicants' best option would perhaps have been to apply for stay of execution before the Court that entered the Judgment.

Final Orders for Disposal

25. Consequently, the two applications are determined as follows;
 - a. The Respondent's application dated 30/5/2025 is allowed.
 - b. The Intended Appellants' application dated 16/04/2025 is unmerited and it is hereby dismissed with costs to the Respondent.
 - c. The ex-parte orders of stay of execution issued on 25/4/2025 are hereby vacated.
26. It is ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF JULY 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the Presence of:

N/A for the Appellants/Applicants

Mr. Omondi HB for Mr. Gachie for the Respondent

CA – Ms. Yvette Njoroge

