



**Kinuthia v Kinyua (Environment and Land Miscellaneous Application  
E016 of 2023) [2024] KEELC 5953 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5953 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E016 OF 2023  
JM MUTUNGI, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**WILLIAM KARIUKI KINUTHIA ..... APPLICANT**

**AND**

**ZIPPORAH MUTHONI KINYUA ..... RESPONDENT**

**RULING**

1. This Ruling emanates from the Applicant’s Notice of Motion dated 8<sup>th</sup> December 2023 seeking orders that:
  1. Spent.
  2. That the Honourable Court be pleased to grant leave to the Firm of M/S Swaka Advocates to come on record for the Applicant/Intended Appellant
  3. That the Honourable Court be pleased to deem the draft Memorandum of Appeal as properly filed and duly on record.
  4. That leave be granted to the Applicant to appeal out of time, against the Judgement delivered by the Honourable D.M Ireri in Baricho ELC CaseNo. 1 of2020 on 25<sup>th</sup> August 2023
  5. That pending the hearing and determination of this application the Honourable court be pleased to issue a stay of execution of the judgement and all consequential orders delivered by the Hon D.M Ireri on 25<sup>th</sup> August in Baricho ELC Case No. 1 of 2020.
  6. That pending the hearing and determination of the substantive appeal the Honourable court be pleased to issue a stay of execution of the Judgement and all consequential orders delivered by the Honourable D.M Ireri in Baricho ELC CASE No. 1 of2020 on 25<sup>th</sup> August 2023.
  7. That any other relief that the Court deems fit to so order.



8. That costs be in cause.
2. The Applicant's motion was based on the grounds set out on the body of the application and on the annexed affidavit of William Kariuki Kinuthia, the Applicant herein. In the affidavit, the Applicant expressed his dissatisfaction with the Court's decision in Baricho's Principal Magistrate's ELC Case No. 1 of 2020, where his Counterclaim was dismissed. He acknowledged that the time to file his appeal had lapsed and sought an extension of time. He also sought a stay pending the substantive appeal on humanitarian grounds. He averred that he stood to suffer substantial and irreparable loss should stay not be granted as he would lose both the land and the deposit he had paid towards the purchase of the land. He explained that the delay in filing the instant application was not excessive, but was due to circumstances beyond his control. He stated the process of obtaining alternative legal representation and for such Advocate to be fully seized of the matter took some time, occasioning the delay in filing the application. He sought that his current Advocate, the Firm of Messr. Swaka Advocates, be admitted on record as his duly appointed advocates. He expressed concern that if the orders prayed for herein are not allowed, the Respondent may proceed to execute the Lower Court's Judgment, resulting in the loss of the land and the monies he paid as a deposit. Additionally, he averred that his intended appeal raised novel issues for consideration and adjudication by the Court and further expressed his willingness to abide by any conditions that the Court may place regarding the provision of security in relation to the Judgment awarded by the Lower Court.
3. The Respondent filed her Replying Affidavit on 15<sup>th</sup> January 2024. In the affidavit, she averred that the Applicant had 30 days within which to lodge an appeal against the Lower Court's decision, from the day of the Judgment. The Respondent stated that the Applicant did not file the appeal within the specified time and is now seeking extension of time to be allowed to file the appeal out of time after the lapse of nearly four (4) months. The Respondent averred that the reasons for the delay in filing the appeal were not well explained or justified. Additionally, the Respondent contended that the Applicant had failed to demonstrate any substantial or irreparable loss he might suffer if the stay was not granted.
4. In the supplementary affidavit dated 12<sup>th</sup> April 2024, the Applicant expressed concern that the Respondent was eager to sell the subject land. The Applicant emphasized that if the land was sold, it would leave no recourse for enforcing any decree in his favour. Further the Applicant averred the trial Court awarded the deposit to the Respondent, even though it was not specifically pleaded for in the Respondent's claim.

### **Submissions of the parties.**

5. The Applicant argued that the court has inherent jurisdiction to extend the time as sought in the application, stating that the time taken to lodge the current appeal was neither excessive nor unreasonable. The Applicant emphasized that a delay would only be considered inexcusable if it is shown to be intentional and contumelious. The Applicant in regard to the order of stay of the Lower Court's Judgment, asserted that the purpose of a stay is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the applicant, as the appeal would be rendered futile without a stay. The Applicant stated that the impugned judgment denied him both the land and a deposit of Kenyan Shillings 480,000/- that had been placed with the Respondent. The Applicant argued that without a stay, the Respondent would be at liberty to deal with the land, including selling it, leaving the Applicant without recourse if the appeal succeeded. As regards the issue of security for costs, the Applicant argued that since the decree issued by the lower court was non-monetary, there was no necessity for security for costs for the due performance of the decree.



6. The Respondent, on her part, contended that the Applicant's appeal lacks merit as the lower court correctly determined that the Applicant breached the agreement dated 9<sup>th</sup> October 2018, leading to the cancellation of the title in his name. The Respondent further argued that the Applicant failed to demonstrate any substantial that he stood to suffer if the stay of execution was not granted. The Respondent emphasized that the possibility of execution does not constitute substantial loss, as executing decrees was a legal process. Additionally, the Respondent argued that the Applicant's explanation that the delay was occasioned because he had to seek alternative legal representation was an attempt to mislead the court and that the application was designed to prevent the Respondent from reaping the fruits of the Judgment in her favour.
7. I have carefully reviewed the application, the Replying Affidavit filed by the Respondent, and the Supplementary Affidavit filed by the Applicant. The issue for determination is whether the Applicant has furnished any reasonable explanation for the delay to warrant the Court to exercise its discretion in his favour and extend the time for filing the appeal out of time.

### **Whether leave should be granted to file an appeal out of time**

8. Appeals from a subordinate Court to the High Court ought to be filed within thirty (30) days of the making of the decision sought to be appealed against. Extension of time is a matter of discretion and the law gives this Court jurisdiction to extend time upon application. The law allows for such applications to be made even when the time for doing the act in question has already lapsed. Section 79 G of the *Civil Procedure Act* provides as follows: -

“79G. Time for filing appeals from subordinate courts

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.”

9. Order 50, Rule 6 of the Civil Procedure Rules provides that;

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the Justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed”
10. The discretion to extend time must be exercised within the established principles of the law. The factors to be considered when determining an application seeking leave to appeal out of time were discussed by the Court of Appeal in the case *Omar Shurie Vs Marian Rashe Yafar (2020)eKLR*. The factors that a Court needs to consider include;
  - i) the length of the delay
  - ii) the reason for the delay
  - iii) the chances of the appeal succeeding if the application is granted
  - iv) the degree of prejudice to the respondent if the application is granted.



11. The Judgment that the Applicant seeks to challenge was delivered on 25th August 2023. Therefore, the Applicant had until 24<sup>th</sup> September 2023 to appeal the decision within the prescribed 30-day window period. However, the current application was filed on 8<sup>th</sup> December 2023, nearly 2 ½ months after the expiration of the 30-day window period. The Applicant claims that the application was made without undue delay and, if delayed, the delay was excusable and beyond his control. They submitted that the delay was caused by the Applicant's process of seeking alternative legal representation and it was his assertion that their new advocates needed more time to review the case, discuss it with the Applicant, and obtain instructions to proceed.

12. The importance of offering a sufficient explanation for delay was explained by the Court of Appeal in the Case of Susan Ogutu Oloo & 2 others vs Doris Odindo Omolo [2019] eKLR as follows: -

“The instant application is founded on Rule 4 of the Rules of this Court. In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in Nicholas Kiptoo arap Korir Salat V. IEBC (2014) eKLR.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted.”

13. In the Case of Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet (2018)eKLR the court stated as follows;

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

14. A factor that this court ought to consider is whether refusal to condone delay would result in foreclosing an Applicant from putting forth his cause. The Supreme Court in Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR held as follows on the applicability of Article 159(2) (d) of *the Constitution*: -

“Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of *the Constitution* is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that “justice shall be administered without undue regard to technicalities.”

15. In the present case the explanation offered by the Applicant for the delay of nearly 4 months is not plausible. The Applicant from the moment the Judgment was delivered on 25<sup>th</sup> August 2023 was aware he had only a period of 30 days from then if he wished to challenge the decision by way of appeal. There is no indication as to when he contacted his current Advocates to take over the matter on his behalf from his previous Advocate. Although the Applicant states it took a bit of time to retrieve his file from his previous Advocates, there is no indication whether and/or when the previous Advocate was requested to release the Applicant's file to the new Advocate. Usually whenever there is a change of Advocate by a party, it is usual for the incoming Advocate for the client to write to the client's



previous Advocate notifying such Advocate of his/her appointment and seeking a confirmation that the previous Advocate had no professional objection to the new Advocate taking over the conduct of the matter on behalf of the client henceforth. No communication with the previous Advocate has been exhibited which could only mean the change over must have been casually handled.

16. When a party approaches the Court for exercise of discretion, the conduct of the parties come under scrutiny as discretion is exercised having regard to all the circumstances in the particular matter. In the present matter, the applicant merely stated the process of acquiring alternative representation and getting the file papers released by his previous Advocate took some time. That explanation for the delay in my considered view is not satisfactory and the Applicant is not entitled to exercise of the discretion of the Court in his favour. Accordingly, I decline to extend time for the Applicant to file his appeal out of time.
17. Having declined to grant leave to the Applicant to file his appeal out of time, the prayer for an order for stay of execution becomes moot. However, I have concerns whether in a miscellaneous application for leave to file an appeal out of time, it would be competent for the Court to make an order of stay of execution of Judgment or decree pending the hearing and determination of the Intended appeal.  
  
Order 42 Rule 6 of the Civil Procedure Rules that deals with stay pending appeal anticipates there is a filed appeal that is pending such that an order of stay of execution of the Judgment and/or decree is predicated on the hearing and disposal of such appeal. Where a party has not filed any appeal an application under Order 42 Rule 6 of the Civil Procedure Rules would not lie. In an application such as the present one, there is no appeal. The Applicant is merely seeking leave to file an appeal out of time. Even if the application is allowed, there still would be no appeal as such an appeal would need to be filed in accordance with the terms of the leave granted. In the premises, the Applicants prayer for stay of execution of the Judgment cannot be granted. In the instant matter the Applicant's best option would perhaps have been to apply for stay of execution before the Court that entered the Judgment.
18. The end result is that after evaluation of the Applicant's Notice of Motion application dated 8<sup>th</sup> December 2023, I find the same unmeritorious and I accordingly dismiss the same with costs to the Respondent.

**RULING DATED, SIGNED AND DELIVERED AT KERUGOYA VIRTUALLY THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**J. M. MUTUNGI**

**ELC - JUDGE**

