



**Makori v Njoroge & another (Miscellaneous Application
E006 of 2022) [2024] KEELC 1556 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1556 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION E006 OF 2022**

**BM EBOSO, J
MARCH 13, 2024**

BETWEEN

KENNETH NYAKUNDI MAKORI APPLICANT

AND

JOSEPH GIKONDO NJOROGE 1ST RESPONDENT

EVANGELINE WANDIA MURIITHI 2ND RESPONDENT

RULING

1. Falling for determination in this ruling is the notice of motion dated 18/7/2023, brought by Kenneth Nyakundi Makori [the applicant]. The motion was filed on 20/7/2023. Through the motion, the applicant seeks an order enlarging the time within which to lodge an appeal against the Judgment rendered by Hon C K Kisiangani on 27/10/2022 in Ruiru Senior Principal Magistrate Court E & L Case No. E112 of 2021. In addition, the applicant seeks an order of stay of execution of the said Judgment pending the filing, hearing and disposal of the intended appeal. The application is premised on the grounds outlined in the motion and in the applicant's supporting affidavit sworn on 18/7/2023. It was canvassed through written submissions filed by Ms Nelius Njuguna Advocate.
2. The case of the applicant is that, despite applying for certified copies of the Judgment and proceedings on 31/10/2022, he was only furnished with copies of the documents after he issued a reminder dated 10/2/2023. He has, however, not disclosed the exact date when he was furnished with the documents.
3. The application is opposed by the respondents through a replying affidavit sworn on 7/11/2023 by Joseph Gikondo Njoroge and written submissions filed by M/s DW Gichio & Company Advocates. The case of the respondents is that the applicant has filed a multiplicity of suits in this Court over the same subject matter. The said suits are: (i) ELC Civil Appeal No. E054 of 2023; (ii) Miscellaneous Application No. E006 of 2023; and (iii) ELC No. E031 of 2023. The respondents fault the applicant for failing to file this application in ELC Civil Appeal No. E054 of 2023. The respondents contend



that the applicant was all along aware of the Judgment. They urge the Court to dismiss the application and award them costs.

4. I have considered the application, the response to the application, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. Two issues fall for determination in this ruling. The first issue is whether the application meets the criteria upon which jurisdiction to enlarge time for initiating an appeal is exercised. The second issue is whether the criteria for grant of an order of stay of execution pending appeal has been met. I will dispose the two issues sequentially in the above order.
5. The relevant criteria for enlargement of time 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 or 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."
6. In his plea for an order enlarging of time, the applicant contends that he wrote to the court on October 31, 2022 requesting for certified copies of the Judgment and the proceedings. It is his case that he was not provided with certified copies of the Judgment and the proceedings on time, hence the delay.
7. The impugned Judgment was not exhibited by the applicant. It is not clear why the applicant withheld this critical item that this court would need to peruse before exercising the discretionary jurisdiction to enlarge time. It does, however, emerge from the draft memorandum of appeal exhibited by the applicant and from the replying affidavit sworn by Joseph Gikondi Njoroge that the impugned Judgment was rendered on October 27, 2022. It does also emerge from the replying affidavit of Joseph Gikondi Njoroge that on or about 12/6/2023, the applicant lodged an appeal in this court through a memorandum of appeal dated 12/6/2023, challenging a post-Judgment ruling that had been rendered by Hon C A Kisiangani on 11/5/2023 in Ruiru SPM E & L Case No E112 of 2021. The said appeal is Thika ELC Appeal No 54 of 2023. It is discernable from the memorandum of appeal dated 12/6/2023 that the application culminating in the impugned ruling was a plea by the applicant for an order of stay of execution of the impugned Judgment of the trial court, pending appeal.
8. It does also emerge from the ruling dated 31/8/2023 exhibited by the respondents that the applicant fully participated in an application filed by the respondents in the trial court seeking to enforce the Judgment and decree of the trial court. It is clear from paragraphs 2 and 3 of the said ruling that the applicant filed a replying affidavit dated 23/6/2023 before the trial court. He attached to the said affidavit the memorandum of appeal dated 12/6/2023 and an undated memorandum of appeal titled



“application for extension of time within which to lodge a notice of appeal and appeal out of time”. The trial court declined to grant him the stay orders sought in the application because he had not filed an appeal against the Judgment of the trial court.

9. From the above analysis, it is clear that the applicant had access to the record of the trial court. That is how he was able to participate in the respondents’ application in the trial seeking enforcement of the Judgment of the trial court. That is also how he was also able to file and prosecute a formal application in the trial court seeking orders of stay of execution of the impugned Judgment. He therefore had ample opportunity to peruse the Judgment of the trial court and file a memorandum of appeal within the time frame of 30 days as required under Section 79G of the *Civil Procedure Act*.
10. It is not lost to this court that to file a memorandum of appeal, the applicant did not require certified copies of the Judgment and the proceedings. All he needed was to peruse the court file of the trial court and file a memorandum of appeal in this court. He had access to the trial court file and was able to deal with the above two post-judgment applications in the file.
11. The court has examined the request for copies of the proceedings and Judgment attached to the applicant’s supporting affidavit. The letter dated 31/10/2022 bears a stamp of 8/2/2023. The applicant contends that he was “recently” supplied with copies of the said proceedings and judgment. The applicant has, however, not specified the date. He has also not placed before the court any communication from the court relating to the date when the documents were availed. The Court cannot therefore establish the exact date when copies of the Judgment and Proceedings were issued to the applicant. It was the obligation of the appellant to place before the court that important information.
12. Looking at the evidence that the respondents tendered in response to the application, it is clear that the explanation advanced by the applicant to account for the delay of close to nine (9) months is not bonafide.
13. It does also emerge from the evidence presented to this court that the respondents have demonstrated that the applicant’s claim of an interest in the suit land was adjudicated by this court [Gacheru J] in Thika ELC Case No 162 of 2019 (OS) and was found to be without merit.
14. For the above reasons, I do not think the application dated 18/7/2023 has met the criteria upon which our superior courts exercise the discretionary jurisdiction to enlarge the time within which to lodge an appeal.
15. In the absence of an order enlarging time, there is no basis for granting an order of stay of execution pending appeal. The application dated 18/7/2023 is accordingly rejected for lack of merit. The applicant shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 13TH DAY OF MARCH 2024

B M EBOSO

JUDGE

In the Presence of: -

Ms Njuguna for the Applicant

Court Assistant: Hinga

