



Kinyanjui v Kariuki & 12 others (1st - 4th Respondents being sued for and on behalf of the Estate of Kariuki Maina - Deceased) (Miscellaneous Application 1 of 2023) [2024] KEELC 417 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELC 417 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION 1 OF 2023
BM EBOSO, J
JANUARY 31, 2024**

BETWEEN

NDUATI KINYANJUI APPLICANT

AND

ALICE WANJIRU KARIUKI 1ST RESPONDENT
RUTH GATHONI KARIUKI 2ND RESPONDENT
DOMINIC KINYANJUI KARIUKI 3RD RESPONDENT
SIMON KARIUKI 4TH RESPONDENT
JOSEPH GATHERU KINYANJUI 5TH RESPONDENT
MUIGAI GAKAHU 6TH RESPONDENT
TERESIA NJERI GAKUMO 7TH RESPONDENT
ESTHER WAMBUI MBURU 8TH RESPONDENT
WANGUI KINYANJUI 9TH RESPONDENT
PETER KIMANI KARANJA 10TH RESPONDENT
HILLARY MANJI KIONGO 11TH RESPONDENT
JANE GATHONI KIONGO 12TH RESPONDENT
LAND REGISTRAR, GATUNDU 13TH RESPONDENT
**1ST - 4TH RESPONDENTS BEING SUED FOR AND ON BEHALF OF THE
ESTATE OF KARIUKI MAINA - DECEASED**



RULING

1. Falling for determination in this ruling is the notice of motion dated 4/1/2023, brought by Nduati Kinyanjui [the applicant]. Through the motion, the applicant seeks, inter alia, an order enlarging the time within which to lodge an appeal against the Judgment rendered by Hon H M Ng'ang'a on 12/10/2022 in Gatundu SPMC E & L Case No E009 of 2021 and an order of stay of execution of the impugned Judgment and resultant decree, pending the hearing and determination of an intended appeal. The application is premised on the grounds outlined in the motion and the applicant's supporting affidavit, sworn on 4/1/2023. It was canvassed through written submissions dated 4/10/2023, filed by M/s Mitiambo & Company Advocates.
2. The case of the applicant is that he was not able to lodge an appeal within the prescribed time of 30 days because the impugned Judgment was delivered by the trial court without notice; in his absence; and without his knowledge. He adds that in the said Judgment, the trial court gave an order for cancellation of the title deed in respect of land parcel number Kiganjo/Handege/2876 and further decreed that the said parcel of land be registered in the names of the 1st to 4th respondents. Being aggrieved by the said Judgment, he is desirous of appealing against it. He contends that he has already applied for proceedings in Gatundu SPMC E & L Case No. E009 of 2021 for the purpose of lodging an appeal against the Judgment and Decree of the said court. He further contends that he has lived on the suit property his entire life, adding that he lives on the land together with his adult children who also have families living on it, and that the suit property is the only place he has known and called home. The applicant adds that the 1st to 4th respondents have already commenced the process of executing the decree and that he and his family face the risk of being evicted from their land which will render the intended appeal nugatory.
3. The application is opposed by the 1st, 2nd, 3rd and 4th respondents through a replying affidavit sworn on 24/5/2023 by Alice Wanjiru Kariuki and written submissions dated 23/10/2023, filed by M/s Wambui Ngugi & Company Advocates. Their case is that the applicant was logged into the virtual court when the Judgment of the trial court was rendered, adding that the applicant has been indolent. They add that despite the applicant stating that he obtained information about the impugned Judgment on 15/12/2022, he filed the present application on 5/1/2023, twenty-one days later, contending that no explanation has been provided to explain the delay. The 1st to 4th respondents contend that it is not enough for the applicant to merely state that he will suffer in the event the orders sought are not granted. They argue that the applicant should establish other factors which show that execution would create a state of affairs that will irreparably affect or negate the very essential core of the applicant's case in the event he succeeds in the appeal. The 1st to 4th respondents contend that the applicant has approached the court with unclean hands as he seeks to hoodwink the court on the reasons for his delay in bringing this application. They further contend that the appeal does not have any chance of success. They urge the Court to find that the application is without merit and dismiss it.
4. The 7th respondent opposes the application through her replying affidavit sworn on 8/6/2023. Her case is that the applicant was present in court on 12/10/2022 when the impugned Judgment was delivered virtually. She adds that the applicant inordinately delayed in applying for the trial court's proceedings, adding that he requested for the proceedings on 16/12/2022, more than two months after the Judgment had been rendered. She contends that the impugned Judgment had already been typed at the time the trial court delivered it. She further contends that the applicant has not given a proper explanation as to why he did not file the appeal within the stipulated period



5. The 10th respondent opposes the application through his replying affidavit sworn on 12/7/2023. His case is that all the parties to the suit, including the applicant, were present in the trial court when the matter was mentioned to confirm the filing of submissions and a Judgment date set for 12/10/2023 by consent of all the parties. He adds that the applicant's appeal lacks merit and has no chance of success. He further contends that the delay by the applicant is inordinate since the impugned Judgment was rendered on 12/10/2022 but the applicant filed the present application on 4/1/2023, almost three months later yet proceedings of the suit had already been typed. In conclusion, he states that the application is devoid of merit; is an afterthought; contains falsehoods; and ought to be dismissed with costs.
6. I have considered the application, the responses to the application, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The two issues to be determined in the application are: (i) Whether the applicant has satisfied the criteria upon which jurisdiction to enlarge the time for initiating an appeal is exercised; and (ii) Whether the applicant has satisfied the conditions for grant of an order of stay of execution pending appeal.
7. The relevant criteria upon which jurisdiction to enlarge the time for initiating an appeal is exercised was outlined by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR as follows:
 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
8. The impugned Judgment was rendered on 12/10/2022. Consequently, by dint of the provisions of Section 79G of the *Civil Procedure Act* and Order 50 rule 4 of the *Civil Procedure Rules*, the limitation period lapsed on or about 11/11/2022. The explanation advanced by the applicant is that he was neither given notice of delivery of the impugned Judgment nor was he present during the delivery of the Judgment. Even though the respondents contended that the applicant was present when the Judgment date was fixed and that he was present during delivery of the Judgment, none of the parties provided evidence to prove the allegation. The coram on the face of the impugned Judgment indicates that the applicant who was the 1st defendant in the suit was absent on the date the impugned Judgment was rendered. Taking the foregoing into account, I find that the plea for leave to appeal out of time is merited.



9. On the plea for stay of execution of the impugned Judgment and decree of the trial court pending the hearing and determination of the intended appeal, Order 42 rule 6(2) of the Civil Procedure Rules provides that:

“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.”
10. In the present application, the court is being invited to grant an order of stay of execution more than 15 months after Judgment. At this point, the court is not seized of a competent appeal. The court is not certain that the contemplated appeal will indeed be filed and served. Given the circumstances of this application, the court takes the view that, should the applicant lodge the appeal, he will be at liberty to prosecute the plea for stay on the platform of the intended appeal. At this point, it is premature to grant the stay orders.
11. In the end, the notice of motion dated 4/1/2023 is disposed as follows:
- a. The limitation period for lodging an appeal against the Judgment rendered on 12/10/2022 in Gatundu SPMC E & L Case No E009 of 2021 is enlarged by 7 days from today.
 - b. The intended appellant shall file and serve the record of appeal and brief written submissions within 30 days from the date of lodging the memorandum of appeal.
 - c. The applicant shall be at liberty to renew the plea for an order of stay of execution on the platform of the intended appeal.
 - d. Parties shall bear their respective costs of this miscellaneous application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 31ST DAY OF JANUARY 2024.

B M EBOSO

JUDGE

In the presence of: -

Ms. Wambui for the 1st to 4th Respondents

Ms. Ngochi [muted]

Mr. Mitiambo for the Applicant - Absent

Court Assistant: Hinga

