



**Kihumba v Kimotho & another (Civil Application E356 & E357 of 2023
(Consolidated)) [2024] KECA 345 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] KECA 345 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E356 & E357 OF 2023 (CONSOLIDATED)
PO KIAGE, JA
MARCH 15, 2024**

BETWEEN

STEPHEN MACHARIA KIHUMBA APPLICANT

AND

WILSON GIKONYO KIMOTHO 1ST RESPONDENT

JOHN MAGU 2ND RESPONDENT

*(An Application for extension of time to file and serve the Notice
of Appeal from the Judgement and Decree of the Environment and
Land Court at Nairobi (A. Omollo, J.) dated 22nd June 2023 in)*

RULING

1. Before me are two applications, concerning the same parties and urging the same prayers. The only difference is that they have two different case numbers namely; E356 of 2023 and E357 of 2023. Consequently, I hereby order them consolidated and will consider them jointly as one application. The applicant therein moved the Court by a Motion dated 27th July 2023, ostensibly made under Article 159(2)(d) of the *Constitution*, Rules 4, 5(2)(b), 42(1), 43(3) and 47(1) of the *Court of Appeal Rules*, 2010. The applicant seeks the following orders;

- “1. Spent.
2. That the Honourable court be pleased to extend time within which to lodge and serve the notice of appeal from the Judgment and Decree of Honourable Lady Justice A. Omollo of the Environment and Land Court of Kenya delivered on 22nd June 2023 pending the hearing and determination of the intended appeal.



3. That the Honourable court be pleased to stay execution of the Judgment and Decree of the Honourable Lady Justice A. Omollo of the Environment and Land Court of Kenya delivered on 22nd June 2023 pending the hearing and determination of the intended appeal.

4. That the costs of this application be in the cause.”

2. I note that the applicant is intent on simultaneously obtaining orders of extension of time and stay of execution. However, pursuant to Rule 5(2)(b) of this *Court’s Rules*, one can only make an application for stay of execution when there’s a properly filed notice of appeal on record which is not the case herein. In any event, in accordance with Rule 55(2) of the *Rules*, an application for stay of execution can only be heard by the Court and not a single judge. I will therefore proceed to deal with the prayer for extension of time under Rule 4 of the Court’s Rules.

3. My consideration of this application is guided by the laid down parameters as espoused in the oft-cited case of *Leo Sila Mutiso Vs. Rose Hellen Wangari Mwangi* (1999) 2 EA 231 as follows;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason 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.”

4. In the matter before me, it is averred that following delivery of the impugned judgment, the advocates who formerly represented the applicant advised him not to lodge an appeal for the reason that there were no grounds to justify such an appeal. The applicant decided to seek an alternative opinion from his current advocates who are now ceased of this matter. It was deposed that time within which the applicant should have lodged the notice of appeal, which is 14 days from the date of judgment, lapsed as he changed advocates and sought a different legal opinion.

5. The law firm of Byron Associates filed written submissions dated 16th August 2023 on behalf of the applicant. They submitted that this application was lodged 21 days later after the lapse of the statutory period within which the notice of appeal ought to have been filed. Counsel contend that such a period of delay should be excused since the decision to appeal only crystallized in the applicant’s mind when he received alternative advice from his current advocates. Moreover, a delay of 21 days is not inordinate.

6. In view of the foregoing explanation, which I find plausible, and the length of delay in filing the notice of appeal, which is not disproportionate, I am amenable to exercise my discretion in favour of the applicant, a task made easier by the absence of opposition to the application.

7. In the result the motion dated 27th July 2023, is allowed. I accordingly extend time to the end that the applicant shall lodge the notice of appeal within seven (7) days of the date of this order.

Costs of this motion shall be in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH, 2024.

P. O. KIAGE

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JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

