



**Ndung'u v Maina (Sued in her capacity as the legal representative of the Estate of the Late Maina Mukura) (Environment and Land Appeal E024 of 2024) [2024] KEELC 5765 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5765 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MURANGA**  
**ENVIRONMENT AND LAND APPEAL E024 OF 2024**  
**LN GACHERU, J**  
**JULY 29, 2024**

**BETWEEN**

**ANTONY MAINA NDUNG'U ..... APPELLANT**

**AND**

**EUNICE NJERI MAINA (SUED IN HER CAPACITY AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE MAINA MUKURA) ..... RESPONDENT**

**RULING**

1. The Notice of Motion Application before the Court dated 11<sup>th</sup> June, 2024 is founded under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and Sections 3 and 3A of the [Civil Procedure Act](#). The Applicant/Intended Applicant seeks the following Orders:
  - (1). That this court be pleased to grant leave to the Applicant/Intended Appellant to file Appeal out of time against the Judgment and Decree of the Senior Principal Magistrate's Court at Murang'a, delivered by Hon. S. Mwangi, Senior Principal Magistrate on 31<sup>st</sup> day of May, 2022 in Murang'a ELC No.52 of 2020; Eunice Njeri Maina (suing In Her Capacity As The Legal Representative Of The Estate Of The Late Maina Mukura (deceased) v Anthony Maina Ndung'u.
  - (2). That be a stay of execution of the Judgment and Decree of the Senior Principal Magistrate's Court at Murang'a delivered by Hon. S. Mwangi, Senior Principal Magistrate on 31<sup>st</sup> day of May 2022, in Murang'a Elc No.52 Of 2020; Eunice Njeri Maina (suing In Her Capacity As The Legal Representative Of The Estate Of The Late Maina Mukura (deceased) V Anthony Maina Ndung'u and any and all attendant consequences pending hearing and determination of this application inter-partes.



- (3.) There be a stay of execution of warrants of his arrest issued against him by the Senior Principal Magistrate's Court at Murang'a delivered by Hon. S. Mwangi, Senior Principal Magistrate on 31<sup>st</sup> day of May, 2022 in Murang'a Elc No.52 Of 2020; Eunice Njeri Maina (suing In Her Capacity As The Legal Representative Of The Estate Of The Late Maina Mukura (deceased) V Anthony Maina Ndung'u and any and all attendant consequences pending hearing and determination of the Appeal in the Employment and Labour Relations Court.
  - (4.) The Court be pleased to make such other further orders as may be just and expedient in the circumstances to meet the overriding objectives.
  - (5.) Costs of this Application be provided for".
2. The Application is supported by the various grounds stated thereon and the Supporting Affidavit of KINYANJUI KIMANI, an Advocate working in the Law Firm of Amadi & Associates Advocates, for the Intended Appellant sworn on 11<sup>th</sup> June, 2024.
  3. The Applicant/Intended Appellant contended that the trial court Hon S. Mwangi (SRM), in MURANG'A ELC NO.52 OF 2020; EUNICE NJERI MAINA (Suing in her capacity as the Legal Representative of the estate of the late MAINA MUKURA (deceased) V ANTHONY MAINA NDUNG'U, issued warrants for the arrest and committal to Civil jail of the Applicant herein.
  4. Therefore, the Applicant is apprehensive that the Judgment-Creditor through the OCS Murang'a Police Station , might execute the warrants for his arrest at any moment.
  5. Further, the Applicant contended that he was aggrieved by the decision of the trial Court dated 31<sup>st</sup> May 2022, in the above stated matter, and is keen to Appeal against the same.
  6. Further, that the Applicant also contended that he is being exposed to undue prejudice with no guarantee of recovering any damage that may be paid to the Respondent should he pay the money as demanded in the Notice to Show Cause.
  7. It was the Applicant's further contention that he has preferred the instant Application and the accompanying Appeal promptly and is willing to comply with any reasonable conditions for stay of execution as this Court may direct. That the interests of justice demand that the instant Application be allowed in order to preserve the subject-matter of the Intended Appeal.
  8. He alleged that he may be committed to Civil jail for a period of six (6) months, unless the said committal order is stayed by this Court. Further, that unless the impugned Judgment, Decree and warrants for his arrest are stayed, he stands to suffer substantial loss as the substratum of the intended Appeal may be rendered futile and inconsequential. That the substantial loss he stands to suffer may not be recouped on successful appeal.
  9. He contended that through his intended Memorandum of Appeal dated 11<sup>th</sup> June, 2024, he has challenged the decision of the trial Court on the following grounds:
    - (1). That the trial Court erred in law and in fact in failing to enter the finding that the Respondent's suit did not disclose a cause of action against the Appellant in the circumstances of the entire case.
    - (2). That the trial Court erred in law and in fact by proceeding to hear and determine the Respondent's suit disregarding the Appellant's Notice of Preliminary Objection challenging the trial Court's jurisdiction.



- (3). That the trial Court erred in law and in fact by failing to satisfy itself as to whether the Applicant was served with the proceedings in the suit before it prior to rendering an interlocutory Judgment against the Applicant.
  - (4). That the trial Court failed to take into account the Appellant's right to be heard which is enshrined in *the constitution* of Kenya.
  - (5). That the trial Court erred in law and in fact in finding that the Appellant was trespassing on private property and granted an Order for his eviction which Order was of no consequence as the Respondent together with her servants and agents evicted the Respondent therefrom using crude methods.
  - (6). That the trial Court exercised the wrong principles in awarding costs in a matter where interlocutory Judgment was entered and which matter proceeded ex-parte.
10. Consequently, the Applicant/ Intended Appellant has sought for;
    - a. The intended Appeal to be allowed.
    - b. The Judgment of the trial Court dated 31<sup>st</sup> May, 2022 be set aside including the decision on costs.
    - c. That the costs of the Appeal be allowed together with interest at Court rates from the date of the trial Court's Judgment.
    - d. Any other Orders the court may deem fit.
  11. The Application is opposed by the Respondent through the Replying Affidavit, EUNICE NJERI MAINA sworn on 1<sup>st</sup> July, 2024, wherein she averred that the instant Application amounts to an abuse of the due process of the Court, as the Applicant was well aware of the trial Court's decision delivered on 31<sup>st</sup> May, 2022 because the Applicant/Intended Appellant was served with the Decree thereof requiring him to vacate the suit property as is attested to by the Respondent's annexure "ENM1".
  12. She refuted the Applicant's contention that the matter before the trial Court proceeded ex-parte because the Applicant's counsel on record in the proceedings before the trial Court was served with a Bill of Costs, and he acknowledged receipt of the same as is evident from the Respondent's Annexure "ENM2".
  13. The Respondent contended that this Application and intended Appeal was commenced by the Applicant in mala fides (bad faith), and is meant to circumvent the warrant of arrest issued against the Applicant and urged the Court to dismiss the same entirely.
  14. Further, that this Application and the intended Appeal are brought after inordinate and unreasonable delay as two (2) years have lapsed since the delivery of the decision, which is being challenged and is meant to deny the Respondent the fruits of a successful Judgment which she obtained.
  15. Further, that the Applicant has already vacated the property in question hence the instant suit amounts to a mere academic exercise. She also contended that the Applicant has been indolent, and is guilty of laches, as he has not presented any cogent grounds warranting the Court to exercise its discretion in his favour. She urged the Court to dismiss the suit with costs.
  16. The Application was canvassed by way of written submissions.



## **Applicant/intended Appellant's Submissions**

17. The Applicant filed his written submissions dated 11<sup>th</sup> July, 2024 through the Law Firm of Amadi & Associates Advocate, who identified Three (3) issues for determination as follows:
  - i. Whether the Applicant has met the threshold for the grant of for extension of time to Appeal out of time against the decision of the trial Court.
  - ii. Whether the Applicant has discharged the conditions necessary to warrant the issuance of an order of stay of execution.
  - iii. Whether the court should issue a temporary and permanent Injunction against the Respondents pending the hearing and determination of the Appeal.
18. Further, the Applicant cited the holding of the court in the case of County Executive of Kisumu V County Government of Kisumu and 2 Others to buttress the submission that an Applicant seeking for the extension of time to appeal, needs to declare and explain the delay in question to the satisfaction of the Court. Further reliance was sought in the case of Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others [2014] eKLR (Supra). These principles include:
  - a. 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;
  - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
  - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - f. Whether the application has been brought without undue delay; and
  - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
19. It was submitted that the Respondent obtained Judgment in the proceedings before the trial Court through non-disclosure of material facts and the Applicant was condemned unheard.
20. The Applicant explained the delay in lodging an Appeal as follows: that the impugned Judgment was delivered ex-parte; despite the trial Court being aware of the Applicant's Notice of Preliminary Objection;- Further, that the Respondent served the Applicant's counsel with a Bill of Costs only in 2023.
21. The Applicant reiterated that he came to know about the entire matter before the trial Court only upon being served with the Notice to Show Cause. He further submitted that the hearing before the trial Court was conducted in secrecy, thus denying him the right to be heard.
22. He cited the provisions of Order 42, Rule 6 of the Civil Procedure Rules, on the conditions to be satisfied for grant of an order of stay of execution. He relied on the case of Vishram Ravji Halai V Thornton & Turpin Nairobi Civil Application No. 15 of 1990 [1990] KLR 365, which held as follows



on conditions to be established: the establishment of a sufficient cause, satisfaction of substantial loss, furnishing of security and the Application must be made without unreasonable delay.

23. The Applicant urged the court to allow the instant Application, and also preserve the subject matter of the Intended Appeal.

### **Respondent's Submissions**

24. The Respondent filed her written submissions on 8<sup>th</sup> July, 2024 through the Law Firm of T.M. Njoroge & Company Advocates. It was her submissions that two (2) years have lapsed since the trial Court delivered its Judgment which the Applicant/ intended Appellant now wishes to challenge. She also submitted that equity aids the vigilant, and not the indolent. She submitted that the Applicant has failed to explain the delay in lodging the Appeal, taking to account the fact that he was represented by counsel in the proceedings before the trial Court.
25. Further, that the Applicant failed to satisfy the Court that the Intended Appeal has any chances of success or that the prayers for stay of execution are warranted.
26. She characterized the instant suit as mischievous as a Court bailiff has already discharged his mandate by evicting the Applicant from land parcel No. LOC.19/KIAWAMBOGO/681, and the only issue left for determination by the trial Court is the payment of costs. Further, that the trial Court ordered the Applicant to make arrangement for payment of costs, but the Applicant failed to attend Court during the hearing of the Notice to Show Cause, and hence the issuance of warrants of arrest against him.
27. It was her further submission that the Applicant has rushed to this court to forestall the warrants of arrest issued against him. That the warrants of arrest cannot be lifted in the circumstances of the instant case because execution has already taken place and this Application is in futility. She urged the Court to dismiss the said Application with costs as it lacks merit.
28. The court has carefully considered this Application, the grounds for and against the same, the rival written submissions, cited authorities and relevant provisions of law, and finds the issues for determination are;-
- i). whether the orders sought in the instant Application have been overtaken by events?
  - ii). Whether the Applicant/Intended Appellant is entitled to the orders sought?

### **i). Whether the orders sought in the instant Application have been overtaken by events?**

29. Order 42 rule 6 (1) and (2) of the Civil Procedure Rules provides 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 appeal case of 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 referred may apply to the appellate court to have such order 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.”

30. The Court will rely on the case of *Selestica Limited v Gold Rock Development Ltd* [2015], where it was held as follows:

“On the issue of whether stay of execution pending appeal should be granted or the same has been overtaken by events, the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

31. Further, in the case of *James Wangalwa & Anor Vs Agnes Naliaka* [2012], the Court stated that;

“No doubt, in law, the fact that the process of execution has been put in motion or is likely to be put in motion by itself does not amount to substantial loss...the Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party in the Appeal.”

32. Again in the case of *Butt vs Rent Restriction Tribunal* [1982] KLR 417, the Court declared *inter alia* that:

- “a.) The power of the court to grant or refuse an Application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal
- b.) The general principle in granting or refusing a stay is: if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory...”

33. Reliance will also be placed in the case of *M/S Portreiz Maternity V James Karanga Kabia Civil Appeal No. 63 of 1997*, where the Court held that:

“That right of Appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right...”

34. Further while citing the decision in the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR, the Court in the case of *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR declared as follows:

“... an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due



performance of such decree or order as may ultimately be binding on the applicant has been given”.

35. The Court of Appeal in *Absalom Dova vs. Tarbo Transporters* [2013] eKLR, reasoned as follows:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

36. In the instant Application and intended Appeal, the Applicant claims to have been condemned unheard in the proceedings before the trial Court; and that the impugned Judgment dated 31<sup>st</sup> May, 2024 was delivered ex-parte.

37. The Court has considered the pleadings, annexures thereto and rival submissions of the parties herein in light of the applicable law. The Court has also perused the correspondence between the Applicant’s counsel and the Respondent’s counsel in respect of the suit before the trial Court contained in the Respondent’s annexure “ENM2”. The Court is satisfied that the Applicant was represented by counsel in the proceedings before the trial Court, therefore, he was not condemned unheard as claimed.

38. The next issue that the Court addresses itself to, is the question whether the orders as sought by the Applicant in the present suit have been overtaken by events. In the case of *Wang’ombe v Nyamu (Environment & Land Case 48 of 2017)* [2023] KEELC 366 (KLR) (26 January 2023) (Ruling), the court held as follows:

“It would, therefore, follow that the decree sought to be stayed having been long executed, there is really nothing to be stayed. The court agrees with the plaintiff’s submission that the instant application has been overtaken by events hence untenable.”

39. In the case of *Elijah Kimani Kimuyu & 2 Others v Francis Mburu Kamau* [2021] eKLR, the Court held that:

“We have anxiously considered the application. The assertion by the respondent that the decree has already been executed is not controverted, meaning that the application for stay of execution has been overtaken by events.”

40. Further, in the case of *Evans Kidero v Speaker of Nairobi City County Assembly & Another* (2018) eKLR, the Court reasoned as follows:

“A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact...”

No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. ...A suit is academic where it is merely theoretical, makes empty sound



and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity...

A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness..."

41. Also in the case of Samuel Kimani & another v Dominic Kamiri Karanja [2022] eKLR, the Court held as follows:

"This Court would be failing in its duty if it were to allow what are essentially spent proceedings to linger on, thereby unnecessarily dissipating the Court's resources and, to the prejudice of the Respondent. In the circumstances, it is my view that the matter before me stands moot for all intents and purposes and the Court therefore dismisses the second and third motions herein with costs to the Respondent."

42. Considering all the above decisions, and the circumstances of this case, the Court is satisfied that the Applicant was evicted from the suit property by a Court bailiff pursuant to the Decree of the trial Court.

43. In the circumstances, the Orders sought herein by the Applicant became moot, as the only matter which is outstanding in respect of the proceedings before the trial Court is the issue of the warrants of arrest issued against the Applicant.

44. Accordingly, this Court finds and holds that orders sought have been overtaken by events.

#### **ii).Whether the Applicant/Intended Appellant is entitled to the orders sought?**

45. The court has found and held that the orders of stay have been overtaken by events, and cannot be granted. The Court has found and held that the Applicant was represented and cannot be heard to say that the matter was heard *ex parte*. The impugned Judgment was delivered on 31<sup>st</sup> May 2022. This Application was filed on 11<sup>th</sup> June 2024, after lapse of 2 years from the date of the said judgement.

46. This court finds and holds that no sufficient reasons or explanation for the delay was given by the Applicant.

47. For the above reasons, the court finds and holds that the Applicant is not deserving of the orders sought for leave to file the intended Appeal out of time. See the case of *The County Government of Mombasa V Kooba Kenya Ltd (Court of Appeal at Malindi) Civil Appeal Appl. No. 130 of 2018*, where the Court held that;

"an Applicant seeking leave to Appeal out of time is required to provide the court with sufficient reasons for the delay in filing the Appeal".

48. Further in the case of in the case of Karnay Zaharya *& Another V Shalom Levi (Appl. No. 80 of 2018)* the court held that;

"the length of the delay is one of the issues to be considered by a Court adjudicating over an Application for leave to Appeal out of time such as the present suit".



49. Having carefully considered the instant Notice of Motion Application before the Court dated 11<sup>th</sup> June, 2024, and this court finds and holds that the said application is not merited. Consequently, the instant Application is thus dismissed entirely with costs to the Respondent.

50. Given that leave to Appeal out of time has not been granted, this file is closed with no further orders.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 29<sup>TH</sup> DAY OF JULY 2024.**

**L. GACHERU**

**JUDGE**

**29/7/2024**

Delivered online in the presence of:

Joel Njonjo – Court Assistant.

Appellant/Applicant – Absent

Respondent – Absent

**L. GACHERU**

**JUDGE**

**29/7/2024**

