



REPUBLIC OF KENYA



**Njoroge v Njuki (Civil Application E166 of 2024)
[2024] KECA 600 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 600 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E166 OF 2024**

P NYAMWEYA, JA

MAY 24, 2024

BETWEEN

HANNAH NJOKI NJOROGE APPLICANT

AND

GEORGE KIMANI NJUKI RESPONDENT

(Being an application for leave to file an appeal out of time from the judgment of the Environment and Land Court at Nairobi (A. Omollo, J) delivered on 29th February 2024 in ELC Case No. 850 of 2017)

RULING

1. Hannah Njoki Njoroge, who is named as the Applicant herein, has filed an application in this Court by way of a Notice of Motion dated 27th March 2024, in she seeks the following orders which I shall reproduce verbatim:
 1. This application be certified as urgent and service thereof be dispensed with in the first instance.
 2. The Honorable Court be pleased to hear this application under the Court vacation rules.
 3. That a stay of execution in Nairobi ELC No. 850 of 2007 be granted pending the hearing and determination of this application.
 4. The Court be pleased to grant leave to the Applicants to appeal out of time against the Judgment made by the Hon. A. Omollo, J. on the 29th of February 2023 in Nairobi ELC 850 of 2007.
 5. The said leave do operate as a stay of all proceedings.
 6. The costs of this application be provided for.



7. Any other orders that meets the ends of justice.
2. The grounds for the application are that the Applicant was aggrieved by the judgment delivered by A. Omollo, J. in Nairobi ELC Case No. 850 of 2007 on 29th February 2024, and that her advocates who were previously on record communicated that they had obtained a copy of the judgment on 6th March 2024, and that they had filed a Notice of Appeal and an application for stay of execution pending appeal. However, that contrary to the communication, the previous advocates had not filed any appeal nor obtained any stay or execution, which the Applicant realized late on 22nd March 2024, when the time to lodge a Notice of Appeal has run out. Further, that the Respondent is likely to execute the decree herein at any time and the same shall render the Applicant destitute and defeat any appeal.
3. The Applicant’s advocates. Keli Mwinzi Advocates, also filed submissions dated 18th May 2024 inter alia setting out the principles that apply for extension of time, and I will return to the said submissions later on in this ruling.
4. George Kimani Njuki, the Respondent herein, thereupon filed an undated replying affidavit which he swore, and I will again reproduce some of the averments made therein verbatim, for full effect:
 - “ 5. That when the said suit was heard in the Superior Court, the Applicants herein were represented by the Firm of Messrs C. N. Kinyanjui & Co. Advocates and hence Messrs Keli Mwinzi Advocates were nowhere in the picture.
 6. That no Change of Advocates has been filed regarding the Applicants’ representation.
 7. That my Advocate in record has advised me, which advice I verily believe to be true, that the said Kelly Mwinzi Advocate has no locus standi to file the present Application.
 8. That a similar Application (seeking same prayers/reliefs) in the same suit has been filed by Messrs C. N. Kinyanjui & Co. Advocates in Civil Application No. E132 of 2024.
 9. That I am informed by my Advocates, which information I verily believe to be true, that the Applicants are abusing the process of this Honourable Court by filing two similar Applications, in the same suit, and seeking the same prayers/reliefs.”
5. J.P. Machira Advocates appearing for the Respondent reiterated these averments in submissions dated 17th May 2024, wherein it is also stated that “there is also another fundamental error in the Application. Hannah Njoki Njoroge is demonstrated as the Applicant whereas in fact she died some years ago as a result of which her estate is represented by Messrs Amos Njoroge Kimani and Peter Muthee Kamau and thus rendering the Application invalid and untenable”. The counsel also points out that “it is not rocket science to appreciate that under the [Court of Appeal Rules](#), an application for extension of time is the function of a single Judge whilst an Application for Stay of execution is the jurisdiction of the full Court.”
6. The Applicant’s advocates in their submissions addresses the concerns raised by the Respondent as regards the Applicant being deceased as follows:
 - “6. It has been submitted on behalf of the respondent that the applicant is deceased and thus cannot file the current application. My Lord, the suit herein survived the applicant and thus



guardians ad litem were appointed by the court to conclude the matter. It is trite law that the guardians ad litem are only appointed for the sole purpose of ensuring that a suit that survives a deceased party is heard to the conclusion but does not make them original parties to the case. We urge the Honourable Court to disregard the invitation to hold that the application is filed by a wrong party.”

7. The response on the issue of the Applicant’s representation was as follows:

“9) My Lord, the respondent has raised the issue of representation. We submit that the matter before the court is not an appeal but a miscellaneous application to file an appeal out of time. Order 9 of the civil procedure rules, 2010 thus do not apply as the firm of Keli Mwinzi advocates is not representing the applicant before the high court matter. We further submit that rule 23 (1) too does not apply as there is no appeal to consider in this matter. A miscellaneous application, we submit, is an entirely different matter and thus cannot be considered an appeal as has been held numerous by the courts that there is no appeal or rather an appeal cannot be heard if leave to appeal out of time is not granted. We implore the court to disregard the respondent’s argument.”

8. Needless to say the Respondent’s replying affidavit and submissions alleges a number of irregularities and errors in the present application. The said application at the very least therefore needs to be canvassed at an inter partes hearing of a full bench of this Court, in light of the nature of irregularities concerns raised by the Respondent. It is pertinent that the Applicant’s advocates do not dispute that they have not filed a change of advocate, that there is another application filed for extension of time by the Applicant’s previous advocates, and that the Applicant named in the application is deceased.

9. There is one issue though, that I can deal with in this ruling with finality, namely that of the nature of the orders sought in the application. The Applicant in this respect seeks an order that the leave to file an appeal out of time “operates as a stay of all proceedings”, in addition to stay of execution of the impugned judgment. Rule 55 of the [Court of Appeal Rules](#) of 2022 provides as follows:

“55.

(1) Each application, other than an application specified in sub- rule (2), shall be heard by a single judge:

Provided that such application may be adjourned by the judge for determination by the Court.

2. This rule shall not apply to—

- a. an application for leave to appeal;
- b. an application for a stay of execution, injunction, or stay of further proceedings;
- c. an application to strike out a notice of appeal or an appeal; or
- d. an application made as ancillary to an application under paragraph (a) or (b) or made informally in the course of a hearing.”



10. It is evident from the said provisions that applications seeking stay of execution and proceedings cannot be heard and determined by a single judge. The Applicant's Notice of Motion dated 27th March 2024 is therefore not properly before me as a single Judge, and shall accordingly be listed by the Registrar of this Court before a full Bench of this Court for hearing and determination. In light of these directions, I shall not make any order as to the costs of the application.

11. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY 2024.

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

