



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi & another v Kibowen (Civil Application E189 of 2021)
[2023] KECA 1294 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1294 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E189 OF 2021
F SICHALE, FA OCHIENG & WK KORIR, JJA
OCTOBER 27, 2023**

BETWEEN

ELIUD NJUGUNA MWANGI 1ST APPLICANT

MICHAEL MWANGI 2ND APPLICANT

AND

JOHN KIBIWOT KIBOWEN RESPONDENT

(Being an application for extension of time to file and serve record of appeal out of time and stay of execution to the decision of High Court at Eldoret (M.A. Odeny, J.) dated 29th October, 2020 in ELC Case No. 299 of 2012)

RULING

1. The applicants, Eliud Njuguna Mwangi and Michael Mwangi, are before us with an application dated February 8, 2023 premised on rules 4 and 5(2)(b) of the *Court of Appeal Rules*, 2022. The application is, on its face, not only omnibus in nature and content but also amorphous. The applicants are seeking orders, inter alia, that the Court do grant leave for filing of an application for stay of proceedings in Eldoret ELC Case No. 299 of 2012 out of time; that the Court do issue stay of execution of the orders of the judgment and any other consequential order arising from Eldoret ELC Case No. 299 of 2012; and that the costs of the application be provided for.
2. The application is supported by the affidavit of the 1st applicant sworn on the date of the application. The applicants aver that the ruling in Eldoret ELC Case No. 299 of 2012 was issued on October 29, 2020, in their absence. That upon learning of the existence of the ruling, they instructed their counsel on record to lodge an appeal against it. That their counsel lodged a notice of appeal and applied for certified copies. That when lodging the appeal, their counsel failed to apply for stay of further proceedings hence the time for filing such an application has lapsed. The applicants aver that the delay is solely a mistake of their counsel and the mistake ought not to be visited upon them. The applicants



also depose that they moved the Court as soon as they became aware that the matter was continuing at the trial court hence there has not been any inordinate delay on their part. Further, that the respondent may proceed to subdivide the suit property if stay is not issued. Finally, the applicants depose that the respondent will not suffer any prejudice if their application is allowed.

3. When this matter came up for hearing on July 18, 2023, Mr. Migele held brief for Mr. Seda for the applicants while Mr. Tororei appeared for the respondent. We did not have any document, replying affidavit, grounds of opposition or submissions by the respondent. On the part of the applicants, Mr. Migele informed the Court that they relied on the written submissions dated March 10, 2023.
4. In the submissions, counsel for the applicants referred to rule 4 of the [Court of Appeal Rules](#) and sections 63 and 95 of the [Appellate Jurisdiction Act](#) as the provisions that donate jurisdiction to this Court to determine the instant application. Counsel urged that the reasons tendered for the delay were sufficient and genuine. Counsel recounted the evidence with regard to the delay in filing the application and attributed the same to the fault of the advocate in conduct of the matter. Counsel relied on the cases of [Mombasa County Government v Ferry Services & 3 others](#) [2019] eKLR and [Nick Kiptoo Arap Korir Salat v IEBC & 7 others](#) [2014] eKLR to underscore the principles that guide courts when considering an application for extension of time.
5. As for the application for stay of execution, counsel for the applicants referred us to the grounds in the draft memorandum of appeal and submitted that the intended appeal is arguable. Counsel also submitted that the intended appeal would be rendered nugatory because the respondent intended to transfer the suit land. Counsel relied on [Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others](#) [2014] eKLR and [Benson Kibwarese Wafula v DPP & 3 others](#) [2020] eKLR, among other cases, to support his arguments in support of the application for stay of execution.
6. Mr. Tororei appearing for the respondent argued that the application is incompetent and a manifestation of the applicant's continuous lodging of applications, one after the other. He urged the Court to dismiss the application.
7. We have duly considered the application, the supporting affidavit plus the annexed documents, the submissions as well as the authorities cited and the applicable provisions of law. As we have already stated from the onset, this is an omnibus and amorphous application. An application for stay in this Court is brought under Rule 5(2)(b) of the [Court of Appeal Rules](#). Rule 5(2)(b) is anchored on the provisions of Rule 77 of the [Court of Appeal Rules](#) which provides the lodging of a notice of appeal as the cornerstone of the jurisdiction of this Court. In the present application, despite the applicants making an averment that they had filed a notice of appeal within time, no such notice was exhibited in support of the averment. We cannot therefore confirm that indeed a notice of appeal was lodged in this matter within 14 days as prescribed by Rule 77(2). In that regard, the words of this Court in [Safaricom Limited v Ocean View Beach Hotel Limited & 2 others](#) [2010] eKLR speaks to the circumstances of this case as follows:

“At the stage of determining an application under Rule 5 (2) (b) there may or there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be an intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5 (2)(b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal, the Court of Appeal would have no business to meddle in the decision of the High Court.”



8. The Supreme Court similarly held the same view in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR by stating that:

“ A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.”

9. In the circumstances, we find that without a notice of appeal, we have no jurisdiction to hear the applicants’ application for stay of proceedings. The application is therefore for striking out and we strike it out.

10. The other prayer sought in this application is a prayer for extension of time. Prayers 2 and 5 of the notice of motion are amorphous. The applicant herein seems to be seeking “extension of time to file an application for stay out of time”. Nowhere in the Rules of this Court are timelines provided for lodging an application under Rule 5(2)(b). However, commonsense would require that such an application ought to be brought in good time as it will serve no purpose if what is sought to be stayed has been overtaken by events.

11. Further, an application for extension of time is always lodged pursuant to Rule 4 of the Court of Appeal Rules. Under Rule 55(1) of the Court of Appeal Rules, such an application is for determination by a single judge but there is a proviso that a single judge can refer the application for hearing by the Court. Additionally, under Rule 57(1)(b) of the Court of Appeal Rules, any person dissatisfied with the decision of a single judge may apply to have it varied, discharged or reversed by the Court. The relevance of this additional channel must not be overlooked as it proffers a litigant dissatisfied with the decision of a single judge a second bite at the cherry. Therefore, if this Court assumes the jurisdiction of a single judge, without any reference of the matter to this Court by a single judge, the applicants would suffer an injustice in their quest for justice. To avoid such an eventuality, we are inclined, which we hereby do, to decline the applicants’ request to consider his application for extension of time of whatever nature.

12. Consequently, the notice of motion dated 8th February 2023 is hereby struck out in its entirety. The costs of the application shall be borne by the applicants.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF OCTOBER, 2023

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

