



**Githinji v Gitero & another (Miscellaneous Application
E006 of 2022) [2023] KEELC 16526 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16526 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
MISCELLANEOUS APPLICATION E006 OF 2022
AK BOR, J
MARCH 23, 2023**

BETWEEN

ELIJAH MAKANGA GITHINJI APPLICANT

AND

FRANCIS MAINA GITERO 1ST RESPONDENT

FLORENCE WANGUI MAINA 2ND RESPONDENT

RULING

1. The Applicant filed the application dated 2/10/2022 seeing stay of execution of the decree and judgment delivered in Nanyuki CMCCC No. 90 of 2014 pending filing and determination of the intended appeal. He also sought leave to file an appeal against the decree notwithstanding the expiry of the time allowed for filing the appeal.
2. The application was made on the grounds that the Applicant was the defendant in Nanyuki CMCC No. 90 of 2014 in which judgment was delivered on 23/8/2018, although he came to know of this on 20/12/2018. That upon learning of the delivery of the judgment and being dissatisfied with the decision, the Applicant instructed his advocates then to appeal against the judgment and seek stay execution pending appeal. The other ground was that the judgment was written by a magistrate who had been posted to another station but was delivered by a magistrate who replaced the trial magistrate. It was contended that the judgment was delivered in the absence of parties and without notice to the Applicant's advocate. Further, that the Applicant's advocates learned of the judgment more than three months after it was delivered upon writing a letter of enquiry to the court. That on learning of the delivery of the judgment, the Applicant's advocate requested the trial court to supply him a copy of the judgment which was furnished on 2/2/2019. The Applicant claimed that he was made to understand by his advocates at the time that they were pursuing orders for leave to file an appeal out of time, stay of execution and the eventual institution of an appeal. It came to the Applicant's knowledge that that was not done.



3. The Applicant swore the affidavit in support of the application. He stated that through the judgment delivered on 23/8/2018 he was adjudged to pay the 1st Respondent the sum of Kshs. 4,500,000/= as the principal sum, costs and interest. He averred that the judgment was delivered by Hon. Njeri Thuku, Principal Magistrate even though it was written by Hon. E. Ngigi who had been transferred to another station. The Applicant exhibited a copy of the letter which his advocates wrote to court 20/12/2018. He also exhibited an affidavit which his advocate prepared and made him sign that was intended to support the application for extension of the time for filing the appeal. He maintained that the chances of success of his intended appeal against the judgment were reasonable and relied on the proposed appeal. He stated that he was prepared to offer as security for the possible eventual satisfaction of the decree the parcel of land which was the subject of the suit that gave rise to the decree. He attached the copy of certificate of lease over the suit property.
4. The 1st Respondent swore the affidavit in opposition to the application. He deponed that his previous advocates were to commence execution after the judgment was delivered but they did not do so which prompted him to instruct a new firm of advocates. He maintained that the Applicant slept on his rights for four good years which in his view was inordinate and unreasonable. He averred that he stood to suffer great prejudice if an extension of the time for filing of the appeal were granted as this would delay the execution proceedings going on before the Magistrate's court. He added that the intended appeal was only filed when he commenced execution and argued the court to dismiss the application.
5. The Applicant was granted leave to file a further affidavit on 1/11/2022. He filed the affidavit on 1/11/2022 and explained that the sum of Kshs. 500,000/= had been deposited in the account opened in his advocates' name and the 1st Respondent's previous advocate. He did not know whether execution proceedings had commenced and averred that the Respondent would not be prejudiced in any way because it would still be possible for him to obtain the principal relief which he sought in the suit before the Magistrate's court on a retrial or an order by the court to that end upon the intended appeal.
6. He pleaded that the sum of Kshs. 4,500,000/= was astronomical and purged that he stood to be highly prejudiced by being condemned to pay that sum which would not have been the case were it not for his advocates' inaction. The Applicant added that he was not aware of any means of the Respondent to repay the decretal sum if his intended appeal succeeded. He attached copies of receipts issued by Kiget and Company advocates on 26/8/2019, 15/3/2019, 18/9/2020 and 7/11/2020 on account of legal fees and instructions for appeal.
7. Parties were directed to file written submissions. The Applicant submitted that the guiding principle in enlargement of time and stay of execution pending appeal, is that it was discretionary and was to be considered on the merits and circumstances of each case. The Applicant relied on *Joseph Schmaderer v Serah Njeri Ngene* (2021) eKLR in where it was stated that the whole period of delay should be explained satisfactorily to the court and that whether or not to extend time for filing an appeal was an exercise of the court's discretion which should be based on reason and not on whims or caprice. Further, that unreasonable delay depended on the surrounding circumstances of each case. Additionally, that even if an applicant had a good case on merit but was out of time and had no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy.
8. The Applicant also relied on *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* (2018) eKLR in which the court stated that any delay should be satisfactorily explained and that it was a plausible explanation for the delay that would unlock the court's discretionary favour. The Applicant maintained that he was not to blame for the delay which in the first instance was occasioned by the court's failure to give notice of the date of delivery of judgment and subsequently by his advocates'



failure to execute his instructions. He maintained that the delay had sufficiently been explained and added that the general view was that mistakes of counsel should not be visited upon clients.

9. The Applicant submitted that the proposed memorandum of appeal raised weighty questions of law and if successful would turn the tables in his favour. On the aspect of the appeal being rendered nugatory if stay was not granted, the Applicant submitted that in the judgment he was condemned to pay an astronomical sum of Kshs. 4.5 million yet he did not know the Respondent's financial means. He submitted that there was real danger of not being able to recover the amount if the appeal succeeded.
10. The Applicant added that another factor which would make the appeal nugatory if stay were not granted is that the process of execution had the prospect of depriving or dispossessing him of the land for which no restitution was possible.
11. On the issue of security, the Applicant agreed with the principle that a successful litigant should not be unreasonably deprived of the fruits of his judgment. The Applicant was of the view that security need not always be in monetary form and that there were circumstances in which the court should exercise its discretion and order security in forms other than money.
12. He pointed out that the Respondent effectively sought specific performance by which the suit land would have been granted to him but the Learned Magistrate awarded him the alternative monetary decree. He added that he was willing to offer the suit property and urged that it was reasonable for the court to order preservation of the suit land as security. The Applicant pointed out that the court had already made an order for payment of security in the sum of Kshs. 500,000/= and in his opinion the court could maintain that sum as security.

The Respondent did not file written submissions.

13. The twin issues for consideration are whether the court should grant stay of execution of the decree issued following the judgment of the Learned Magistrate delivered on 10/8/2018; and whether the Applicant should be granted leave to file an appeal out of time. His explanation for not filing the appeal within time was that the Learned Magistrate who delivered the judgment did not issue a notice of the delivery of judgment and secondly, that his advocate failed to lodge an appeal or file an application for execution of time after he learnt of the delivery of judgment. The court has not had the benefit of looking at the magistrate's court file to ascertain whether or not the Applicant was indolent in following up his case. The court is satisfied that plausible reasons have been given for the delay. In the draft memorandum of appeal, the Applicant challenges the finding of the Learned Magistrate for granting a relief not provided in the contract instead of granting the principal relief.
14. Under order 42 rule 6 of the *Civil Procedure Rules* the Applicant is required to furnish security for the due performance of the decree that may ultimately be binding on him. The applicant is required to demonstrate that substantial loss may result if an order for stay is not made.
15. Having considered the application, the response and the Applicant's submissions the court is satisfied that the Applicant should have leave to lodge an appeal out of time and stay of execution of the decree on condition that within 14 days, the Applicant furnishes security in the sum of Kshs. 2.5 million, which is to include the sum of Kshs. 500,000/= that the court ordered deposited earlier. The money is to be held in an interest earning account in the joint names of both advocates' names.
16. In the alternative, the Applicant is to deposit the title over Nanyuki Municipality Block 10/30 with the Deputy Registrar of this court within 14 days of the date of this ruling. A restriction is to be registered against the parcel of land by the Land Registrar restraining dealings with the land until the appeal is heard and determined. The Respondents are awarded the costs of the application to be borne by the Applicant.



DELIVERED VIRTUALLY AT NANYUKI THIS 23RD DAY OF MARCH 2023.

K. BOR

JUDGE

In the presence of: -

Mr. Mwangi Kariuki for the Applicant

Mr. Maxwell Gichuhi for the Respondents

Ms. Stella Gakii - Court Assistant

