



Kiprop & 3 others v Opiyo & 2 others (Environment and Land Civil Miscellaneous Application E012 of 2022) [2023] KEELC 16566 (KLR) (27 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16566 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION E012 OF 2022
BN OLAO, J
MARCH 27, 2023

BETWEEN

CONNY KIPROP 1ST APPLICANT
SUSAN OPIYO 2ND APPLICANT
ELIZABETH OPIYO 3RD APPLICANT
AKINYI NDALO KHAJUSU 4TH APPLICANT

AND

JOSEPHAT ANDREW OPIYO 1ST RESPONDENT
HUSSEIN OUNDO MUKHEBI 2ND RESPONDENT
ABDALLA ALI 3RD RESPONDENT

RULING

1. I have before me for determination, the Notice of Motion by the Applicants dated November 22, 2022 and premised under the provisions of Sections 1, 1A, 1B, 3A, 79G, 89 and 95 of the [Civil Procedure Act](#) as well as Order 42 Rule 6, Order 51 Rule 1 and Order 50 Rules 6 and 8 of the [Civil Procedure Rules](#). The Applicants seek the following remedies:
 1. Spent
 2. Spent
 3. The Honourable Court be pleased to grant leave to the Applicants herein to file and/or mount an appeal out of time against the judgment and decree of the subordinate court dated and delivered on September 21, 2022 in Busia CMCC ELC No E27 of 2022 pursuant to the annexed draft memorandum of appeal filed herein which, on such time being extended, be deemed as duly filed and served upon payment of the prescribed fees.



4. The Court be pleased to order a stay of execution of the judgement and decree of the subordinate court dated and delivered on September 21, 2022 in Busia CMCC No E27 of 2022 pending the hearing and eventual disposal and determination of the intended appeal on such terms and conditions as the Court shall direct and order.

5. The costs of this application shall be in the intended appeal.

The application is based on the grounds set out therein and is also supported by the affidavit of Akinyi Ndalo Khajusu the 4th Applicant herein.

2. It is the Applicants' case that they are aggrieved by the judgment of the subordinate Court dated September 21, 2022 in which the trial magistrate ordered that the land parcel No Bunyala/Bulemia/242 (the suit land) revert to the deceased. The Applicants intend to appeal the same but the statutory period within which to do so has lapsed. That the judgment was delivered without notice and in the absence of the Applicants or their counsel. That by the time the Applicants became aware of the judgment, time for lodging an appeal had already lapsed. That pursuant to the said judgment, the 1st Respondent has informed the Applicants that a meeting had been set to distribute the Estate yet their intended appeal is not frivolous as the trial magistrate did not adjudicate on all the issues presented before him including the allegation of the death of the 2nd Applicant Leah Nasike Opiyo in whose names the suit land which the Court ordered to revert in the names of the deceased, was registered. That the statutory period within which the appeal should have been filed has lapsed by about ten days.
3. Annexed to the application are the following documents:
 1. Draft Memorandum of Appeal.
 2. Letter by the 1st, 2nd and 3rd Applicants authorizing the 4th Applicant to swear the supporting affidavit on their behalf.
 3. Order dated September 12, 2022 and issued in Busia CMCC ELC No E27 of 2022.
 4. Judgment delivered on September 21, 2022 in Busia CMCC ELC NO E27 of 2022.
4. The application is opposed and Josephat Andrew Opiyo (the 1st Respondent) filed a replying affidavit dated November 25, 2022 in which he deposed, inter alia, that the Applicants are his sisters from another house and that the judgement was delivered on September 21, 2022 in both his and the 1st Applicant's presence and therefore it is not true that the Applicants were not aware about the delivery of the judgment. That the suit land is the property of their late father and so the Respondents' counsel informed the Applicants' counsel about the delivery of the judgment and they cannot therefore feign ignorance of the same. That it is not true that any execution will be to the applicants' detriment since the trial court ordered that the Estate of their deceased father be managed with the involvement of all his children including the Applicants. That this application is a move to avoid the consequences of properly administering their father's Estate and there is nothing that the Respondents can do without involving the Applicants and this application is a clear admission that the Applicants are using this application to avoid carrying out proper succession of their father's Estate. That the trial magistrate properly considered all the facts placed before him and it is not true that the Applicants will suffer substantial loss. The Respondents add further that the proposed appeal lacks merit and if leave is granted, the Applicants should deposit the Respondents' costs. The 1st Respondent has deposed further that this application is an afterthought which has not been filed in good faith as no sufficient cause has been given for the delay in filing this appeal within the time provided in Section 79G of the [Civil Procedure Act](#). Further, that the Applicants have not shown what prejudice they will suffer and that this application and the intended appeal are simply intended to delay the management of their



late father's Estate, is mischievous, contemptuous and an abuse of the process of this Court. It should therefore be dismissed.

5. When the application was placed before me on November 3, 2022, I did not certify it as urgent but directed that it be canvassed by way of written submissions.
6. Submissions were subsequently filed by the firms of M. A. Okumu Advocates for the Applicants and by Wangira Okoba & Company Advocates for the Respondents.
7. I have considered the application, the rival affidavits and the submissions by counsel.
8. The Applicants seek two substantive orders:
 - a. Leave to appeal out of time.
 - b. Stay of execution of the judgement of the subordinate court delivered on September 21, 2022 pending determination of the intended appeal.

a. Leave to appeal out of time:

Section 79G of the *Civil Procedure Act* provides that:

“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.” Emphasis mine.

Section 16A(1) and (2) of the *Environment and Land Court Act* provides that:

1. “All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in Section 13(2) of the *Environment and Land Court Act*, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.
 2. An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.” Emphasis mine.
9. Section 95 of the *Civil Procedure Act* provides for the general power of the court to enlarge time. It states:
95. “Where any period is fixed or granted by the court for the doing of any act 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.” Emphasis mine.
10. The judgment sought to be appealed having been delivered on September 21, 2022, the Applicants had upto October 21, 2022 to file their appeal. However, as is clear from the above provisions this court, for “good and sufficient cause”, and at its discretion, has the powers to extend the time within which the Applicants can file their intended appeal. The term “good and sufficient cause” means one and the same thing – *Qureshi & Another -v- Patel & Others* 1964 EALR 633.



11. In the case of *Hon. Attorney General -v- The Law Society Of Kenya & Another*, C.a. Civil Appeal Application No 133 of 2011 [2013 eKLR], Musinga J.A. stated thus citing [*Black's Law Dictionary*](#) 9th Edition:

“Sufficient cause or good cause in law means:

... the burden placed on a litigant (usually by Court rule or order) to show why a request should be granted or an action excused.”

The judge went on to add:

“Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a judge’s mind. The explanation should not leave un-explained gaps in the sequence of events.”

I may add that whatever explanation the Applicant seeking an extension of time provides must be honest, reasonable, factual and satisfactory.

12. In *Nicholas Kiptoo Arap Korir Salat -v- I.e.b.c & Others* 2014 eKLR, the Supreme Court laid down the following principles to guide a court while considering an application to extend time. These are:-

1. Extension of time is not a right. 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 its discretion to extend time is a consideration to be made on a case to case basis.
4. Where there is a reason for delay, it should be explained to the satisfaction of the Court.
5. Whether there will be any prejudice suffered by the Respondent if extension is granted.
6. Whether the application has been brought without delay.
7. Whether in certain cases like election petitions, public interest should be a consideration.

13. What then is the explanation offered by the Applicants for not filing the appeal within the time provided for under Sections 79G of the [*Civil Procedure Act*](#) and 16A(1) of the [*Environment and Land Court Act*](#)? This is found in grounds NO 4 and 5 on which the application is premised. They read:

4. “The said judgment was delivered without notice and in the absence of the applicants and or their counsel on record.
5. The applicants were thus never notified or made aware of the judgment which was delivered in the matter due to the fact it was delivered in their absence and thus decisions of appeal were not made and instructions to appeal were not communicated to the present advocates on record in time.”

It is clear from paragraphs 7, 8, 9 and 10 of the 4th Applicant’s supporting affidavit that the judgment sought to be appealed was first scheduled for delivery on September 14, 2022 virtually but the Applicant’s counsel was not admitted even though she tried to log in. When she later enquired at the registry, she was informed that the judgment had been deferred to 16th September 2022. On that day



however, she again tried to log in through the Court's virtual link but again she was not admitted. The 4th Applicant depones in paragraph 11 that:

11. "Unknown to me and or the applicants' advocate on record, the said judgment was delivered on record on 21st September 2022 without notice."
14. The Respondents rebutted the above averments through the 1st Respondent's replying affidavit in which he described them as "blatant misleading of the Court." In particular, in paragraph 6 of that affidavit, the 1st Respondent has deposed as follows:
 6. "That on September 21, 2022, I was in Court together with the 1st Applicant herein who was a key witness in the trial of the case and therefore it is not true that the Applicants were not aware of the judgement and hence they are guilty of blatantly misleading the Court on factual matters."
15. To get the factual position of who was present in the Court on September 21, 2022 when the judgement was delivered, I have perused the record. And since the last paragraph of the judgment will be important when I shall be considering the next limb of the application which is the prayer for stay of execution, I shall reproduce it in extenso. It reads:

"It is for the above reasons that the plaintiff's claim succeed and I hereby grant judgment for the plaintiff as against the defendants as prayed in the plaint. The land parcel No Bunyala/Bulemia/242 shall revert back to the name of the deceased to be subjected to normal way of succession. Parties herein shall bear their own costs pending the process if (sic) succession and given that the party (sic) herein have not lived (sic) in peace, I order that the status quo on the ground be maintained and party directed to file for succession within one month from the date herein.

Judgment read in open court in presence of Nabulindo holding brief for Okoba for plaintiff.

N/A for the defendant.

A. Olengo, SPM

September 21, 2022"

It is clear from the above that neither the Applicants nor their counsel was in court when the judgement was delivered on September 21, 2022. The 1st Respondent has deponed in paragraph 5 of his replying affidavit as followed:

5. "That the Honourable Court directed that the judgement was ready and was to be read on September 21, 2022 and which information was received by the Applicants and the advocate holding brief for the Applicant's advocate was aware of the directive."

Since the Applicants had alleged that the judgment was delivered in their absence and without notice to them, the onus shifted to the Respondents to demonstrate that infact the Applicants were notified of the Court's directive that the same would be delivered on September 21, 2022 as deposed to by the 1st Respondent. This is because, asking a party to prove the negative is clearly an onerous task. Court directions especially on such an important event as to when a judgment or ruling shall be delivered, will ordinarily be made in open court or in writing. This is because, the delivery of judgements and rulings is not a secret or clandestine affair. It was therefore easier, indeed important, for the Respondents to avail the proceedings or notice in which the Magistrate directed that the judgment would be delivered on September 21, 2022 as proof that the Applicants were aware about the date. The Applicants cannot be expected to produce what is not there.



16. I am persuaded from the above that both the applicants and their counsel were not in Court when the judgment was delivered on September 21, 2022. Their explanation for not filing their appeal within the time stipulated in the law is clearly reasonable and truthful since it is borne out of the proceedings of September 21, 2022. They have therefore demonstrated good and sufficient cause to enable this Court exercise its discretion in their favour and allow them an extension of time within which to file their appeal. In doing so, I take note of the fact that the right of appeal, unless expressly denied by the law, is so central in the litigation process and it should not be declined other than for compelling reasons. I see no such reasons in the circumstances of this case. The Applicants approached this Court slightly over 14 days from the time when they should have lodged their appeal. There is no evidence of malafides on their part. And I do not see what prejudice the Respondents will suffer as the delay is not inordinate and has also been satisfactorily explained.
17. The prayer for leave to appeal out of time is clearly well merited. I allow it.

Stay of execution of the judgment delivered on 21st September 2002:

18. Order 42 Rule 6(1) of the *Civil Procedure Rules* grants the Court the power to order a stay of execution of judgment pending appeal. Sub-rule (2) provides however, that:

“No order for stay of execution shall be made under subrule (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 unreasonable 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.”
Emphasis mine.

The Applicants were required to meet the threshold set out in Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules* in order to be entitled to the remedy of stay of execution pending appeal. These are:

- a. Show sufficient cause.
- b. Demonstrate substantial loss if the order of stay is not granted.
- c. Approach the Court without unreasonable delay.
- d. Offer security.

This Court having granted leave to file the appeal out of time, the Applicants have surmounted the hurdle of showing sufficient cause. The judgment sought to be appealed was delivered in their absence and I am prepared to find that they have approached the Court without unreasonable delay. And in paragraph 10 of her supporting affidavit, the 4th Applicant has deposed thus:

10: “The applicants are ready and willing to comply with the terms as the Court shall order.”

That undertaking, in my view, is a sufficient offer of security. The Applicants have therefore satisfied three out of the four requirements necessary for the grant of an order of stay of execution pending appeal as set out in Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules*.

19. However, the requirement of substantial loss “is the cornerstone” of such an application as was stated by Platt Ag. JA (as he then was) in the case of *Kenya Shell Ltd -v- Benjamin Kibiru & Another* 1986 KLR 410. What then is the substantial loss that the Applicants are likely to suffer unless the order of stay of execution pending appeal is allowed?



20. In paragraph 21 of the 4th Applicant's supporting affidavit, she has deponed that:

21 "I know of my own knowledge that the applicants shall stand to suffer substantial loss and or irreparable damages in relation to the judgment, consequent upon the realization and actualization of the benefits of the said judgment now intended to be appealed against unless leave as sought is granted and stay of execution pending appeal is allowed."

Other than that mere reference to substantial loss, the applicants have not specified what loss they will in fact suffer arising out of the judgment unless the order of stay of execution pending appeal is granted. The word "substantial" is defined in *Black's Law Dictionary* 10th Edition as:

"Considerable in amount or value; large in volume or number ...

Having permanence or near permanence; long lasting ..."

21. In the preceding paragraphs of this ruling and specifically in paragraph 15, I have cited in extenso the disposal orders made by the trial court in the judgment sought to be appealed. It is clear that the parties were directed to approach the Succession Court with regard to the distribution of the suit land and meanwhile, the status quo obtaining on the ground be maintained. I have not heard the Applicants complain that subjecting themselves to the Succession process will inflict on them substantial loss. And as was held in *Macharia T/a Macharia & Company Advocates -v- East African Standard* (No 2) 2002 2 KLR 63, "a court will not order a stay upon a mere vague speculation." My view of the disposal orders issued by the trial court is that they are not really final orders liable to execution. They are subject to the succession process in which the Applicants will have an opportunity to prosecute their claim with respect to the suit land. They can also elect to prosecute their appeal for which leave has now been granted. In any case, the trial court has in the meantime ordered that the status quo obtaining on the ground be maintained. Essentially, therefore, the orders arising out of the judgment sought to be appealed are transient in nature and incapable of execution because the trial magistrate appears to have shied away from making final orders in the dispute before him and referred the parties to another forum. The long and short of all the above is that there is really nothing capable of being finally executed in the judgment delivered on September 21, 2022 and which can result to any substantial loss because if the parties abide by the terms of that judgment, they will only be moving to another court. And although the trial court delivered a judgment, it is doubtful in my view, if the disposal orders cited above can be said, in law, to constitute a final judgment which is defined in *Black's Law Dictionary* 10th Edition as:

"A Court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs ..."

22. I do not discern any "last action" in the judgment delivered on September 21, 2022 whose execution can amount to any substantial loss more so given the fact that the trial magistrate proceeded to "order that the status quo on the ground be maintained." Given the above circumstances, an order of stay of execution will clearly be idle.

23. The up-shot of all the above is that having considered the Notice of Motion dated November 1, 2022, I make the following disposal orders:

1. Leave to file the appeal out of time is granted.
2. The Applicants to file and serve the memorandum of appeal within 7 days of this ruling.



3. The Deputy Registrar shall thereafter call for the record of proceedings in the trial Court to be placed before me for admission or otherwise within 45 days of filing of the memorandum of appeal.
4. The prayer for stay of execution pending appeal is declined.
5. The parties are a family and therefore, there shall be no order as to costs.

BOAZ N. OLAO

JUDGE

27TH MARCH 2023

Ruling dated, signed and delivered at BUSIA ELC on this 27th day of March 2023 by way of electronic mail as was advised to the parties on 23rd February 2023.

BOAZ N. OLAO

JUDGE

27TH MARCH 2023

