



Kalume (Suing through Dennis Billy Thuva as Donee with Special Power of Attorney) v Sadaka (Environment and Land Miscellaneous Application E056 of 2024) [2025] KEELC 4818 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEELC 4818 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E056 OF 2024
EK MAKORI, J
MARCH 27, 2025

BETWEEN

BILLY THUVA KALUME (SUING THROUGH DENNIS BILLY THUVA AS DONEE WITH SPECIAL POWER OF ATTORNEY) APPLICANT

AND

WILSON VUMBI SADAKA RESPONDENT

RULING

1. The Applicant seeks, in his Chamber Summons dated 31st December 2024 and brought under Certificate of Urgency, that he be allowed to file his appeal out of time; that the Court stay execution of the judgment delivered by Hon. Nang'ea on 19th March 2024; and that the Court award costs of the Application.
2. The Respondent opposes the Application on the grounds set out in his Replying Affidavit, sworn on 12th February 2025. The Respondent prays that the same be dismissed with costs.
3. The court directed that the application be canvassed via written submissions.
4. Based on the materials and submissions presented to me, the issues I frame for the court's consideration are whether to grant an enlargement of time for appealing and whether a stay pending appeal has been achieved. And who should bear the costs of this application?
5. The conflict between the Applicant and the Respondent concerns parcels of land known as MN/IV/690 and MN/IV/692, which are registered in the name of the Respondent.
6. The Applicant and the Respondent were parties to Kilifi MCELC Case No. 118 of 2018, wherein the Respondent was the Plaintiff and the Applicant was the Defendant. Before filing the suit, the



Respondent had taken other measures to assert his proprietary rights over the suit property through various means, including involving the area chief and reporting trespass to Mtwapa Police Station.

7. In the suit, the Respondent sought, inter alia, a permanent injunction against the Applicant barring him from interfering with the Respondent's enjoyment of the suit property and a declaration that the Respondent was the rightful owner of the suit properties.
8. On 20th September 2022, the presiding Magistrate, Hon. Kituku, delivered his judgment, wherein he found in favor of the Applicant and dismissed the suit. The learned Magistrate reasoned that the Respondent had not provided documentary evidence to show how he acquired titles to the suit properties. Aggrieved by the judgment, the Respondent filed an application for Review dated 24th October 2022, seeking, inter alia, that the court set aside its judgment delivered on 20th September 2022. In a ruling delivered on 30th May 2023, Hon. Kituku set aside his judgment and directed the suit to proceed to a full hearing.
9. The suit proceeded to a full hearing, and the Respondent prosecuted his case. The Applicant, despite being represented by advocates of his choice, refused to prosecute his case. Judgment was entered in favor of the Respondent by the Hon. Nang'ea on March 19, 2024. The judgment was delivered in the presence of the Applicant.
10. In his affidavit and submissions, the Applicant focused on the merits of the main appeal rather than providing reasons for the delay in filing an appeal out of time.
11. The Respondent submits rightly so – that Section 79(G) of the *Civil Procedure Act* provides that every appeal from a Lower Court to the High Court must be filed within thirty days from the date of the decree or order being appealed against. It further provides 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.”

12. The Respondent correctly submits, and with which I agree, that the Supreme Court's decision in *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles guiding the admission of an appeal out of time. The Supreme Court stated thus:

“The underlying principles a court should consider in exercise of such discretion should include: -

1. Extension of time is not a right of any 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-by-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 respondent if the extension is granted;
6. Whether the application has been brought without undue delay.



7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.” [16]
13. In *Paul Musili Wambua v Attorney General & 2 others* [2015] eKLR, the Court of Appeal, in considering an application for an extension of time to file an appeal, pronounced itself thus:
- “(8) it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”
14. In *Kangethe v Kienye & 2 others* (Miscellaneous Application 64 of 2022) [2023] KEELC 19899 (KLR), Kemei J. addressed the issue of what constitutes inordinate delay, stating that:
- “16. It is trite that there is no mathematical way of calculating delay. Where the delay is found to be inordinate, the same should be 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.”
15. The court in *Amina Karama v Njagi Gachagua & 3 others* [2020] eKLR further noted that:
- “20. It has been held that equity aids the vigilant and not the indolent. It has also been held that delay defeats equity. In the case of *Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi* [2014] eKLR, the court quoted the following passage from *Snell’s Equity* by John MC Ghee Q.C. (31st Edition) at page 99:
- ““The Court of Equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing.”
16. 287 days elapsed between the judgment delivered on 19th March 2024 and the swearing of the Applicant’s Affidavit on 31st December 2024. This delay remains unexplained and is excessive, as the Applicant has not satisfactorily accounted for it. According to Section 79(G) of the *Civil Procedure Act* and the relevant judicial precedents, the Applicant is obligated to present a valid and compelling reason for the untimely appeal. The court has not received any explanation from the Applicant regarding the delay in filing his appeal. His lack of response suggests that he has no justification for this delay. An extension of time is considered an equitable remedy, and it is a well-established principle that equity favors those who act diligently, while delay undermines the principles of equity. By allowing nearly nine months to pass without a valid reason to exercise his right to appeal, the Applicant has, in my opinion, forfeited his entitlement to this equitable remedy.
17. When assessing whether to grant a stay, the Applicant must comply with Order 42, Rule 6, which requires them to demonstrate to the court that they would incur substantial loss if a stay of execution



is not granted. The Applicant's submission does not address whether he would experience significant loss or any loss at all if a stay of execution is not issued. The Applicant has failed to demonstrate to this Court that executing the Orders from the judgment dated 19th March 2024 would create a situation that would irreparably undermine the appeal.

18. The Applicant has not only failed to demonstrate that he is deserving of the equitable remedy of extending time to appeal out of time but has also failed to provide any reasons why he did not file the appeal on time. The Applicant has also not shown that he will suffer substantial loss if he is not granted a stay of execution.
19. The net effect is that the application dated on 31st December 2024 lacks merit and is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 27TH DAY OF MARCH 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Billy Thuva (Applicant in person)

Ms. Mubassu, for the Respondent

Happy: Court Assistant

