



REPUBLIC OF KENYA



Ndiritu & another v Kubai (On behalf of 32 others) (Environment and Land Appeal E014 of 2023) [2024] KEELC 6008 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6008 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E014 OF 2023
JO OLOLA, J
SEPTEMBER 20, 2024**

BETWEEN

ANNAH GATHONI NDIRITU 1ST APPELLANT

JANE WANJIRU GITAKA 2ND APPELLANT

AND

DAVID NGIBUNI KUBAI RESPONDENT

ON BEHALF OF 32 OTHERS

RULING

1. By the Notice of Motion dated 2nd October 2023, Annah Gathoni Ndiritu and Jane Wanjiru Gitaka (the Applicants) pray for orders:-
 2. That the filing of this Appeal be allowed out of time;
 3. That there be a stay of execution of the Ruling entered on 16th August 2023 in Civil Case No. E128 of 2009 at Nyeri Law Courts pending (the) hearing and determination of this Appeal; and
 4. That the costs of this Application be in the cause.
2. The application is supported by an affidavit sworn by Jane Wanjiru Gitaka (the 2nd Applicant) wherein she avers that she is the daughter to the late Gabriel Ndiritu Mureithi who is the registered proprietor of LR. No. Gakawa/Kahurura/Block 1/Ichuga 482 (the suit property). The 2nd Applicant further avers that there has been a long drawn dispute over the suit property, which the Respondents maintain is a public road.
3. The 2nd Applicant states that the Respondents had filed two separate suits relating to the property namely Nyeri CMCC No. E128 of 2009 at Nyeri and Nanyuki ELC Case No. 14 of 2019 at Nanyuki.



At some point in time, the said Nyeri CMCC No. E128 of 2009 was stood over generally to allow the substantive matter raised in Nanyuki ELC No.14 of 2019 to be dealt with conclusively.

4. The Applicants aver that by an application dated 29th March 2023, the Respondents activated the Nyeri case and they were shocked to realize that the Respondents got orders on 16th August 2023 directing the District Surveyor Nyeri to conduct a visit to the suit property to establish, mark and maintain the boundaries thereon. It is the Applicant's case that the Respondents may move at any time to execute the Ruling thereby rendering the instant application/Appeal as well as the matter pending before the Nanyuki court nugatory and a mere academic exercise.
5. The 33 Respondents are opposed to the application. In a Replying Affidavit sworn on their behalf by one Joseph Kariuki Kanyai on the 7th December 2023, the Respondents assert that the application is defective to the extent that it seeks to extend time to file an Appeal as well as an order of stay of execution.
6. It is further the Respondents case that the two suit in Nyeri and Nanyuki raise different issues and that a determination had been made to that effect in the Nanyuki case vide a Ruling delivered on 28th September 2022. It is further the Respondents' case that the claim by the Applicant that the Nyeri suit was stood over to allow the Nanyuki case to proceed is a falsehood not backed by any material evidence.
7. I have carefully perused and considered the Motion as well as the response thereto. I have similarly perused the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
8. By this application before the court, the two applicants urge the court to allow them to file an Appeal out of time and for an order of a stay of execution of a Ruling delivered on 16th August 2023 in Nyeri CMCC No. E128 of 2009 pending the hearing and determination of their intended Appeal.
9. The period for filing an Appeal from the subordinate court to this court is provided for under Section 79G of the Civil Procedure Act as follows:

“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.”

10. The factors to be considered when determining an application for extension of time have been the subject of a number of judicial pronouncements. In Nicholas Kiptoo Arap Korir Salat -v- Independent Electoral and Boundaries Commission & t Others [2014] eKLR, the Supreme Court laid down the principles that govern the exercise of discretion in applications such as this as follows:-

1. 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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;



4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 5. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
11. I have considered the application before me in light of the principles that guide discretionary jurisdiction when determining an application for extension of time. The first question to be answered is whether the applicant has tendered a satisfactory explanation for the delay in filing the Memorandum of Appeal.
 12. In the matter before me, the Ruling against which the Applicants intend to appeal against was from a perusal of the extract order delivered on 9th August 2023 and not 16th August 2023 as stated by the Applicant. That would mean the period for filing the Memorandum of Appeal lapsed on or about 9th September 2023. The period of delay is therefore approximately 30 days.
 13. I have gone through the supporting Affidavit as sworn by the 2nd Applicant. The apparent reasons for the delay are to be discerned from Paragraphs 1 to 8 of the Affidavit wherein she deposes as follows:-
 - “ 4. That the Respondents had filed two separate suits relating to the suit property namely Civil Case No. E128 of 2009 in the Chief Magistrate’s Court at Nyeri and ELC NO. 74 of 2019 at the Chief Magistrate’s Court in Nanyuki;
 5. That the Applicants had been attending to both suits and the Nyeri matter was stood over to allow the substantive matters raised in ELC No. 14 of 2019 determined conclusively. The latter case is still in court and thus not fully determined;
 6. That the Respondents later activated the suit and moved the court in Civil Case No. 14 of 2019 in Nyeri vide application dated 23rd March 2023 (sic). They later obtained, marked and annexed JWG 3 is a copy of the orders dated 22nd July 2011 and 16th August 2023 respectively (sic).
 7. That we were shocked when we realized that the Respondents got an order in their favour when we thought the proceedings in that court had been stood over as we were pursuing the ELC Case No 14 of 2019 at Nanyuki; and
 8. That the Defendant failed to disclose to the court that there was a similar case lodged in Nanyuki which has raised similar issues which are yet to be determined.”
 14. As it were, the Respondents had strongly refuted the claim by the Applicants that there was an order staying proceedings in the Nyeri matter pending conclusion of the proceedings before the ELC Court at Nanyuki. That being the case, one would have expected the Applicants to provide evidence of the existence of such an order.



15. The Applicants do not state that they were not served with the notices for the proceedings in the matter sought to be appealed. As can be seen from Paragraph 6 of the Supporting Affidavit, they were aware of the application dated 23rd March 2023 that had been filed by the Respondents in the said matter.
16. From a perusal of an extract of the court order annexed to the Supporting Affidavit it was apparent that it was that same application that led to the orders sought to be appealed herein on account that “the Applicants thought the proceedings had been stood over.”
17. In the circumstance herein, I was not persuaded that the Applicants had tendered any satisfactory explanation for the delay to warrant this court to exercise its discretion in their favour.
18. Accordingly, I decline to grant the prayer for extension of time as sought in prayer 2 of the Motion dated 2nd October 2023.
19. Having declined to grant extension of time, there was no basis upon which I could consider the prayer for stay of execution pending appeal.
20. In the totality of the circumstances, the Motion dated 2nd October 2023 is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AND IN OPEN COURT AT NYERI THIS FRIDAY 20TH DAY OF SEPTEMBER, 2024.

In the presence of:

Mr. Wanjohi for the Applicant.

Mr. Mbau for the Respondent.

Court Assistant: Michael

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J. O. OLOLA

JUDGE

