



**Henry v Kinyua (Miscellaneous Application E006 of 2023)
[2024] KEELC 5517 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5517 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
MISCELLANEOUS APPLICATION E006 OF 2023**

CK YANO, J

JULY 25, 2024

BETWEEN

AILEEN NCUGUNI HENRY APPLICANT

AND

JOHN M. W. NJERU KINYUA RESPONDENT

RULING

1. Before me is a Notice of Motion dated 7th December, 2023 brought under Order 22 Rule 22 (1), Order 42 Rule 6 (1) and 6 (6), Order 50 Rule 6, Order 51 Rule 1, of the Civil Procedure Rules 2010, Section 3, 3A and Section 79G of the Civil Procedure Act, Article 159 (2) (d) of the Constitution of Kenya 2010 and all Enabling Provisions of the Law. The motion seeks for the following orders:-
 1. Spent.
 2. That this Honourable Court be pleased to stay the execution of the Judgement and Decree issued by the Chief Magistrate’s Court at Chuka on 8th day of September, 2021 in CMC ELC No. 2 of 2020: *John M. W. Njeru Kinyua v. Aileen Ncuguni Henry* pending the inter parties hearing and determination of this Application.
 3. That this Honourable court be pleased to grant an order of stay of proceedings of CMC ELC No. 2 of 2020: *John M. W. Njeru Kinyua v. Aileen Ncuguni Henry* pending the hearing and determination of the instant application.
 4. That the Honourable court be pleased to grant leave to the Applicant herein to file an appeal out of the statutory period against the Judgment of Hon. J. M. Njoroge, Chief Magistrate, made on the 8th day of September, 2021 vide CMC ELC No. 2 of 2020: *John M. W. Njeru Kinyua v. Aileen Ncuguni Henry*.



5. Consequent to prayer (6) (sic) above being granted, the Applicant be and is hereby allowed to lodge the intended Appeal within 14 days from the date of the Order of this Honourable Court and/or such other shorter duration as the Honourable Court may deem fit and expedient.
 6. That this Honourable Court be pleased to stay the execution of the Judgment and Decree issued by the Chief Magistrate's Court at Chuka on 8th day of September, 2021 in CMC ELC No. 2 of 2020: *John M. W. Njeru Kinyua v. Aileen Ncuguni Henry* pending the hearing and determination of the intended Appeal.
 7. That this Honourable Court be pleased to grant an order of Stay of Proceedings of CM ELC No. 2 of 2020: *John M. W. Njeru Kinyua v. Aileen Ncuguni Henry* pending the hearing and determination of the intended Appeal.
 8. Such further and/or other orders be made as the court may deem fit and expedient.
 9. Costs be provided.
2. The motion is supported by the grounds on its face and a supporting affidavit sworn by Aileen Ncuguni Henry on 7th December, 2023 together with annexures thereto. The applicant avers that the suit through a plaint dated 13th January 2020 in CMC ELC No. 2 of 2020: *John M. W. Njeru Kinyua v. Aileen Ncuguni Henry* was instituted against her which matter proceeded and the court entered a judgment on 8th September, 2021 in favour of the respondent as was prayed in the suit. She has annexed a copy of the judgment marked ANH1. That being aggrieved by the said judgment, she instructed M/ S Igweta Murithi & Co. Advocates to appeal and challenge the said Judgment.
 3. The Applicant avers that the said advocates moved the court through ELC Appeal E001 of 2022 seeking an appeal against the said judgment through a Memorandum of Appeal dated 11th January 2022 and filed in court on 13th January, 2022. The Applicant has annexed a copy of the Memorandum of Appeal marked ANH2.
 4. The Applicant avers that having instructed the said advocate on time she was convinced that he would have moved the Court immediately to file the Appeal and represent her as they had agreed. That later it came to her attention that he failed to appear in court on 8th November, 2022 and the said appeal was dismissed. She as annexed a copy of the order dismissing the Appeal. That the only documents that she has received from her former advocates was a copy of a record of appeal dated 25th July, 2022 which had an undated memorandum of appeal and she was never aware it had been filed out of time and without leave of court. She has annexed a copy of the Record of Appeal marked ANH4.
 5. The Applicant states that she instructed her current advocate on record by handing over the said copy of the Record of Appeal that she had and requested them to reinstate ELC Appeal E001 of 2022. That her advocate on record filed an application dated 10th July, 2023 seeking to reinstate ELC Appeal E001 of 2022. She has annexed a copy of the Application dated 10th July, 2023 marked ANH5.
 6. The Applicant states that the respondent filed a response dated 19th October, 2023 which is annexed and marked ANH6, and through the said documents, she came to learn that her former advocate had filed ELC Appel E001 of 2022 out of time and without leave of court. The Applicant states that she was never aware that her former Advocate instituted an incompetent Appeal before court and if she knew, she would have remedied the mistake soonest possible.
 7. The Applicant states that it is for the inadvertent mistake of her former advocate that ELC Appeal E001 of 2022 was filed out of time and without the leave of court. That the Respondent has already



initiated the execution process since he filed an application in the Lower court file seeking her eviction from the suit property.

8. The Applicant avers that she was served upon by the Respondent an eviction notice issued on 3rd May, 2023 and on 4th June, 2023 and the notice was for 90 days since its issuance. She has annexed copies of the said order and Notice of Eviction marked ANH7. That, that necessitated her to file an application dated 20th July, 2023 seeking the order to be set aside for non-service, which application came up for ruling on 24th January, 2024. That having known the Appeal previously filed was incompetent, she instructed her current advocate to withdraw the pending Application in ELC Appeal E001 of 2022 and move the court appropriately which was done.
9. The Applicant avers that she was aggrieved by the judgment of the Lower Court and intends to appeal to this court out of the stipulated timelines. That her appeal has high chances of success and requests the court to give her an opportunity to ventilate the same failure to which she will forever be driven from the seat of justice. The applicant has annexed a copy of the draft memorandum of appeal marked ANH8. That she is informed by her advocates on record that the intended appeal has high chances of success. That it is unfair and unjust to condemn her unheard and due to the mistakes made by her former Advocate on record.
10. The Applicant further states that she is advised by her advocates on record that mistakes of an advocate should not be visited upon a litigant. That the *Constitution of Kenya* 2010, provides that all litigants should be accorded an opportunity to be heard as per the right to a fair hearing guaranteed by Article 50 (1) and that the right to a fair trial remains at the heart of any judicial determination and courts should endeavor to protect and uphold the same. The applicant states that there is no reason grave enough that would warrant her being locked out from pursuing the intended Appeal since the interest of justice warrants the court's intervention.
11. The Applicant states that she is apprehensive that unless the court intervenes, her right to appeal will be prejudiced and she will suffer great injustice. That the Appeal is arguable and will be rendered nugatory if the orders herein sought are not granted as the respondent is in the process of executing the judgment. That in seeking to be granted leave to appeal the decision of the Lower Court, she is not snatching the fruits of the judgment from the respondent but exercising her legal rights of appealing. That the application is brought in good faith and has been lodged expeditiously.
12. The Applicant further states that the fact that an appeal had been earlier filed is sufficient reason in Law for the court to see the intention to appeal against the lower court decision and grant an extension of time to file the intended appeal which may be subject to such terms as the court may find reasonable.
13. In opposing the application, the respondent filed a replying affidavit dated 21st February 2024.
14. The respondent avers that the leave sought to appeal out of time is not merited because the Applicant dillydallied from 8th September 2021 when the judgment was delivered in the primary case up to 7th December 2023 when she belatedly filed the application as an afterthought, upon a lapse of 2 years and 3 months (that is 27 months). That his counsel on record has advised him that the prayers for stay of execution and stay of proceedings sought are not merited because there is no pending appeal or pending proceedings in the primary case which was concluded on 8th September, 2021.
15. The respondent avers that there is nothing to stay since he executed the judgment in the primary case by causing transfer of the subject land to his name and obtained his title deed on 25th November, 2021 as per a copy annexed and marked "JMWN 1". That later, on 28th June, 2022, he charged his said parcel of land and obtained a loan of Kshs. 3,100,000/- as attested to by a copy of the certificate of official search annexed and marked "JMWN2". That the Applicant has failed to disclose that she applied for



a stay order in the dismissed appeal but withdrew the application on 27th October, 2023 whose copy is annexed and marked “JMWN3”.

16. The respondent states that since the said appeal was dismissed on 8th November, 2022 and consent to bring her present advocate on record is dated 10th July, 2023, the period between 8th November, 2022 and 10th July, 2023 totaling to over 8 months has not been explained. A copy of the said consent is annexed and marked “JMWN4”. That the court actions belong to the parties and not their advocates and it behooved the Applicant to diligently follow up her appeal with her advocate, but she inexplicably failed to do so and that if the Applicant has a genuine grievance against her former advocate, she has a recourse/remedy in law against him.
17. The respondent avers that the Applicant is lackadaisical and lethargic and has approached the court too late in the day. That she is a very dishonest litigant and that justice cuts both ways and litigation must come to an end. That he shall be gravely prejudiced in terms of time to attend another litigation in court and further costs, if the application is allowed, yet the Applicant has refused to pay her the costs of the earlier actions.
18. The Applicant filed a further affidavit dated 23rd February 2024 wherein she reiterated that the Application before court has merit and is premised on the law and ought to be determined by the court. That there are pending proceedings in the Primary case where the respondent is seeking to have her evicted from the suit property and which proceedings are ongoing since there is a pending ruling thus the apprehension she has expressed to this court.
19. The Applicant avers that despite the respondent transferring the property in his name and going forward to charge the property, that should not be the reason grave enough to warrant her being locked out from pursuing the intended appeal since it would be unfair and unjust. That she has disclosed to the court through attaching all pleadings for the court to review everything that transpired in the previous appeal as evidenced in annexures ANH1-ANH6 and therefore it would be in the interest of justice for the court to exercise its discretion and issue a stay of execution of the Lower Court judgment and Decree even as they argue the instant matter.
20. The Applicant avers that the court should note that her advocate has also sworn an affidavit dated 7th December, 2023 explaining the gap between them coming on record and filing the instant matter. That as per annexure ANH7 in her supporting Affidavit, the court will note that the Lower court had issued an eviction notice within a timeline of 90 days and luckily upon urgently moving the lower court seeking a review of the said order for non-service, the court stayed the order and her application is pending a ruling.
21. The Applicant further states that it would be fair and just for the court to allow her application since she has been staying in the said property for over forty (40) years, raised her children in the same property and has nowhere else to call home and therefore risks becoming destitute if the court does not intervene. That the respondent was awarded costs for the withdrawn appeal and has already filed a bill of taxation and therefore he will not be prejudiced in any way if the instant matter is to be heard and leave to appeal allowed.
22. The Applicant states that she is apprehensive that unless the court intervenes, her right to appeal will be prejudiced and she will suffer great injustice since she has nowhere to go. That the court will note that she has approached the court with clean hands and timeously as explained in her supporting affidavit and it would be in the interest of justice to allow her application as prayed.



23. The application was canvassed by way of written submissions. The Applicant's submissions dated 28th March, 2024 were filed by the firm of Kathurima & Mungui Co. Advocates LLP while the respondent filed his submissions dated 17th April, 2024 through the firm of Carl Peters Mbaabu & Co. Advocates.
24. The court has read and considered the submissions and I need not reproduce them in this ruling.
25. I have considered the application, the response and the rival submissions. The issues for determination, in my view are:
 - i. Whether the court should grant leave to the applicant to file appeal out of time.
 - ii. Whether the orders of stay of execution of the judgment and decree and proceedings in Chuka CMC ELC No. 2 of 2020 should be granted.
26. Regarding the first issue, the applicant substantially seeks for leave to file an appeal out of time. The decision which is sought to be appealed is from the lower court. Under Section 79G of the Civil Procedure Act, appeals from the decisions of the lower court to the High Court must be filed within 30 days from the date of the decree or order from which the appeal lies. The proviso to the said Section however, allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he or she has a good cause for doing so.
27. The principles upon which the court should exercise the said discretion and grant leave to appeal out of time are now settled. The court ought to consider the length of delay, the reason for delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. (See *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi* – Civil Application No. NAI 255 of 1997 and *Thuita Mwangi v. Kenya Airways Limited* (2003) eKLR. The question therefore is whether taking into account the facts of the instant case; the applicant has satisfied the said conditions.
28. As for the length of the delay, the judgment of the lower court was delivered on 8th September 2021 while the instant application was filed on 8th December, 2023. The 30 days' period within which the applicant ought to have filed the appeal lapsed on 9th October, 2021. The application has been brought after a period of over two (2) years. It is my considered view that the application was brought after an unreasonable and undue delay.
29. In justifying the said delay, the applicant deposed that she had filed an incompetent appeal, ELC Appeal E001 of 2022 which was dismissed by the court on 8th November, 2022. The applicant appears to blame her previous advocates for the filing and the subsequent dismissal of the said incompetent appeal. It is my opinion that the reasons for the delay are not convincing and all that the applicant seeks is to revive the earlier appeal which in itself was incompetent and which was dismissed by this court. The applicant cannot be heard attributing the blame on her previous advocate since the case belonged to her and not the advocate. In my view, the reasons given for the delay are farfetched, unbelievable and frivolous and not convincing at all. Indeed the filing of this application after the applicant's previous appeal was dismissed amounts to an abuse of the court process.
30. As it has always been held, extension of time to file appeal is a matter of exercise of discretion. Where a party is aggrieved and wishes to pursue an appeal, it would be fair to exercise discretion in his/her favour, especially where the delay in filing the appeal is not inordinate and sufficient reason has been given for the delay. A court will also take into account the fact that the other party will not be prejudiced in any way. The discretion of the court must always be exercised judiciously. The applicant, although



having expressed her intention to be heard by this court on appeal, it is my considered opinion that she ought not be given an opportunity to pursue the intended appeal since she had her chance through ELC Appeal No. E001 of 2022 which was otherwise dismissed for being incompetent. Moreover, the delay herein is quite inordinate. Further, the respondent has clearly explained that he has since executed the decree of the lower court and has even gotten a title deed of the suit property.

31. For the above reasons, it is my considered opinion that the applicant herein has not satisfied the conditions for grant of leave to appeal out of time and the prayer for leave to appeal out of time is declined.
32. The applicant also seeks stay of execution of the judgment and decree of the lower court and stay of proceedings in that court pending the hearing and determination of the intended appeal. Having declined to grant leave to appeal out of time, the order for stay in this case will serve no purpose as there is no appeal pending determination. Moreover, it has come out from the material herein that the decree of the lower court has since been executed and completed. A court of law cannot issue orders in vain.
33. In the circumstances, and for the reasons I have given above, I find that the Notice of Motion dated 7th December, 2023 is devoid of merit and the same is hereby dismissed with costs to the respondent.
34. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH JULY, 2024

In the presence of:

Court Assistant – Kiruja

Kawira for Respondent

Ms. Kathurima for Applicant

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C.K YANO,

JUDGE

