



Kibera v Diligence Transport Services Saving and Credit Cooperative Society Limited (Environment and Land Miscellaneous Application E030 of 2022) [2023] KEELC 16485 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16485 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E030 OF 2022
CK YANO, J
MARCH 22, 2023**

BETWEEN

SAMUEL NKONGE KIBERA APPLICANT

AND

DILIGENCE TRANSPORT SERVICES SAVING AND CREDIT COOPERATIVE SOCIETY LIMITED RESPONDENT

RULING

1. By a notice of motion dated September 6, 2022 brought under section 3A 79G & 95 of the [Civil Procedure Act](#) and Order 42 Rule 6 (2) of the [Civil Procedure Rules](#), the applicant is seeking orders:
 1. spent
 2. spent
 3. That this honourable court be pleased to order a stay of execution of the judgment/decree in Githongo ELC case No 28 of 2019 delivered on September 20, 2021 pending the filing, hearing and determination of the intended appeal.
 4. That this Honourable court be pleased to allow the applicant to appeal the judgment in Githongo ELC case No 28 of 2019 delivered on September 20, 2021 out of time.
 5. That the costs of this application be provided for.
2. The application is based on the grounds in the body of the application and the contents of a supporting affidavit of Samuel Nkonge Kirera, the applicant, sworn on September 6, 2022.
3. The applicant has deponed that he was aggrieved by the judgment delivered on September 20, 2021 in Githongo ELC Case No 28 of 2019 in favour of the respondent and intends to appeal. That after the



delivery of the said judgment, he immediately applied to the trial court to be furnished with certified copies of the proceedings and judgment and diligently followed up on the same by visiting the registry severally in vain. That it was not until August 29, 2022 when the trial court informed them that the typed proceedings and judgment were ready and that is when the applicant instructed his advocates on record to collect the said typed proceedings and judgment and file the instant application. That the certified typed proceedings and judgment were furnished to the applicant's advocate on September 2, 2022.

4. It is the applicant's contention that the delay in filing the appeal within the statutory stipulated period is attributed to the trial court's delay in furnishing the applicant with certified copies of the proceedings and judgment.
5. The applicant further contends that he has an arguable appeal that raises serious triable issues and is not frivolous. The applicant avers that he is ready and willing to deposit such security as may be ordered by the court, adding that no prejudice will be occasioned to the respondent if the orders sought herein are granted. The applicant further states that he is in imminent danger of losing the proprietorship of land measuring 40 feet by 80 feet to be excised from LR No Abothuguchi/Kithirune/3405 if the impugned judgment is executed and the intended appeal will be rendered nugatory. That the delay in bringing this application is not inordinate.
6. In the affidavit in support of the application, the applicant has annexed copies of a letter dated September 27, 2021, a copy of the respondent's application dated June 29, 2021, copies of the proceedings and judgment and a copy of the draft intended memorandum of appeal.
7. In opposing the application, the respondent filed a replying affidavit sworn by Auceliu Kaimenyi Kinoti, the chairman of the respondent's supervisory committee on October 19, 2022. He depones inter alia that the applicant herein sold to the respondent the suit property on September 10, 2016 at a consideration of Kshs. 1,333,440/=. A copy of the said sale agreement and acknowledgment receipts are annexed. That upon the execution of the sale agreement the applicant surrendered to the respondent vacant possession of the suit premises wherein the respondent commenced developments on it by constructing a fueling station which is now fully operational. That although payment of Kshs. 20,000/= was paid to the applicant for an application to the Control Board consent, transfer and registration, the applicant subdivided the original land and registered the resultant subdivision in his name and obtained title deed, prompting the respondent to file Githongo ELC case No 29 of 2019 where judgment was delivered in favour of the respondent on September 20, 2021.
8. That the applicant refused to heed to the judgment of the court for over 9 months prompting the respondent to apply for execution but still the applicant refused to sign the transfer. That the respondent made an application seeking the land registrar to dispense with the production of the original title deed during transfer, and that application was allowed and the transfer was effected and title deed has been issued in the name of the respondent.
9. It is the respondent's contention that the current application is spent since execution in the trial court has proceeded to its final stage. The respondent further contends that the certified copies of proceedings and judgment were ready on September 20, 2021 contrary to the applicant's allegation. It is also pointed out that the applicant has made contradictory statements and is guilty of laches.
10. In the replying affidavit the deponent has also annexed copies of a mutation form, application dated June 29, 2022, replying affidavit and the title deed. The respondent urges the court to dismiss the application with costs.



11. The application was canvassed by way of written submissions which were duly filed by both parties. The applicant filed his submissions dated December 6, 2022 through the firm of John Muthomi & Co. Advocates while the respondent filed theirs dated December 9, 2022 through the firm of Kithinji Kirigiah & Co. Advocates.
12. I have considered the application and the submissions made. I have also taken into account the authorities cited. The issues for determination are whether leave to appeal out of time should be granted and whether the applicant is entitled to the orders of stay pending the intended appeal.
13. The decision which is sought to be appealed is from the lower court. Under Section 78G of the *Civil Procedure Act* and Section 16A of the *Environment and Land Court Act*, appeals from the decision of the subordinate 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. However, the said provisions of law 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 enlargement of time to file an appeal must show that he has a good cause for doing so.
14. The principles upon which the court should exercise the said discretion and grant leave to appeal out of time are now 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 degree of prejudice to the respondent if the application is granted. (see *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* civil application No Nai 255 of 1997 (unreported) and *Tuita Mwangi v Kenya airways limited* [2003] eKLR. The question therefore is whether taking into account the facts of the instant case, the applicant has satisfied the said conditions.
15. As for the length of the delay, the judgment of the trial court was delivered on September 20, 2021. The instant application was filed on September 6, 2022. The 30 days' period within which the applicant ought to have filed the appeal lapsed in October, 2021. The application has been brought after a period of about one (1) year. It is my considered view that the application was brought after unreasonable delay.
16. In justifying the said delay, the applicant deposed that the delay in filing the appeal within the statutory stipulated period is attributable to the Lower Court delay in furnishing him with certified copies of the proceedings and judgment. That therefore he has shown good and sufficient cause for his failure to file the appeal within the required time. That his appeal has high chances of success. It is my opinion that the reasons for the delay are not convincing since the proceedings and judgment attached to the application are dated September 20, 2021. The same must have been ready by the date. The reasons given therefore are farfetched and I find that the delay was quite inordinate.
17. As for the chances of the appeal succeeding, as alleged by the applicant, at the stage of determining whether to grant leave to file an appeal out of time on the grounds that the appeal is arguable. It is trite that the court is bound to consider whether the said intended appeal raises a bona fide issue for determination by the court. The court is not supposed to determine as to the success of the appeal but as to whether the same is arguable. An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the court, one which is not frivolous (see *Joseph Gitahi Gachau & another v Pioneer holdings (A) Ltd & 2 others*, Civil application No 124 of 2008.
18. As for the prejudice which the parties might suffer, the respondent has averred that the members stand to suffer prejudice since they will be unable to enjoy their land and therefore there must be an end to litigation.



19. As it has always been held, extension of time to file appeal is a matter of exercise of discretion. Where a party is aggrieved and wishes to pursue an appeal, it would be fair to exercise discretion in his favour and especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way. Discretion of the court must always be exercised judiciously. The applicant although having expressed his intention to be heard by this court on appeal, it is my considered opinion that he ought not be given an opportunity to pursue the appeal since the delay is quite inordinate and no good reason has been given for such delay. The respondent already has title in its name from the execution of the impugned judgment.
20. The respondent stated that allowing the application will prejudice the respondent whose members are now enjoying the land they legally bought with their hard earned money and a title deed issued which money was paid to the applicant to the last coin and which money the applicant is enjoying but now wants to go behind the agreement.
21. The respondent submitted that he who comes to equity must come with clean hands and that the applicant has not come with clean hands. In my considered view, the applicant has slept on his right to challenge the judgment for too long and has failed to explain the inordinate delay. Equity aids the vigilant and not the indolent. The application has in my view been made as an afterthought. The typed proceedings and judgment are dated September 20, 2021 and no reason has been given why the applicant did not obtain a copy then or soon thereafter.
22. For the above reason, it is my considered opinion that the applicant herein has not satisfied the conditions for grant of leave to appeal out of time. Consequently, the application for leave to appeal out of time is denied.
23. Order 42 Rule 6 of the *Civil Procedure Rules* lays out the law on stay of execution pending appeal by giving the court the discretion to order stay for sufficient cause. Sub Rule 2 outlines the mandatory conditions that have to be met for a court to grant stay pending appeal. However, the relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law, not capriciously or whimsically. Stay of execution can only be granted where sufficient cause has been shown by the applicant.
24. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites under Order 42 Rule 6. First, the application must be brought without undue delay, secondly, the court must satisfy itself that substantial loss may result to the applicant unless stay of execution is granted, and thirdly, such security as the court orders for the due performance of such decree or order as may ultimately be binding upon him has been given by the applicant.
25. From the material on record, the impugned judgment was made on September 20, 2021 and the application herein was filed on September 6, 2022. This is a period of about one year. The application was therefore not made timeously and the delay is inordinate.
26. In justifying the delay, the applicant stated that he applied for certified copies of the proceedings and judgment but the trial court took time to supply the same. I have perused the certified copies of proceedings and judgment annexed to the affidavit in support of the application herein and marked "SNK – 03 (a) & (b) ". As I have noted, the same is dated September 20, 2021. In this regard, the applicant's explanation for the delay is not believable and I reject it.



27. Regarding the second pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the applicant, I wish to refer to the case of *Kenya Shell Limited v Benjamin Karanja Kigibu & another* (1982 – 1988) KAR 108 where the Court of Appeal stated:

“It is usually a good rule to see if order 41 Rule 4 of the Civil Procedure rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay”

28. In the present case, the applicant has stated that he will suffer substantial loss as he is in imminent danger of losing the proprietorship of the suit premises, and that the intended appeal will be rendered nugatory unless stay of execution is granted. The respondent has however shown that execution has since been carried out and the suit premises has been transferred to the respondent. There is a title deed annexed to the replying affidavit which indicates that the suit premises is now in the name of the respondent herein. In my view, there is nothing to stay since execution has already been undertaken and title deed issued to the respondent. In my considered view, the application for stay has been overtaken by events due to the indolence on the part of the applicant in failing to bring the application timeously.

29. Moreover, having declined to grant leave to appeal out of time, the order for stay in this case will serve no purpose as there is no appeal pending determination.

30. I have already found that no valid reason has been offered for the delay in filing an appeal because the explanation given is not plausible. I am also of the considered view that the applicant has not met the test for grant of stay of execution in this matter.

31. In the result, this court finds no merit in the notice of motion dated September 6, 2022. The same has failed to meet the threshold laid down in section 78G of the *Civil Procedure Act* and Order 42 Rule 6 of the *Civil Procedure Rules*. The application is hereby dismissed with costs to the respondent.

Dated, signed and delivered at Meru this 22nd day of March 2023

In the presence of:

Kithinji for respondent

J. Muthomi for appellant

Court assistant - Kibagendi

C.K YANO

JUDGE

RULING

Page 4 | 4

