



REPUBLIC OF KENYA



Wairimu & another v Mwangi (Environment & Land Miscellaneous Case E287 of 2024) [2025] KEELC 3559 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEELC 3559 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E287 OF 2024**

JG KEMEI, J

FEBRUARY 13, 2025

BETWEEN

LUCY WAIRIMU 1ST APPLICANT

PAUL NGOTHO KANYUA 2ND APPLICANT

AND

ANGELIUS MAINA MWANGI RESPONDENT

((In respect of the application dated 8/12/24 seeking extension of time to file an appeal out of time and stay of execution of judgement))

RULING

Background.

1. Before me for determination is a Notice of Motion dated 8/12/24 . The application is brought under the provisions of Sections 3A, 63 (e) 79G and 95 of the [Civil Procedure Act](#) (Cap. 21), Order 50 Rule 5 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. It principally seeks the following orders:
 - a. Spent
 - b. For extension of time within which to lodge an Appeal in respect of the Judgement in the Judgement dated 28/3/24 in Milimani in Civil Suit No. 535 of 2003.
 - c. In the interim, an order setting aside the Magistrate’s Court’s Judgement dated 28/3/24 in Milimani in Civil Suit No. 535 of 2003 and the Orders emanating therefrom pending the hearing and determination of this application.
 - d. That stay of execution of the Judgement dated 28/3/24 in Milimani in Civil Suit No. 535 of 2003 be granted pending the hearing and final determination of intended appeal.



- e. That the costs of the Application be provided.
2. The application is premised on the grounds set out on its face as well as the sworn Affidavit of Lucy Wairimu deponed on the 8th December, 2024. The deponent avers that the Respondent filed a suit in the Chief Magistrates Court at Milimani being Civil Suit No. 535 of 2003 against them. That Judgement in the said suit was entered on the 28/3/24. That being aggrieved by the Judgement entered therein, they wish to prefer an appeal.
3. The Applicant avers that she was led to believe by the Advocate who was previously acting for them that they had filed an appeal against the trial court's Judgement. That on inquiries from their previous Advocates on the status of the appeal, they were assured that everything was on course. She states that it was only until 3/12/24 that she learnt that it is only an application for a stay of execution and abatement of the Suit against the 1st Defendant that had been filed and not an appeal as intended. She accuses her previous counsel of misrepresenting her legal rights hence compromising her ability to file an appeal within the appropriate timeframe.
4. She depones that upon retaining her current advocates on record, she has been advised that she has meritorious grounds of appeal, which she wishes to pursue. Hence the instant application to contained in the draft Memorandum of Appeal.

The Respondent's Replying Affidavit

5. Angelus Maina Mwangi, Respondent herein, opposed the application through the Replying Affidavit sworn on the 28/1/25. The Respondent avers that this court has no jurisdiction to entertain the application as presently filed. That this court's jurisdiction can only be triggered upon filing a memorandum of appeal, albeit out of time; what is before this court is an uncommissioned and unsigned draft memorandum of appeal. He deposes that in any event, this court has already pronounced itself similarly on the interim directions issued on 10/12/24 that this court's appellate jurisdiction can only be invoked by filing an appeal as provided under Order 42 Rule I of the Civil Procedure Rules.
6. The Respondent deposes that the applicants' assertion with respect to the instruction on appeal to their lawyers is frivolous and vexatious as the Applicants were enjoying interim orders of stay of execution from the said application. Moreover, the Applicants are now before this court seeking the same orders of stay of execution, an action he terms as an abuse of court and forum shopping, at the very least.
7. The Respondent has decried the dilatory acts of the applicants which now span over 257 days between the delivery of the judgment at the trial court and filing for the application herein. He avows that the delay is extremely inordinate and is curtailing him from enjoying the fruits of his investment since 2003.
8. In conclusion the Respondent faulted the applicants for placing and purporting to rely on annexures appearing in the Applicant's supporting affidavit that are uncommissioned, hence are inadmissible for want of compliance with rule 9 of the Oaths and Statutory Declarations Rules.

The Court's directions.

9. On the 22/1/25 on application by the parties, the court directed that the application be dispensed with by way of written submissions. The Applicants complied and filed their submissions dated 30/1/25. The Respondent was yet to file his submissions at the time of writing this ruling despite the lapse of the time within which he was supposed to comply.



Applicant's submission.

10. The Applicant identifies three issues for determination. On the first issue, the Applicant submits that the Advocate-Client relationship is underscored by agency relationship inherent in legal representation. That the conduct of the Advocate binds the client to the degree that the latter's rights to due process and access to justice must remain unhindered. He cites the case of *Fauzi Said Ali & 3 Others -vs- Said Ahmed Ali & Another* [2019] eKLR, where the court stated that an advocate's errors ought not to be visited upon the Client. She argues that the principal cannot bear the brunt of ignorance or improper action perpetrated by their legal counsel.
11. As to whether the Applicant can be presumed to be indolent in her pursuit of the appeal, given her reliance on the assurances and advice provided by her previous counsel who filed of an application challenging the judgment (as opposed to a formal appeal); the Applicant submits that the mere act of making an application does not, in itself, create a presumption of indolence or lack of interest in pursuing an appeal. She cites that case of *County Government of Narok & Another -vs- Mwavali (Civil Application E072 of 2023)* [2024] KECA 390 (KLR) (12 April 2024) (Ruling), where it was held that courts must consider the whole picture of diligence and commitment demonstrated by the applicant.
12. The third issue for determination is whether the court's discretion allows for the granting of leave to appeal out of time, considering the interests of justice, the merits of the proposed appeal, and the reasons for the delay in lodging the initial appeal. The Applicant avers that the grounds of appeal raises legal concerns that requires a review by this Court. The Applicant asserts that the Respondent's failure to adhere to essential procedural norms amounts to a profound irregularity. The ruling by the Magistrate's Court would contravene Article 50(1) of *the Constitution* of Kenya, 2010, which guarantees a fair hearing to every Individual.

Issues for determination.

13. I have considered the application, the response and the submissions filed by the parties to buttress their assertions. The issues for determination which arise therefrom are: -
 - A. Whether leave should be granted to appeal out of time.
 - B. Whether an order for stay of execution should issue against the Judgment entered on the 28th March, 2024 and the consequential orders thereto.

Analysis and Determination

14. The parties herein were protagonists in the CMELC No 535 of 2003 in which the Respondent was the Plaintiff and the applicants herein were the defendants. In that suit the Respondent sought orders interalia of eviction of the applicants, general damages for trespass and mesne profits. On hearing the suit, the court delivered judgement in favour of the Respondent on the 8/3/2024 effectively granting eviction orders as well as mesne profits in the sum of Kshs 3.6 Million together with interest interalia.
15. Reacting to the said judgment, the applicants moved the court seeking in the main orders of stay of execution pending the hearing and determination as well as orders that the suit against the 1st Defendant (read Paul Ngotho Kanyua) who died on 28/3/2007 had abated.
16. According to the record, the court heard and determined the said application and on 7/11/24 pronounced itself and dismissed the application on merits, interim orders were discharged and the Respondent was given the green light to proceed with execution of the judgement.



17. Unrelenting, the applicants moved this court vide the instant application seeking the orders cited at para 1 which is the subject of this Ruling.

18. The Application before Court for consideration has been anchored under Section 3A , 63 (e), 79G and 95 of the CPA and Order 50 Rule 5 of the CPR. Section 79 G reads 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”.

19. Section 95 of the CPA reads as follows; -

“Where any period is fixed or granted by the Court for the doing of any acts prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired”

20. It is clear from the above provisions of the *Civil Procedure Act*, Cap 21 that the extension of time for a party to do certain acts is a matter of discretion by the court. It is also true that the court may admit an appeal out of time provided that the applicant satisfied the court that he had a good and sufficient cause for not filing the appeal in time.

21. The threshold of extension of time was set out in the case of *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi* – Nairobi Civil Application No. 251 of 1997, the Court stated:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court considers in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the Respondent if the application is granted.”

22. Further the Supreme Court in the Supreme Court in *County Executive of Kisumu vs. County Government of Kisumu & 8 Others* (2017) eKLR pronounced the general criteria for considering applications for extension of time in the following words: -

“it is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the *Nicholas Salat* case to which all the parties herein have relied upon. The Court delineated the following as:

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.”
23. Before delving in the merits of the application, the Respondent has faulted the applicants for filing an unsigned memorandum of appeal and has urged the court to strike it out. In my view the unsigned and uncommissioned memorandum of appeal on record is sufficient to notify the court and the Respondent of their grounds of appeal. The court would have taken a different view if this was an appeal.
24. Turning back to the application, the trial Court delivered the Judgment on the 28/3/24 . The instant application was filed on 10/12/24, a period of 8 months.
25. Is the delay inordinate? The court in the case of Mwangi S. Kimenyi –vs- Attorney General and Another (2014) eKLR observed that “what constitutes ‘inordinate delay’ is dependent on the particular circumstances of each case. It stated that:
- “There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however, advised for courts not to take the word “inordinate” in its dictionary meaning, but to apply it in the sense of excessive as compared to normality.....see the case of Allen –vs- Alfred McAlphine & Sons [1968] 1 All ER 543 where a delay of fourteen (14) years was considered inordinate and inexcusable. But see also the cases of Agip (Kenya) Limited –vs- Highlands Tyres Limited [2001] KLR 630 and Sagoo –vs- Bahari [1990] KLR 456, where delay of eight months and five (5) months respectively was considered not to be inordinate and also ELC Case No. 2058 of 2007 where delay of about 1½ years was considered not to be inordinate.”
26. As stated in the above cases the length of the delay and reasons for non-compliance of the time lines are important factors to influence the exercise of discretion of the Court. Inordinate delay will differ from case to case depending on the circumstances of each case.
27. The Applicant has attributed the delay in filing the appeal on the alleged misunderstanding of their instructions by their previous advocate. That all along she was under the mistaken belief that the Advocate had filed the appeal only to realize in November that the Ruling was on whether or not the suit against the 2nd applicant had abated or not. That by then 8 months had elapsed. That she quickly changed counsel and filed this application speedily on the 8/12/24.
28. I have considered the explanation tendered by the applicant and the court is satisfied that the applicant filed the application within reasonable time after the delivery of the ruling by the trial court on 7/11/24



and on realizing the mishaps of the purported instructions. I say purported because no evidence was placed before the court in support. That said the delay is not inordinate.

29. The Court therefore finds in favor of the Applicant. The orders sought by the Applicant for leave to file the Appeal out of time is merited.

b. Whether an order for stay of execution should issue against the Judgment entered on the 28th March, 2024 and the consequential orders thereto

30. The guiding principles in considering an Application for stay of execution were set out by the Court of Appeal in the case of Butt –vs- Rent Restriction Tribunal {1979} eKLR (Madan Miller and Porter JJA) thus: -

a. The power of the Court to grant or refuse an Application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

b. 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.

c. 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.

d. The Court in exercising its discretion whether to grant or refuse an Application for stay will consider the special circumstances of the case and its unique requirement.

31. Generally, stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules. Sub-rule (1) and (2) provides as follows:

“

“6.

(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, on 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 for 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.



32. The burden of proving that substantial loss would occur unless stay is granted rests upon and must be discharged accordingly by the Applicant. It is not enough to merely state that loss will be suffered, the Applicant ought to show the substantial loss that it will suffer in the event the orders sought are not given.
33. In the instant suit, by the very nature of the judgement in favour of the Respondent, it goes without saying that if the orders of stay of execution are not granted the Respondent will be at liberty to evict the applicants before their appeal is heard and determined hence rendering it superfluous.
34. The Court has taken note of the Respondent's Affidavit that stay of execution was already granted in the subordinate Court. This was not challenged by the applicant.
35. The purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. This was the finding of the court in the case of *RWW vs. EKW (2019) eKLR* where the court addressed itself as hereunder: -
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
36. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

Disposal orders.

37. To balance the rights of the parties herein, I allow Stay of execution of the judgement of the court issued on 8/3/24 on terms;
- a. The Applicant is hereby granted leave of fourteen (14) Days from the delivery of this Ruling to file the appropriate Memorandum of Appeal, the Record of appeal together with written submissions.
 - b. The applicant to deposit the sum of Kenya Shillings Eighty Thousand Only (Kshs 80,000/-) within the next fourteen (14) days into a joint fixed account to be held in the names of the rival parties' counsels pending the determination of the appeal as security for the costs.
 - c. In default a and b above the orders granted herein shall stand spent.
 - d. Costs of this Application are awarded to the Respondent herein.
38. It is so ordered

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

