



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mkungu & another v Gonzi & another (Environment & Land Case  
7 of 2024) [2024] KEELC 4434 (KLR) (4 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4434 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 7 OF 2024**

**FM NJOROGE, J**

**JUNE 4, 2024**

**BETWEEN**

**NIPHER ACHOLA ..... 1<sup>ST</sup> PLAINTIFF**

**HAMISI MSEMA MKUNGU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KAHINDI KAZUNGU RUWA ..... 1<sup>ST</sup> RESPONDENT**

**NGUMBAO SHADA GONZI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The notice of motion application for determination in the present ruling is dated 5/2/2024 and it was filed by the Plaintiffs on 6/2/2024. It seeks the following orders: -
  - a. That the honourable court be pleased to extend the time within which the Applicants may file their appeal as per the attached memorandum of appeal out of time and the annexed memorandum of appeal be deemed duly filed upon payment of the requisite court fees;
  - b. That pending the hearing and final determination of the intended appeal there be an order for stay of execution of the decree issued on 12<sup>th</sup> December 2023 by the honourable hon. E.K Usui, CM;
  - c. That costs of this application be costs in the cause.
2. The application which is brought under Order 51 rule 1, Order 22 rule 22, Order 42 rule 6 (1), (2), (3) of the *Civil Procedure Rules* and Sections 1A, 1B, 3, 3A, 63E, 78G and 95 of the *Civil Procedure Act*, is premised on the grounds listed on the face of the motion and supported by the affidavit sworn by Hamisi Msema Mkungu on even date. The Plaintiff deposed that judgment was delivered in CMCC Land Case No. 49 of 2020 on 11/12/2023 by the Hon. E.K Usui, CM but they were not aware of the same until 28/1/2024 when they were served with a letter from the firm of Mbura & Company



Advocates. Thereafter, they immediately instructed their advocate Geoffrey Katsoleh to file an appeal against both judgment and decree. The Plaintiff asserted that the intended appeal is meritorious and that the court should exercise discretion in their favour to ensure that the ends of justice are met.

3. The Respondents filed a replying affidavit in opposition to the application. The affidavit was sworn by Kahindi Kazungu Ruwa on 14/2/2024 wherein he stated that the Plaintiffs have not demonstrated the reason for failure to file the appeal on time or any other reason to warrant granting of the orders sought.
4. Parties agreed to file written submissions. However, as at the time of writing this ruling, only the Plaintiffs had complied. I have carefully considered the Plaintiffs' submissions dated 8/3/2024 and I identify the following issues for determination:
  - i. Whether leave should be granted to appeal out of time.
  - ii. Whether execution of the trial court's judgment should be stayed pending the hearing and determination of the intended appeal.

### **Analysis and determination**

5. The statutory provision governing to appeals from the judgment or decree of a subordinate court to this Court is Section 75G of the [Civil Procedure Act](#), which provides that:

“79G. 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.”

6. I have examined the supporting affidavit. It states that at the time of judgment the applicant's advocates' offices were closed for the December holidays. The undisputed facts herein are that the trial court delivered its judgment on 11/12/2023 and a decree issued on 19/12/2023. Section 79G of the [Civil Procedure Act](#) provides that every appeal from the subordinate court to the High Court shall be filed within 30 days from the date of the decree or order appealed against. The applicants should have therefore filed their appeal by 10/1/2024. The Plaintiffs moved this court on 6/2/2024 seeking leave to appeal the said judgment and decree out of time. That is a period of about 27 days after the expiry of the period set for filing of an appeal.
7. The Plaintiffs' explanation was that they were not made aware of the judgment until on 28/1/2024 when they got served with a letter dated 25/1/2024 asking them to vacate the suit premises. As the judgment was delivered on 11/12/23 there is probability of truth in the statement regarding closure of the plaintiff's offices. The terms and extent of that closure are not exactly clear for reasons seen herein below.
8. Looking at the annexures in the supporting affidavit the alleged letter, contrary to the Plaintiffs' assertion, is actually dated 15/12/2023 and is addressed to the Plaintiffs' advocates, Messrs. Katsoleh & Co. Advocates. The letter was received by the said advocates on 19/12/2023 which was well within the statutory time to file an appeal.
9. As I had stated earlier there appears to be a conflict between the claim that the advocates' had closed for the holidays and the fact that the letter relied on as communicating the delivery of judgment was received in their offices on 19/12/2023. However, taking into consideration that court activities are



at a minimum around that period as citizens prepare to usher in the holidays, I still find that I must accord the applicants a margin, a benefit of doubt, especially as they are before this court pro se and the advocate is not present to explain office closure and the extent of that closure is not known. In this court's view it suffices that the date of receipt that is 19/12/23 still fell within the festive season.

10. Order 50 Rule 4 of the *Civil Procedure Rules* states as follows:

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act Provided that this rule shall not apply to any application in respect of a temporary injunction.”

11. In *Gabriel Osimbo V Chrispinus Mandare*, [2020] eKLR the Court of Appeal stated as follows:

“Taking into account Rule 4 in computing the 30 days, it is evident that the appellant's appeal which was filed on 7th February, 2011 was filed within time as it was affected by the High Court vacation and the period, 21st December, 2010 to 13th January, 2011 had to be excluded in computing the time. The learned Judge was therefore wrong in dismissing the appeal.”

12. Therefore, having regard to Order 50 Rule 4, a further period of 23 days have to be deducted from the total period of delay between 11/12/2023 and 6/2/2024, that period being 27 days in total. That results in a delay of only 4 days and it is not inordinate enough to militate against the grant of the twin orders of leave and stay. This court will therefore refrain from penalizing the applicants for that brief delay by barring their appeal.

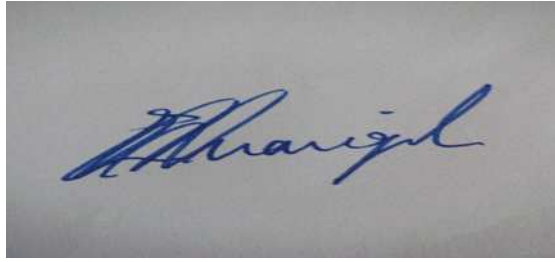
13. The second issue is whether an order of stay of execution of decree should issue. One of the conditions of stay is that there should be risk of substantial loss. the other is that the appeal may be rendered nugatory.

14. The applicants state that the home that is supposed to be demolished is the only home they have. In that regard, this court considers that if the home is demolished before an appeal is heard and determined the applicants may suffer substantial loss and also that the appeal may be rendered nugatory in the event that the court finds in the applicant's favour. It is important that they continue to have shelter if only during the pendency of the appeal. However, the appeal must be prosecuted expeditiously and this court will in its final orders put in place measures to prevent the applicants from drifting into somnolence after this ruling.

15. The outcome is that the application dated 5/2/2024 has merit and the same is allowed on condition that the applicants shall file and their memorandum of appeal and pay for it and serve it within seven (7) days of this order. The applicants shall also file and serve their record of appeal in the matter within thirty (30) days from the date of this order. In default of compliance with the foregoing conditions either singly or cumulatively the orders of leave and stay granted herein shall stand automatically vacated and the respondents will be at liberty to execute the decree.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 4<sup>TH</sup> DAY OF JUNE 2024.**





**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

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