



**John v Manthi & another (Environment and Land Appeal  
E005 of 2023) [2024] KEELC 3404 (KLR) (17 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3404 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E005 OF 2023**

**A NYUKURI, J  
APRIL 17, 2024**

**BETWEEN**

**MARY MWIKALI JOHN ..... APPELLANT**

**AND**

**AGNES N. MANTHI ..... 1<sup>ST</sup> RESPONDENT**

**KIMITI HOUSING COOPERATIVE SOCIETY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in regard to two applications; a notice of motion dated 28<sup>th</sup> July 2023 seeking stay of execution pending appeal and undated chamber summons filed on 6<sup>th</sup> October 2023, seeking leave to appeal out of time. Both applications were filed by the appellant.

**The application dated 28<sup>th</sup> July 2023**

2. In the application dated 28<sup>th</sup> July 2023, the appellant sought the following orders;
  - a. Spent
  - b. Spent
  - c. That this honourable court be pleased to order a stay of execution of the judgment delivered by the trial court in Kangundo on 30<sup>th</sup> June 2023 pending the hearing and determination of the intended appeal.
  - d. Spent
  - e. That the costs of this application be provided for and the same do await the outcome of the appeal.



3. The application was anchored on grounds on its face as well as the supporting affidavit sworn on 28<sup>th</sup> July 2023 by Mary Mwikali John, the appellant. She deposed that she filed suit at Kangundo against the respondent seeking a declaration that the registration of the 1<sup>st</sup> respondent as owner of Plot No. 16 Matuu Canteen Shopping Centre (suit property) by the 2<sup>nd</sup> Respondent was fraudulent and that the same be restored in the deceased's name Lydia Muendi Kilonzo. That she further sought orders of permanent injunction to restrain the 1<sup>st</sup> defendant from evicting her or interfering with her quiet possession of the suit property until appropriate orders are made in the Succession Court.
4. It was her averment that the trial court erred in arriving at the conclusion that the suit property was legally transferred by the deceased to the 1<sup>st</sup> respondent, by relying on oral evidence, as at the material time in 2011, the deceased's health had deteriorated and was therefore not competent to transact on her own among other matters. She stated that being aggrieved with the trial court's finding, she filed the current appeal. She also stated that the 1<sup>st</sup> respondent was in the process of implementing and executing the said judgment by transferring the plot into her name rendering the appeal nugatory. She attached a copy of the judgment, the deceased's burial program, and minutes of the family.
5. The application is opposed. Agnes Ndinda Manthi, the 1<sup>st</sup> respondent swore a replying affidavit dated 16<sup>th</sup> November 2023 opposing the application. She stated that she was the owner of the suit property which was transferred to her by the deceased in 2014 and that she is in actual possession thereof, which is conceded by the applicant. She argued that its ironical that the applicant alleges that the respondent will transfer the suit property to her name when it is already transferred to her name. She stated that the applicant has not shown any loss that will be occasioned to her to warrant grant of the orders sought. She attached a copy of ownership certificate.

#### **The chamber summons filed on 6<sup>th</sup> October 2023**

6. In the undated chamber summons filed on 6<sup>th</sup> October 2023, the appellant sought the following orders;
  - a. Spent
  - b. The court be pleased to grant leave to the appellant to appeal out of time against the judgment made by Hon. Ole Keiwua K.D. Chief Magistrate in Kangundo ELC No. 16 of 2019 on 30<sup>th</sup> June 2023.
  - c. The court be pleased to admit the Memorandum of Appeal dated 28<sup>th</sup> July 2023 and filed on 3<sup>rd</sup> August 2023.
  - d. That costs of this application be provided for.
  - e. Any other orders that meets the ends of justice.
7. The application is based on grounds on the face of it and supported by the affidavit of Mary Mwikali John, the appellant. She deposed that being aggrieved by the judgment of Hon. Ole Keiwa, Chief Magistrate in Kangundo ELC No. 16 of 2019, she applied for certified copies of the proceedings, judgment and decree, while in the meantime her advocate prepared a Memorandum of Appeal and tasked his staff to file it on 28<sup>th</sup> July 2023. That as that date was a Friday, it was to be filed physically in court the following Monday. That her advocate learned that the same was filed two days late. She also stated that although she applied for the judgment in time, it was supplied after a delay and upon many follow-ups with the registry.
8. She stated that the delay in filing the appeal was occasioned by delayed supply of the judgment by the lower court and a mistake by a member of staff of her advocate. She maintained that the delay was not



inordinate. She stated that the appeal had high chances of success. She attached a letter applying for proceedings and judgment; the Memorandum of Appeal and a filing receipt.

9. The application is opposed. Agnes Ndinda Manthi, the 1<sup>st</sup> respondent filed a replying affidavit dated 16<sup>th</sup> November 2023. She averred that the affidavit supporting the application for leave to appeal out of time was not commissioned, and instead it was certified as the true copy of the original contrary to the provisions of the *Oaths and Statutory Declarations Act*. She stated that the application was an afterthought and an abuse of the court process. She attached a copy of the appellant's affidavit of 28<sup>th</sup> September 2023.
10. By a notice of motion dated 24<sup>th</sup> January 2024, the appellant sought and obtained orders to file a further affidavit and submissions. The applicant's supporting affidavit was dated 28<sup>th</sup> September 2023 and contained similar contents with the earlier affidavit which had been certified as being original.
11. In a rejoinder, responding to the affidavit of the respondent dated 16<sup>th</sup> November 2023, the appellant swore a further replying affidavit dated 24<sup>th</sup> January 2024. She deposed that the respondent's affidavit was full of falsehoods and that the applicant's advocates' clerk erroneously filed a certified affidavit instead of a commissioned affidavit.
12. The appellant also filed written submissions dated 24<sup>th</sup> January 2024, which the court has considered. Counsel relied on the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR to argue that the court has discretion to extend time. Counsel also relied on the case of *Belinda Mural & 9 others v Amos Wainaina* [1978] EA 679 to argue that mistakes of an advocate may amount to a sufficient cause for purposes of extending time. Counsel relied on Article 48 of *the Constitution* to argue that the applicant ought to be granted the right to access to justice and that section 79 G of the *Civil Procedure Act* allows for extension of time.

### **Analysis and determination**

13. Having considered the two applications, two issues arise for determination;
  - a. Whether the appellant has met the threshold for extension of time to file appeal out of time.
  - b. Whether the appellant has met the threshold for grant of stay of execution pending appeal.
14. The jurisdiction of the court to extend time for filing appeal out of time is provided for in section 79 G of the *Civil Procedure Act* as follows;

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.
15. Therefore, where the appellant demonstrates sufficient cause for failure to file appeal in time, the court has discretion to extend time.
16. The discretion to extend time is not a right of any of party, and a party seeking extension if time ought to explain the reason of the delay to the court's satisfaction.



17. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court of Kenya pronounced itself on the court's exercise of discretionary power to extend time as follows;

The under-lying principles that a court should consider in exercise of such discretion:

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, us 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.

18. In the instant case, the judgment of the lower court was delivered on 30<sup>th</sup> June 2023, and the appeal herein was filed on 3<sup>rd</sup> August 2023, which is 4 days after the lapse of the period which is 30 days. The applicant's explanation for the delay is that there was a delay on the part of the court in supplying her with the certified proceedings and judgment and that her counsel's staff member delayed in filing the appeal. The fact that there was delay in supply of judgment and proceedings was not disputed by the respondent. In addition, in litigation, mistakes and blunders on the part of the advocates or the parties, may occur, and where there is no evidence that there was bad faith or indolence, the applicant may be excused from consequences of such mistakes. Having considered the reasons, and noting that there was only a 4-day delay in filing the appeal, I find and hold that the applicant has demonstrated sufficient cause for delay to warrant admission of her appeal out of time.

19. On whether the appellant merits an order for stay of execution, the jurisdiction of the court to grant orders of stay of execution is provided for in Order 42 rule 6 of the *Civil Procedure Rules* as follows;

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
2. 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.
20. Therefore, in the exercise of its appellate jurisdiction, this court has power to grant stay of execution pending appeal. To obtain stay of execution pending appeal, an applicant must demonstrate that they stand to suffer substantial loss if execution proceeds.
21. In the instant case, the appellant alleges that if stay is not granted, she will be evicted from the suit property and the property will be transferred to the 1<sup>st</sup> respondent. In response, the 1<sup>st</sup> respondent has insisted that she is the one in occupation of the suit property and that it is not disputed that the suit property was already transferred to her. The burden of proving occupation is upon the appellant who alleges that if stay is not granted she may be evicted from the suit property. Having considered the affidavit of the appellant, apart from the allegations that she is in occupation of the suit property, she has not provided any evidence supporting that allegation. In addition, there is no evidence that she stands to suffer substantial loss if stay is declined. In the premises, I find and hold that the prayer for stay of execution lacks merit and the same is hereby dismissed with costs.
22. In the end, I find and hold that the application dated 28<sup>th</sup> July 2023 seeking stay of execution pending appeal lacks merits and is hereby dismissed with costs. On the other hand, I find and hold that the application filed on 6<sup>th</sup> October 2023 is merited and the same is hereby allowed as follows;
- a. Leave is hereby granted to the appellant herein to file her appeal out of time.
- b. The Memorandum of Appeal dated 28<sup>th</sup> July 2023 and filed herein on 3<sup>rd</sup> August 2023 is admitted and deemed as a properly filed appeal.
- c. In view of the proviso to Order 50 Rule 6 of the Civil Procedure Rules, I order that the costs of the application herein shall be borne by the appellant.
23. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 17<sup>TH</sup> DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the Presence of;**

Ms Kerema holding brief for Mr. Odhiambo for appellant

Mr. Munguti for 1<sup>st</sup> respondent

No appearance for 2<sup>nd</sup> respondent

Court Assistant- Josephine

