



REPUBLIC OF KENYA



KENYA LAW
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**Chepkuyeng v Kobkangoi (Civil Application E049 of 2024)
[2025] KECA 748 (KLR) (6 May 2025) (Ruling)**

Neutral citation: [2025] KECA 748 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E049 OF 2024
PM GACHOKA, JA
MAY 6, 2025
[IN CHAMBERS]**

BETWEEN

CHRISTOPHER CHEPKIYENG APPLICANT

AND

MILKA KOBKANGOI RESPONDENT

(An application for leave to file a notice of appeal and a record of appeal out of time against the judgment and decree of the Environment and Land Court of Kenya at Iten (L.N. Waitbaka, J.) delivered on 3rd October 2023 in ELC Case No. 33 of 2022)

RULING

1. By Notice of Motion dated 2nd September 2024, the applicant has cited Article 159 of the Constitution, sections 3, 3A and 3B of the Appellate Jurisdiction Act, rules 4, 5, 41, 49, 51, 55, 56 and 58 of the Court of Appeal Rules, sections 72 and 78 of the Civil Procedure Act as well as order 42 rule 6 & 32 and order 50 rule 6 of the Civil Procedure Rules. He prays for the following reliefs:
 1. ... spent;
 2. That this Honourable Court be pleased to grant leave to the intended applicant to file his appeal out of time;
 3. That upon leave being granted and time enlarged as prayed hereinabove, then the annexed Notice of Appeal dated 23/08/2024 and filed on 28th August 2024 be deemed as properly filed and be served upon the respondent in compliance with the rules of the Honourable Court;
 4. That upon leave being granted, the said notice of appeal do operate as stay of execution of the judgment/decree issued by the trial court on 3rd October 2023 pending the hearing of this application and eventually the intended appeal;



5. That the proposed appeal be heard on a priority basis;
6. That the costs of this application abide with the result of the said appeal or be dealt with as the justice of the case shall seem to require.
2. I must state at this juncture that this Court derives its inherent jurisdiction from the *Appellate Jurisdiction Act* and the *rules* thereunder. In the circumstances of the foregoing, the *Civil Procedure Act* and the rules therein do not govern and remain inapplicable in this Court.
3. The application is supported by the grounds on the body of the application and the applicant's supporting affidavit. The gist of the Motion is that the applicant was sued by the respondent at the Iten ELC in Case No. 33 of 2022 seeking several reliefs. The suit was heard to its logical conclusion and by judgment of the trial court dated 3rd October 2023, Waitthaka, J. found merit in the suit in the respondent's favor.
4. The applicant is aggrieved by those findings. He lamented that since he was the sole proprietor of the suit land, the learned judge decided in error. The applicant contended that he instructed his former advocates to file a notice of appeal. However, they did not discharge his instructions. In the circumstances, the applicant instructed his current firm of advocates to file an application for stay of execution of the impugned judgment. However, that application was dismissed. The applicant also annexed his notice of appeal dated 23rd August 2024 that was filed on 28th August 2024.
5. The applicant prayed that the application be allowed for the following reasons: the respondent is using the suit property to his detriment; the respondent is in the process of executing the said judgment; the respondent has caused animosity, division and family feuds instigated by the judgment; the applicant is interested in pursuing his appeal; the delay was occasioned by the applicant's erstwhile advocates; that delay ought not to be attributed to the applicant; the appeal has overwhelming chances of success; and it is in the interest of justice that the application be allowed.
6. The application is opposed. The respondent filed her replying affidavit dated 30th April 2025 through her donee Charles Kibet Yabei. The deponent summarized the facts from the suit at trial to submit that the application was frivolous and for dismissal. This is because the applicant failed to file and serve his Notice of Appeal within the statutory timelines.
7. The respondent pointed out that the impugned judgment, which was sound, was delivered on 3rd October 2023 in the presence of both parties. Dissatisfied, the applicant filed an application for stay before the trial court dated 27th October 2023. She pointed out that the applicant fabricated the facts stating that he had filed a Notice of Appeal when it was not in existence. That application was dismissed because there was no Notice of Appeal. She lauded those findings stating that they were well reasoned.
8. She added that the applicant only filed the Notice of Appeal on 28th August 2024 and was therefore undeserving of the orders sought. The reason for that delay has not been explained and was therefore inexcusable. Furthermore, the respondent pointed out that the applicant had never sought for typed proceedings in line with rule 84 of this Court's rules.
9. In view of the foregoing, the respondent prayed that the application be dismissed for the following reasons: litigation must come to an end; the applicant should let his family live on the property in peace; the appeal was not arguable and would not be rendered nugatory if the orders sought were not granted; the applicant did not attach a draft memorandum of appeal thereby failed to demonstrate arguable grounds; the application was filed inordinately; no grounds were furnished for the exercise of this Court's discretion in the applicant's favor; the applicant as a litigant ought to have been vigilant



- instead of blaming his former advocates for the inordinate delay; there were no orders capable of being stayed; since there was no valid Notice of Appeal, there was no basis for grant of stay of execution; and the orders seeking stay of execution could only be determined by a full bench and not a single judge.
10. The application was canvassed by way of written submissions. In his written submissions and bundle of authorities dated 8th October 2024, the applicant argued that he had satisfied the threshold set out in rule 4 of the Court of Appeal Rules 2022 for enlargement of time to file his Notice of Appeal out of time. This is because the delay in filing the same was ascribable to his former advocates on record. He added that a denial of the orders sought would be tantamount to his denial to a fair hearing as couched in Article 50 of the *Constitution*. That he immediately filed the application upon discovery that he had not complied with the dictates of the law.
 11. On whether the orders for stay ought to be issued, the applicant submitted that based on the facts set out in his application, he had an arguable appeal and would be rendered an academic exercise if the orders sought are granted. Emphatic that his application was merited, the applicant prayed that the same be allowed with costs in his favor.
 12. The respondent filed her written submissions, list of authorities and case digest, all dated 30th April 2025, to argue that the applicant had not met the threshold set out in our jurisdiction for extension of time to appeal out of time. She cited several decisions and relied on the facts set out in the replying affidavit in support of her argument. On stay of execution, the respondent submitted that the same could not be granted as there was no Notice of Appeal on record. In any event, the same could not be determined by a single judge. Finally, relying on her arguments set out in her replying affidavit, the respondent submitted that the appeal was not arguable and would not be rendered nugatory if stay was not granted. She prayed that the application be dismissed.
 13. I have considered the application, the affidavits and annexures thereto. I have also examined the parties' written submissions and analyzed the law. The applicant seeks a stay of execution of the judgment dated 3rd October 2023. He also prays for extension of time to lodge his Notice of Appeal out of time.
 14. Onto the prayer for stay of execution, as rightly pointed out by the respondent, an application for stay can only be heard and determined on its merits before a collegiate bench. Rule 55 of the *Court of Appeal Rules 2022* provides that all applications before this Court shall be heard by a single judge. However, sub rule 2 provides inter alia that an application for stay shall not be heard by a single judge. In that case, prayer 4 in the body of the application cannot be determined by me at this juncture and is thus disregarded.
 15. Turning to the prayer for extension of time, rule 4 of this *Court's rules* provides that the Court may, on such terms as may be just, by order, extend the time limited by these *Rules*, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.
 16. The principles guiding this Court on whether to grant or deny an application for extension of time were well articulated by this Court in the case of *Fahir Mohammed v. Joseph Mugambi & 2 Others* Civil Application NAI 332/04 (UR) as follows:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is



granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors: see *Mutiso v Mwangi*, Civil Application No. Nai. 255 of 1997 (UR), *Mwangi v Kenya Airways Ltd* [2003] KLR 486”.

17. The applicant urged that the Notice of Appeal was not filed in good time because his former advocates did not dispense with his instructions to appeal out of time. I have carefully analyzed the applicant’s arguments. While stating that his former advocate did not appeal against the judgment on time, it is interesting to note that the applicant instructed a new firm of advocates to come on record on his behalf at the trial court. Those advocates would then proceed to apply for stay of execution dated 27th October 2023. So that as at that date, the new firm of advocates were well apprised of the matter and issue.
18. In its ruling dated 9th May 2024, dismissing the applicant’s application for stay of execution of the judgment, the learned judge held in part:

“On whether the application offends the provisions of Order 42 Rule 6 (4) of the [Civil Procedure Rules](#), I have perused the court record and I have not seen the notice of appeal referred to in paragraph 3 of the applicant’s supporting affidavit marked CC1. I have also not seen the Memorandum of Appeal dated 6th November 2023 referred to in the applicant’s submissions. The court is therefore in the dark as to whether an appeal has been preferred to the Court of Appeal or not...

In applying the decision in the cited case to the circumstances of this case, where no notice of appeal has been lodged in line with the provisions of Order 42 Rule 6 (4) of the [Civil Procedure Rules](#), or if one was lodged, it is not before this court, I find that there is no appeal for purposes of granting an order for stay of execution pending appeal.”

19. Firstly, I must emphasize that the applicant and his current firm of advocates, were well aware of the facts as at the time the ruling dated 9th May 2024 was dismissed. The trial judge categorically stated that there was no Notice of Appeal that had been lodged. The applicant, in his application, alluded to the fact that he had indeed filed a Notice of Appeal; clearly aware of its weight and significance in a quest to file an appeal. He was caught red handed in a lie and could not snap out of it. It is apparent that the applicant was being mischievous because he was aware that he had not complied with the law.
20. Be that as it may, the applicant had ample time to file the Notice of Appeal. If his version of facts is anything to go by, then his current advocates ought to have filed the same when filing the application dated 27th October 2023 or immediately after 9th May 2024 when the trial court could not trace this elusive Notice of Appeal.
21. The applicant filed this application more than one year after the time granted by these rules to file the Notice of Appeal had lapsed. No reasons have been advanced as to justify the delay in filing the present application and a Notice of Appeal out of time. The applicant is the author of his own misfortune. Additionally, it is incumbent on the applicant, as a litigant, to remain interested and vigilant in his case. It is not every case that warrants the shoulder of blame to an advocate who cannot even defend himself as he is no longer in the proceedings.
22. Having considered the grounds advanced in the application, I am unable to exercise my discretion in his favor. Accordingly, the Notice of Motion dated September 2, 2024 lacks merit. It is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF MAY, 2025.



M. GACHOKA C.ARB, FCIARB.

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

signed

DEPUTY REGISTRAR

