



**Kangai v Nyomba & another (Environment & Land Miscellaneous Case E003 of 2024) [2024] KEELC 5499 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5499 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT & LAND MISCELLANEOUS CASE E003 OF 2024**

**CK YANO, J**

**JULY 25, 2024**

**BETWEEN**

**CATHERINE KANGAI ..... APPLICANT**

**AND**

**JUDITH KAINDA NYOMBA ..... 1<sup>ST</sup> RESPONDENT**

**LYDIA KANINI KWENGA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a notice of motion dated 21<sup>st</sup> February, 2024 brought under Section 79 G of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 51 (1) Rule of the *Civil Procedure Rules*, the applicant seeks for orders that: -
  1. Spent
  2. That pending the inter parties hearing of this application, the Honourable Court be pleased to order stay of execution of the judgement and decree of the lower court passed on the 18/10/2023 in Marimanti PM ELC No. E014 of 2022.
  3. That the Honourable Court be pleased to grant leave and extend time to the applicant to file appeal against the judgment of the lower court in Marimanti PM ELC No. E014 of 2022.
  4. That pending the hearing of the intended appeal, there be an order of stay of execution of the decree and judgement of the court in Marimanti PM ELC No. E014 of 2022.
  5. Costs of this application be costs in the intended appeal.
2. The application is based on the ground set out on the face of the application and the supporting affidavit dated 21<sup>st</sup> February 2024 sworn by Catherine Kangai and a further affidavit dated 26<sup>th</sup> February, 2024. The applicant has deposed that she was the defendant in Marimanti ELC No. E014



- of 2022 in which judgment was delivered against her on the 18<sup>th</sup> October, 2023. That the trial court ordered that she be evicted from LR Chiakariga 'A'/4002 and 4003. That the respondents herein are her sisters-in-law and that she has lived on the suit land since the year 2000 when she got married to their brother Joseph Murage who died in the year 2014.
3. The Applicant avers that she has 3 children with the respondents' deceased brother with whom they live on the land. That she has known no other home since the year 2000 and her children stand to be thrown out of the only home they know.
  4. That after the judgment of the court was delivered, she was not satisfied with the outcome and she made up her mind to appeal against the judgment. The applicant states that she applied for the judgment of the court which took 3 weeks to be ready.
  5. The applicant further avers that after she got the judgment, she consulted an advocate one Lydia Kijaru for appeal, but she was not able to afford her legal fees and she was left helpless. That on the 8<sup>th</sup> February, 2024, she visited the offices of Murango Mwenda & Company, Advocates to seek help and explained herself that she could not afford legal fees and pleaded with him to do the appeal for her pro bono. That after listening to her pleas, Murango Mwenda Advocate agreed to take up the matter pro bono as she could not afford any legal fees.
  6. The Applicant states that she was not able to file the appeal in time because of the difficulties she has explained herein. That the respondents have already extracted a decree and have applied to Marimanti ELC No. E014 of 2022 to have her evicted together with her children. The applicant has attached the application for eviction marked CKII. That her eviction from land is imminent as the application for eviction was set for hearing on the 22<sup>nd</sup> February 2024.
  7. The Applicant avers that if the orders of eviction are issued, all her houses therein will be demolished and she will be left without shelter and she will suffer irreparable loss. She prays that the court grants her leave to file appeal out of time and in the meantime requested the court to grant her stay of execution.
  8. The applicant has also annexed a copy of the judgment marked "CKIII" in Marimanti ELC No. E014 of 2022.
  9. The application is opposed by the respondents. The 1<sup>st</sup> respondent filed a replying affidavit dated 19<sup>th</sup> March, 2024 wherein she avers that a judgment in ELC No. E014 of 2022 in Marimanti involving them was delivered in October, 2023 in presence of the applicant. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents proved their case on a balance of probability and were declared the registered proprietors of land parcels Tharaka/Chiakariga 'A' 4002 & 4003 respectively.
  10. The 1<sup>st</sup> respondent avers that an order of permanent injunction and eviction was issued against the applicant in regard to the said parcels. That on the 22<sup>nd</sup> January, 2024, they moved the court with an application seeking that the applicant grants them vacant possession and subsequently an eviction order against the applicant on their said land parcels which application was slated for hearing on the 15<sup>th</sup> February, 2024. The 1<sup>st</sup> respondent has attached a copy of the application marked JKN1.
  11. The 1<sup>st</sup> respondent states that she served both applications on the applicant. That the applicant then filed her application herein after they had demonstrated the intention of implementing the judgment of the Honourable Court to evict her from their portions of land. That the judgment in ELC E014 of 2022 at Marimanti was delivered in October, 2023 but the applicant has brought forth her application seeking stay and leave to file appeal out of time almost five months later after judgment was delivered by Hon. M. Wafula. That the applicant's application to file an appeal out of time is an afterthought and they prayed that the Honourable Court disallows it.



12. Regarding the applicant's allegation that she had financial constraints and that is the reason why she took so long to move the court to file an appeal, the 1<sup>st</sup> respondent argued that the speed at which she filed the instant application seeking stay a month later after they intended to implement the judgment is the same pace she should have considered. That she feels that there are no reasonable grounds that the applicant has demonstrated warranting the cause of the delay to file her appeal.
13. The 1<sup>st</sup> respondent avers that the applicant should allow the respondents to enjoy the fruits of their judgment. That it will only be fair that litigation comes to an end since they have been litigating since 2022 and there have been a lot of expenses involved. That her advocate on record advises her that the issue of utilization that had been raised at the trial by the applicant in regard to land parcels Tharaka/Chiakariga 'A' 4002 & 4003 and was not proved at the trial as provided by the *Evidence Act*.
14. The 1<sup>st</sup> respondent contends that the issue raised by the applicant alleging that she shall be thrown out of her home with her children is a mere lie and that the court determined the same on the trial. That the applicant does not utilize the suit lands in contention as she alleges. That the applicant could not even remember the year when her alleged husband who is their biological brother passed on. That the applicant's prayer seeking stay of execution pending appeal is unmerited.
15. The respondents prayed that the applicant's application be dismissed with costs to the respondents.

### **Analysis And Determination**

16. Having considered Application and the submissions of the two parties alongside the legal authorities they have relied upon, the main issues for determination are: -
  - i. Whether the applicant should be granted leave to file appeal out of time against the judgment of the lower court in Marimanti PM ELC No. E014 of 2022.
  - ii. Whether the applicant should be granted stay of execution pending the intended appeal.

### **Whether the court should grant leave and extend time to the applicant to file appeal out of time.**

17. Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The said section provides that:

“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 satisfied the court that he had good and sufficient cause for not filing the appeal in time.”

18. From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time.” This therefore means that an appeal may indeed be admitted out of time, or the court may extend time for filing an appeal.
19. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Thuita Mwangi v. Kenya Airways LTD* [2003] eKLR.

They include the following: -

- i. The period of delay;



- ii. The reason for the delay;
  - iii. The arguability of the appeal;
  - iv. The degree of prejudice which could be suffered by the respondent if the extension is granted;
  - v. The importance of compliance with time limits to the particular litigation or issue; and
  - vi. The effect if any on the administration of justice or public interest if any is involved.”
20. In this case, the judgment was delivered on 18<sup>th</sup> October, 2023, while the present application was filed on 21<sup>st</sup> February, 2024 which is about three months after the lapse of the 30 days within which the appeal ought to have been filed. The applicant has submitted that the delay was occasioned by lack of legal fees to pursue the matter. That she is extremely poor and could not afford to instruct an advocate. I am inclined to allow the applicant leave to file her intended appeal noting that three (3) months is not inordinate. Section 79G permits the extension of time to file an appeal. Once the delay is convincingly explained, then time ought to be enlarged.

**Whether stay of execution pending the intended appeal should be granted or not.**

21. The principles upon which stay of execution pending appeal may be allowed are now well settled from the authorities of this court and from the superior courts. Generally, stay of execution is provided for under Order 42 Rule 6 of the [Civil Procedure Rules](#) which provide 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, an 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 order set aside.
- (2) No order of stay of execution shall be made under Sub-rule (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 undue 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.”

22. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. The Court of Appeal in the case of [Butt v. Rent Restrictions Tribunal](#) [1982] KLR 417 gave guidance on how a court should exercise the said discretion and held that: -

- “1. The power of the court to grant or refuse an application for a stay of execution is discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.



2. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
  3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
  5. The court in exercising its powers under Order XLI Rule 4 (2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order of stay of execution to lapse.”
23. As such for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him or her unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for the due performance of the decree.
24. In the instant case, the judgment was delivered by the trial court on 18<sup>th</sup> October, 2023 while the application herein was filed on 23<sup>rd</sup> February 2024. That is a period of over four (4) months. The applicant has given sufficient explanation in regard to the delay in filing the application. That the delay was caused by financial constraints since she is poor. In my view, the delay in bringing the application was not inordinate and has adequately been explained.
25. As for the applicant having to suffer substantial loss, in the case of *Kenya Shell Limited v. Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982-1988) KAR 107 the Court of Appeal pronounced itself to the effect that: -
- “It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay.”
- (See also the case of *Macharia T/a Macharia & Co. Advocates v. East African Standard* (No.2)2002 KLR 63).
26. The applicant has a burden to show the substantial loss she is likely to suffer if no stay is ordered. This is recognition that both parties have rights, the appellant to her appeal, which includes the prospects that the appeal will not be rendered nugatory, and the decree holders to the decree which includes the full benefits of the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. (See the case of *Absalom Dora v. Turbo Transporters* (2013) eKLR.
27. In this case, the applicant has stated that if the impugned decree is executed and the orders of eviction are issued, her houses standing on the suit properties will be demolished and she, together with her children, will be left homeless and will suffer irreparable loss. In my considered view, if the stay is not



granted, the applicant may be evicted and her houses demolished and therefore the appeal may be rendered nugatory. I am therefore inclined to allow the stay orders.

28. In the result, the court finds that the Notice of Motion dated 21<sup>st</sup> February, 2024 is merited and the same is allowed in the following terms: -

- a. Leave is hereby granted to the applicant to file appeal out of time against the judgment of Marimanti PM ELC No. E014 of 2022 delivered on 18<sup>th</sup> October 2023.
- b. The appeal shall be filed and served within 14 days from the date of this ruling.
- c. An order of stay of execution of the decree and judgment of the trial court in Marimanti PM ELC No. E014 of 2022 is hereby granted pending the hearing and determination of the intended appeal.
- d. In the event the order granted in (b) above is not complied with within the time stipulated, the stay order issued shall automatically lapse.
- e. Considering the close relationship of the parties herein, I order that parties bear their own costs of the application.

29. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 25<sup>TH</sup> JULY, 2024**

In the presence of:-

Court Assistant – Kiruja

Murango Mwenda for Applicant

No appearance for Ms. Kijaru for Respondent

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**C.K YANO,**

**JUDGE**

