



Iderus v Hussein & 10 others (Environment & Land Miscellaneous Case E029 of 2024) [2024] KEELC 14009 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14009 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND MISCELLANEOUS CASE E029 OF 2024
CK YANO, J
DECEMBER 19, 2024**

BETWEEN

MOHAMED SHARIF IDERUS APPLICANT

AND

MOHAMED ALI HUSSEIN 1ST RESPONDENT

MOHAMED NOOR OMAR 2ND RESPONDENT

GOLICHA HASSAN GOLICHA 3RD RESPONDENT

ADEN HAJIR BASHIR 4TH RESPONDENT

AHMED YUSSUF 5TH RESPONDENT

HUSSEIN ABDIWAHAB 6TH RESPONDENT

SAMOW IDERUS 7TH RESPONDENT

RAHA MUKTAR 8TH RESPONDENT

MOHAMED SHARIFOW 9TH RESPONDENT

SALO BORA 10TH RESPONDENT

ABDIKADIR SHARIF 11TH RESPONDENT

RULING

1. The subject of this ruling is a notice of motion application dated 25th July, 2024 said to be brought pursuant to Section 1A, 1B, 3A and 79G of the [Civil Procedure Act](#) and all other enabling provisions of the law. The applicant is mainly seeking for extension of time to file an appeal against the judgment/decree of the Senior Principal Magistrate in Tigania ELC No. 49A of 2022 delivered on 2nd March



2023 and an order of stay of execution of the said judgment/decree and all other consequential orders pending the filing, hearing and determination of the intended appeal.

2. The application is premised on the grounds thereon and supported by the affidavit of Mohamed Sharif Iderus, the applicant herein, sworn on 25th July, 2024. The applicant states that his previous advocates on record failed to follow his instructions and became uncooperative therefore he was not able to file the appeal within the stipulated period as required by law. The applicant states that he has now instructed the firm of M/S Kevin Ouma & Co. Advocates to file an appeal against the judgment of the trial magistrate in order for him to obtain justice. That since the stipulated timeline had already expired, the said law firm advised him that they needed leave of the court to file an appeal out of time. The applicant states that he has a good appeal which he believes has high chances of success.
3. In his supporting affidavit, the applicant avers that he was the 3rd defendant in the trial court. That in the impugned judgment, the learned trial magistrate ordered for the eviction of the applicant and the 4th to 10th respondents from land parcel number 31748 Ngaremara/Gambela area which land is under Adjudication Section. The applicant has annexed copies of the judgment and decree issued on 26th April 2023 and copies of letters dated 15th July, 2020 and 11th August, 2020 marked “MSI – 1” MSI – 2(a)” and ((b)” respectively.
4. The applicant states that he was never given an opportunity to present his case during trial and is now exposed to the danger of execution and that this court needs to preserve the same until the parties are heard. That it is only just and in the interest of justice that he be granted a chance to file his appeal out of time.
5. The applicant avers that he has an arguable and meritorious appeal with good likelihood of success but which will be rendered nugatory unless this court grants the orders of stay of execution pending the hearing and determination of this application as well as the intended appeal. The applicant has annexed a copy of a draft memorandum of Appeal marked “MSI – 3”.
6. The applicant undertakes to lodge the intended appeal and record expeditiously within such time as this court may order, adding that he is ready and willing to abide by any conditions for stay that the court will set if the prayers sought are allowed.
7. In opposing the application, the respondents filed a replying affidavit sworn by Mohamed Ali Hussein, the 1st respondent herein on 12th September, 2024. Relying on advice by their advocate on record, the respondents aver that extension of time is an equitable remedy that is only available to a deserving party at the discretion of the court, and that a party seeking extension of time has the burden of laying a basis to the satisfaction of the court and has to explain the delay to the satisfaction of the court.
8. The respondents aver that it is clearly evident that the judgment sought to be appealed against was delivered on 2nd March, 2023. That upon the delivery of the said judgment, the applicant was served with a notice to vacate the suit land. That by his application dated 31st May, 2023, the applicant moved the trial court seeking to set aside the judgment delivered on 2nd March, 2023 and after hearing the said application, the trial court dismissed it with costs on 7th November, 2023 for lack of merit.
9. It is contended that the applicant has not disclosed at what point and when he disagreed with his former advocates, M/s Mutuma Gichuru & Associates Advocates, and neither has he explained why it has taken more than sixteen months to bring the present application. That without explaining the inordinate delay in bringing the application, the court should not exercise its discretion in favour of the applicant.



10. The 1st respondent avers that he stands to suffer great prejudice in the event the orders sought are granted as they will deny him the fruits of his judgment. That the applicant has not explained what substantial loss he stands to suffer if orders of stay are not granted. That the application for stay has also been brought after a delay of more than 16 months. It is also stated that the applicant has not provided security for the due performance of the decree.
11. The 1st respondent has annexed copies of a notice to vacate and notice of motion application dated 31st May 2023 marked “MAH 1” AND “MAH 2” respectively.
12. The application was canvassed by way of written submissions. The applicant filed submissions dated 17th October, 2024 through the firm of Kevin Ouma & Co. Advocates while the respondents filed theirs dated 2nd November, 2024 through the firm of Nkunja & Co. Advocates. I have read and considered the said submissions and I need not reproduce the same herein.
13. I have considered the application, the response and rival submissions made by the parties. The issues for determination are-;
 - i. Whether leave should be granted to the applicant to file appeal out of time.
 - ii. Whether the applicant should be granted stay of execution pending the intended appeal.
14. The applicant is seeking for extension of time to file an appeal against the judgment/decree of the lower court delivered on 2nd March, 2023 in Tigania SPMC ELC No. 49A of 2022. Under Section 79G of the Civil Procedure Act, appeals from the decisions of the lower court to this court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The Proviso to the said section however, allows for extension of time to appeal where good and sufficient cause has been shown. As such extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking leave to file appeal out of time must show that he/she has a good cause for doing so.
15. The principles upon which the court should exercise the said discretion and grant leave to appeal out of time are now well settled. The court ought to consider the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the decree of prejudice to the respondent if the application is granted. (see *Leo sila Mutiso Vs Rose Hellen Wangari*, Civil application No. NAI 255 of 1997 and *Thuita Mwangi Vs Kenya Airways Limited* [2003] eKLR). The threshold to grant leave to appeal out of time was also set out by the Supreme Court in the case of *Nicholas Kiptoo Salat Vs Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where it was held that

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.”
16. The Supreme Court went on to state the following principles to guide the courts when entertaining applications for extension of time.
 - a) 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;
 - b) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court,



- c) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis,
- d) whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court,
- e) Whether there will be any prejudice suffered by the respondent if the extension is granted,
- f) Whether the application has been brought without undue delay, and
- g) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

17. As for the length of delay, the judgment of the subordinate court was delivered on 2nd March, 2023. The instant application is dated 25th July, 2024. The 30 days period within which the applicant ought to have filed the appeal lapsed on 3rd April 2023. The application has been brought after a period of over 15 months. It is my considered view that the application was brought after unreasonable delay.
18. In justifying the delay, the applicant stated that his previous advocates on record failed to follow up his instructions and became uncooperative, hence the applicant was not able to file the appeal within the period stipulated in law. I note that the applicant was previously being represented by the firm of M/s Mutuma Gichuru & Associates Advocates. The said firm filed an application dated 31st May, 2023 in which the applicant sought *inter alia*, orders to set aside the impugned judgment, stay of execution and leave to defend the suit. That application was filed by the said firm on 6th June, 2023 yet the time to file appeal had lapsed on 3rd April 2023, which is a period of over two months earlier. Further, the applicant has not indicated the date he gave instructions to file appeal and has not shown any evidence of the said disagreement with his previous advocates. Moreover, if the said advocates failed to follow the applicant’s instructions and became uncooperative as alleged, why would the applicant proceed and instruct the said advocate to prepare and file the notice of motion application dated 31st May, 2023? Indeed, the applicant himself is the one who signed the affidavit in support of the said application. It is therefore my finding that the reason given for the delay is an afterthought, farfetched and frivolous.
19. As for the chances of the appeal succeeding as alleged by the applicant, the court has perused the draft memorandum of appeal herein. The grounds of appeal are a mixture of the impugned judgment and the ruling in respect of the application dated 31st May 2023. Having failed to set aside the impugned judgment and having not filed an appeal against the ruling relating to the application to set aside the impugned judgment and for leave to defend the suit, it is my opinion that the intended appeal is frivolous and has no chances of succeeding. In any event, the delay was quite inordinate. For the above reasons, it is my considered opinion that the applicant herein has not satisfied the conditions for granting of leave to appeal out of time.
20. As regards the prayer for stay of execution pending the hearing and determination of the intended appeal, it is my opinion that there is nothing pending in the matter the court having declined to grant extension of time to file an appeal. In my view, the prayer for stay was predicated on the filing of the intended appeal. Having declined to grant leave to file appeal out of time the order of stay will serve no purpose. In any case, the applicant is inviting the court to exercise its judicial discretion in his favour and was obliged to demonstrate utmost candour and good faith. In my view, no satisfactory explanation has been given for the delay from 2nd March 2023 upto 25th July, 2024, a period of over 15 months. The application in my view is an afterthought and the same must have been filed when the respondents issued the applicant with a notice to vacate the suit land in execution of the decree of the lower court.



21. In the result, this court finds that the notice of motion dated 25th July,2024 has no merit. The same is dismissed with costs to the respondents.

22. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF DECEMBER, 2024

In the presence of

Court assistant – Tupet

Kaberia for 1st, 2nd & 3rd respondents

Ouma for applicant

No appearance for 4th -11th respondents

C.K YANO

JUDGE

