



**Plein v Gathigia & 3 others (Environment and Land Miscellaneous Application  
E001 of 2023) [2024] KEELC 5887 (KLR) (20 August 2024) (Ruling)**

Neutral citation: [2024] KEELC 5887 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2023  
AK BOR, J  
AUGUST 20, 2024**

**BETWEEN**

**PURITY MUTHONI PLEIN ..... APPLICANT**

**AND**

**PASTOR TABITHA GATHIGIA ..... 1<sup>ST</sup> RESPONDENT**

**KINGDOM SEEKERS FELLOWSHIP, NYAHURURU ..... 2<sup>ND</sup> RESPONDENT**

**PASTOR FRANCIS NDUNG’U GITHAIGA ..... 3<sup>RD</sup> RESPONDENT**

**JESUS EXALTATION CENTRE NYAHURURU ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Applicant filed the application dated 21/8/2023 seeking stay of execution of the judgment and costs in Nyahururu CMC ELC Case No. 87 of 2018 (formerly Nyahururu SPMCC No. 7 of 2014) and leave to appeal out of time. The application was made on the grounds that the judgment was delivered by the trial court on 20/12/2022 in open court in the absence of her advocate who was waiting on the virtual platform. When her advocate perused the court file on 18/1/2023, he discovered that the judgment had been delivered in open court and that it was handwritten and since the handwriting of the Learned Magistrate was not being legible her advocate was not able to read the outcome of the judgment. He applied for a typed copy which was issued on 27/7/2023.
2. The Applicant swore the affidavit in support of the application and annexed a copy of the letter dated 18/1/2023 seeking a certified copy of the judgment. She deponed that the judgment was issued on 27/7/2023 after following up with the Executive Officer in Nyahururu. The trial court dismissed her case with costs to the 1<sup>st</sup> and 3<sup>rd</sup> Respondent. She urged that she had an arguable appeal with high chances of success and it was in the interest of justice that she be granted leave to appeal out of time. She explained that the delay in filing the appeal was inadvertent and excusable. Further, that the 3<sup>rd</sup> Respondent had taxed his bill of costs and obtained a certificate of costs following which a notice to



show cause why execution should not issue had been scheduled for hearing. The Applicant sought to be afforded an opportunity to exercise her right of appeal and urged the court to exercise its discretion by granting the orders sought to avoid a miscarried justice.

3. Pastor Tabitha Gathigia filed a replying affidavit opposing the application. She urged that it was brought in bad faith after an unreasonable delay. She emphasized that the judgment was delivered on 20/12/2022 and the Applicant did not take action for nine months which made the delay unreasonable, unexplainable, unconscionable and totally unacceptable. Further, that the Applicant and her advocate knew the date of the judgment and should have followed up the case within a reasonable time. She added that the reasons advanced by the Applicant were mere excuses and that the application was an after thought when execution commenced. Pastor Tabitha urged that there was nothing to stay since the Applicant's suit was dismissed with costs. She added that there was no certificate of delay and that the Respondents were entitled to the costs awarded by the trial court.
4. The 3<sup>rd</sup> Respondent filed grounds of opposition in which he averred that the Applicant was guilty of inordinate and inexcusable delay. Further, that she had not offered any security for the performance of the decree issued by the trial court. Lastly that she had not shown the damage she stood to suffer if the orders sought were not granted.
5. The 4<sup>th</sup> Respondent filed grounds in opposition to the application pointing out the date the judgment was delivered while urging that there was no evidence to show that the Applicant's advocate obtained a copy of the judgment on 27/7/2023. It argued that the Applicant had not met the requirements for extension of time to file an appeal and that she had failed to demonstrate why she did not file the application within the set timelines. It maintained that the case was decided on merits and that the appeal did not have a possibility of success. Lastly, that the Applicant had not offered security for the performance of the decree and that this case had been in court for 10 years and it ought to be put to rest to avoid causing injustice to the parties.
6. The court directed parties to file submissions. The Applicant in her submissions filed on 23/5/2024 relied on Section 79G of the *Civil Procedure Act* on the court's discretion to admit an appeal out of time where it is satisfied that an appellant had good and sufficient cause for not filing the appeal in time. The Applicant submitted that her advocate was not aware that the judgment would be delivered in open court on 20/12/2022 as they expected it to be delivered virtually. She relied on case law on considerations which the court ought to take into account in deciding whether to extend time which include the length of the delay, the reason for the delay, the chances of the appeal succeeding and the degree of prejudice to the respondents if the application were granted.
7. The 3<sup>rd</sup> Respondent submitted that based on Section 79G of the *Civil Procedure Act* and the decisions of the court, in the exercise of its discretion to extend time for filing an appeal, the court had to take into account the length of the delay, the reason for the delay, chances of the appeal succeeding and the degree of prejudice the respondent would suffer if the application were granted. She added that the court had to be satisfied with the explanation for the delay yet in this instant the Applicant's advocate was aware that the judgment was to be delivered on 20/12/2022 after which she was required to file an appeal within 30 days. She maintained that this application was an afterthought and that the explanation for the delay was not convincing or satisfactory. Further, she urged that the trial court dismissed the Applicant's suit on 20/12/2022 which was a negative judgment and that there was nothing to be stayed.
8. The 4<sup>th</sup> Respondent submitted that there was no evidence to show that the Applicant's advocate got a copy of the judgment on 27/7/2023 as alleged. It conceded that the court had the discretion to allow a party to file an appeal out of time where sufficient cause was shown. According to the 4<sup>th</sup> Respondent,



based on the time taken from when the judgment was delivered until the application was filed, the Applicant did not deserve the orders sought which in its view were meant to delay the Respondents enjoyment of the fruits of the judgment. It submitted that order 42 Rule 6 (2) of the Civil Procedure Rules stipulated that the court must be satisfied that substantial loss would result to an applicant unless the stay was granted; the application was made without unreasonable delay and the Applicant had provided security for the due performance of the decree. It emphasized that the Applicant had not disclosed the loss she stood to suffer.

9. The 4<sup>th</sup> Respondent relied on the decision in Catherine Njeri Maranga v Serah Chege & Another [2017] eKLR in which the Judge referred to the Court of Appeal decision in Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others [2016] eKLR where it addressed the issue of a negative order as one that was incapable of execution and thus incapable of being stayed. The court observed that an order dismissing an application was a negative order incapable of execution save for costs. The 4<sup>th</sup> Respondent maintained that the Applicant had failed to indicate whether she was willing to furnish any security for the due performance of the decree.
10. The issue for consideration is whether the court should stay execution of the judgment of the trial court delivered on 20/12/2022 and grant the Applicant leave to appeal out of time. The explanation given by the Applicant is that her advocate was not in open court when the judgment was delivered as he had joined the court virtually. The Respondents advocates did not challenge this position. The letter seeking a copy of the judgment was sent on 18/1/2023, which was within a reasonable time. The Applicant attributed the delay in filing the appeal to the long time it took to obtain a typed copy of the judgment.
11. The court notes that the impugned judgement related to a complaint by the Applicant's about private nuisance through noise pollution. As the 3<sup>rd</sup> Respondent rightly pointed out, there is no order capable of being stayed except that for the payment of costs.
12. The court has considered the application dated 21/8/2023 and the responses together with the written submissions filed by the parties and issues an order staying execution of the order for costs in Nyahururu CM ELC Case No. 87 of 2018. The Applicant is granted leave to lodge her appeal against the decision of the trial court within 15 days of the date of this ruling.
13. The Applicant will bear the costs of this application.

**DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF AUGUST 2024.**

**K. BOR**

**JUDGE**

In the presence of : -

Mr. Njoroge Mwangi for the Applicant

Mr. David Kaburu for the 1<sup>st</sup> Respondent

Mr. Kinyua Njogu for the 3<sup>rd</sup> Respondent

Ms. Njoki Mureithi for the 4<sup>th</sup> Respondent

Court Assistant: Vanessa Muiruri

No appearance for the 2<sup>nd</sup> Respondent

