



Wanyama (Suing as a widow, legal and personal representative of the estate of Joseph Wanambisi Naliakho (deceased)) v Wamukota (Environment & Land Case 14 of 2012) [2023] KEELC 16278 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16278 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 14 OF 2012
EC CHERONO, J
MARCH 16, 2023**

BETWEEN

**GRACE NANYAMA WANYAMA PLAINTIFF
SUING AS A WIDOW, LEGAL AND PERSONAL REPRESENTATIVE OF THE
ESTATE OF JOSEPH WANAMBISI NALIAKHO (DECEASED)**

AND

PATRICK WAMUKOTA DEFENDANT

RULING

- 1 The applicant, vide a notice of motion application brought under certificate of urgency dated December 13, 2022 seeks the following orders;
1. (Spent)
 2. That the applicant be granted leave to appeal out of time against the judgment of Hon Justice B N Olao in Bungoma HCCC No 14 of 2012, delivered on November 17, 2022.
 3. That pending the hearing and determination of this application *inter-parties* there be stay of execution of the judgment/decree delivered on the November 17, 2022 in Bungoma HCCC No 14 of 2012 between Grace Nanyama Wanyama v Patrick Wamulota
 4. That pending the hearing and determination of the intended appeal there be stay of execution of the judgment/decree delivered on the November 17, 2022 in Bungoma HCCC No 14 of 2012 between Grace Nanyama Wanyama v Patrick Wamukota.
 5. That costs of this application to abide the appeal.



- 2 The application is supported by the affidavit of the applicant and grounds shown on the face of the said application. The application is further supported by numerous annexures there.
- 3 By way of a response, the respondent filed grounds of opposition dated January 10, 2023.
- 4 In her supporting affidavit, the applicant deposed that though she followed up the judgment and kept on inquiring from her advocates, she was notified of its delivery and outcome on November 6, 2022. She stated that failure to appeal within time was not intentional but caused by inadvertence or mistake by the judicial staff who sent the notice of delivery of judgment to a wrong e-mail address rather than her former advocate's e-mail. She stated that the grounds of appeal raise weighty and triable issues worthy of consideration by the court of appeal. The applicant also deposed that should the judgment of the court be implemented, the suit land would be exposed to adverse dealings by the respondent including sale, transfer, lease or mortgage to third parties which would render the intended appeal, if successful, nugatory.
- 5 She further stated that the respondent has extracted the decree and at the lapse of thirty days as stipulated by the judgment, the county lands registrar Bungoma shall proceed to cancel my title in land parcel and have the same registered in favour of the defendant. The applicant also averred that she is willing to deposit the title deed for the suit land with the court as security for due performance of any decree that may be binding on her.
- 6 The respondent filed the following ten (10) grounds of opposition;
- a. That the honourable court lacks jurisdiction to hear and entertain the instant application which is the preserve of the Court of Appeal
 - b. That no sufficient cause has been shown why the notice of appeal was not filed within the prerequisite period of time of 14 days
 - c. That all the parties received the notice of delivery of judgment from the deputy registrar in accordance with the corvid 19 regulations and protocol.
 - d. That the plaintiff has not fulfilled the conditions necessary for the grant of the orders of stay of execution as she shall not suffer any substantial loss nor has she given any security in accordance with the provisions of order 42 rule 6(2) of the [Civil Procedure Rules](#).
 - e. That the defendant should be allowed to enjoy the fruits of successful litigation
 - f. That the grant of sought orders shall greatly prejudice the defendant.
 - g. That the said application is misconceived, mischievous, unmeritorious, frivolous, and vexatious.
 - h. That the balance of convenience dictates that the plaintiff's application should be dismissed with costs.
 - i. That the application has been made in bad faith and is solely aimed at vexing the defendant.
 - j. That there is no appeal filed to warrant exercising the jurisdiction of the court under order 42 rule 6(2) [Civil procedure Rules](#)



Applicant's Submissions

- 7 The applicant through the firm of M/s V A Lunani & Company Advocates submitted that She was previously represented by the firm of
- 8 Bw-onchiri & Company Advocates and that she kept following up with former advocates office who informed her of its delivery on December 6, 2022 after the statutory time for filing a notice of appeal had already passed. She further submitted that upon perusing the court file, she discovered that the notice for delivery of judgment was not sent to her former advocates e-mail but was inadvertently sent to a wrong address. She submitted that this application has been filed without delay and that the respondent will not suffer any prejudice if the application is allowed.
- 9 In conclusion, the applicant submitted that in the event stay of execution is not granted, the appeal will be rendered nugatory and the subject parcel may be transferred, charged, leased or otherwise alienated beyond the applicant's reach. She cited the following authorities and case law;
1. [*Kenya Airport Authority & another v Timothy Nduvi Mutungi*](#) (2014) eKLR
 2. [*Wilfred Munai Kilungu & another v Mutavi Munai*](#) (2021) eKLR
 3. Section 7 of the [*Appellate Jurisdiction Act*](#)

Respondent's Submissions

- 10 The firm of Makokha, Wattanga & Luyali Associates submitted on behalf of the respondent five (5) issues as follows;
1. The honourable court lacks jurisdiction to hear and entertain the instant application which is the preserve of the Court of Appeal.

The respondent submitted that the applicant, having been dissatisfied with the decision of Justice B.N Olao in Bungoma HCCC No 14 of 2012 delivered on November 17, 2022 ought to have sought leave out of time against the said judgment from the Court of Appeal and file an existing appeal seeking the court to admit that appeal out of time rather than filing the instant application to the same court that passed the decision.
 2. That no sufficient cause has been shown why the notice of appeal has been beyond the prerequisite period time of 14 days because all parties received the notice of delivery of judgment from the deputy registrar in accordance to covid 19 regulations and protocol

The respondent submitted that extension of time is an equitable remedy reserved for deserving applicant and since the applicant has failed to demonstrate a good and sufficient cause for not filing the appeal in time having received notice of delivery of judgment from the deputy registrar, the sought prayers ought not to be granted. He cited the case of [*Mombasa County Government v Kenya Ferry Services & another*](#) (2019) eKLR
 3. The plaintiff has not fulfilled the conditions necessary for the grant of orders of stay of execution under order 42 rule 6(2) CPR.

The respondent submitted that the law governing stay of execution from an order or judgment is anchored in order 42 rule 6 CPR. He further submitted that the general principles are also found in the various decided cases by the superior courts. He submitted that the application by the plaintiff/applicant is a clear indication that the same is an afterthought and a perfect attempt to deny the defendant the fruits of his judgment. He argued that the plaintiff/



applicant did not file his application within a reasonable timeline and that the period to put in an application for stay had already lapsed and no substantial loss shall be occasioned to the applicant as no such substantial loss has been alleged or demonstrated. On the issue of security, the respondent submitted that the applicant has not given any security or undertaking for the due performance of the decree as may be binding on her.

4. That there is no appeal filed to warrant exercising the jurisdiction of the court under order 42 rule 6(2) CPR

The respondent submitted that there is no appeal filed and served upon them by the plaintiff/applicant and therefore the application is incompetent and ought to fail as no substantive appeal has been filed. He stated that the applicant is seeking to file a non-existent appeal

Analysis And Decision

11 I have considered the notice of motion application dated December 13, 2022, the supporting affidavit as well as the grounds of opposition and the rival submissions. I have also considered the applicable law. The applicant in this application is seeking two substantive orders namely, leave to appeal out of time and stay of execution pending appeal. From the proceeding on record, the impugned judgment and decree which is the subject of this application was delivered by my brother Hon Justice B.N Olao on November 17, 2022 after giving notice to the parties via electronic mail. The respondent in one of his grounds of opposition dated January 10, 2023 is questioning this honourable court's jurisdiction to hear and determine this application. Section 7 of the [Appellate Jurisdiction Act](#) provides as follows;

- “7. The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired; provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

In the case of [Mombasa County Government v Kenya Ferry Services & another](#) (2019) eKLR, the Supreme Court of Kenya held;

“ concerning extension of time, this court has already set the guiding principles in the *Nick Salat case* as follows;

“----it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.

“---we derive the following as the underlying principles that a court should consider in exercising such discretion;

1. Extension of time is not a right of a 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 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-to-case basis;
4. Where there is a reasonable (cause) for the delay, (the same should be expressed) to the satisfaction of the court;



5. Whether there will be any prejudice suffered by the respondents, if extension is granted;
6. Whether the application has been brought without undue delay;

12 It is explicit from my literal interpretation of the said provisions of the law that parliament gave the High Court and courts of equal status power to extend time for giving notice of intention to appeal from a judgment of the aforementioned courts or for making an application for leave to appeal or for a certificate that the case is fit for appeal. Section 41 of the [Court of Appeal Rules](#) provides that one is free to approach either the High Court or the Court of Appeal for extension of time to lodge notice of appeal out of time. On that note, the respondent's ground of objection that this honourable court lack jurisdiction to hear and determine this application is without merit. Suffice to say that the authority cited in support by the respondent is distinguishable and irrelevant

As regards stay of execution pending appeal, order 42r 6(2) which is the applicable law sets out three conditions for the grant of stay pending appeal as follows;

1. The application must be brought without undue delay;
2. The applicant must demonstrate that he/she will suffer substantial loss unless the order is granted; and
3. The applicant must give security for the due performance of the decree or order that may subsequently be binding on him/her should the intended appeal not succeed.

13 The applicant in her supporting affidavit deposed that the impugned judgment was delivered by this honourable court via e-mail on November 17, 2022. The applicant also deposed that though she followed up on the judgment and kept on inquiring from her former advocates, she was only notified of its delivery and outcome on December 6, 2022. The applicant further stated that failure to appeal within time was not intentional but caused by inadvertence or mistake by the judicial staff who sent the notice of delivery of judgment to a wrong e-mail address rather than her former advocate's e-mail address.

14 From the date of delivery of the impugned judgment, the applicant was required to file a notice of appeal within 14 days which lapsed on December 1, 2022. The applicant has not given the name of the judicial staff whom she alleged inadvertently or by mistake sent the notice of delivery of judgment to a wrong e-mail address. The applicant has not also given the wrong e-mail address in which the notice of delivery of judgment was sent and the correct e-mail address for her former advocate. It is curious that the applicant and not her former advocate is complaining for failure to be served with a notice of delivery of judgment. Since the applicant was represented by an advocate before the trial court, it was that former advocate to complain if notice for delivery of the impugned Judgment was not served upon him. Since the applicant's former advocate or a representative from his office has not sworn an affidavit stating that they were not served with a notice for delivery of the impugned judgment, the averments by the applicant that the notice of delivery of the impugned judgment was issued to a wrong e-mail address does not hold any water.

15 For the reasons given hereinabove, I find that the applicant has not given any reasonable and satisfactory explanation for failing to lodge the notice of appeal within the statutory period. A delay for 26 days in my view is inordinate delay.

16 On the second condition for stay pending appeal, the applicant has not also shown any evidence of substantial loss she would suffer unless the orders sought are given. Substantial loss has been described in various decisions by the superior courts as the state of affairs which would render an intended appeal



nugatory. That may include alienation of the subject matter of appeal to third parties beyond the reach of the court.

- 17 No sale agreement or any other evidence has been tendered by the applicant showing that the respondent intends to dispose the suit property to third parties once execution of the decree commences. In any event, execution is a lawful process and cannot be a ground for stay pending appeal. Just the same way an application for stay in execution of a monetary decree is required to show that the judgment creditor is a person of straw and is unable to refund the decretal sum if stay is not granted, the applicant in a none monetary decree must also demonstrate by way of a sale agreement that the judgment creditor/respondent will alienate /dispose of the suit property thereby rendering the intended appeal nugatory. Since no such evidence has been shown, this condition also fails.
- 18 The third and final condition for stay pending appeal is giving of security as the court may require for the due performance of the decree as may ultimately be binding on her. At paragraph 11 of the supporting affidavit, the applicant has deposed that she is willing to deposit the title deed for the suit land with the court as security for the due performance of the decree as may ultimately be binding on her. That condition alone in my view is not sufficient for the grant of the orders sought. All the three conditions must be met by the applicant before stay orders are granted
- 19 The upshot of my finding is that the notice of motion dated December 13, 2022 is not merited and the same is hereby dismissed with costs.
- 20 It is so ordered

**READ, SIGNED AND DELIVERED IN THE OPEN COURT/VIRTUALLY AT BUNGOMA THIS
16TH MARCH, 2023**

HON. E.C. CHERONO

ELC JUDGE

In the presence of;

M/S Lunani for Applicant

Mr Wekesa H/B for Mr Makokha for Respondent

Joy C/A

