



REPUBLIC OF KENYA



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Kufuja (Suing as Administrator Ad Litem to the Estate of Kufuja Beja) v Zia (Environment and Land Appeal 31 of 2021) [2023] KEELC 17233 (KLR) (26 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17233 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 31 OF 2021**

**EK MAKORI, J
APRIL 26, 2023**

BETWEEN

HANNINGTON KUBAMBA KUFUJA (SUING AS ADMINISTRATOR AD LITEM TO THE ESTATE OF KUFUJA BEJA) APPLICANT

AND

LUCKY JEGO ZIA RESPONDENT

RULING

1. This Ruling is in respect of an application by the Proposed Appellant/ Applicant dated 15th August 2022 seeking the following orders;
 - a. That a stay of execution of Judgment in Kilifi SRM ELC No 430 of 2018 be granted pending the hearing and determination of this application and intended appeal.
 - b. That the court be pleased to grant leave to the Applicant to Appeal out of time against the whole of the Judgment made by Hon. J. M. Kituku on the 1st February 2022 Kilifi SRM ELC No 430 of 2018.
 - c. That the draft Memorandum of Appeal attached herein be deemed as duly filed upon payment of the requisite fees.
 - d. The costs of this application be provided for.
2. The application was supported by the affidavit of Hannington Kubamba Kufuja sworn on the same day. He deponed that being aggrieved by the Judgment of the Lower Court, he filed a Notice of Appeal on 2nd February 2022 but the same was not signed. That the proceedings and judgment were processed and sent prior to the signing of the Notice of Appeal. He asserted that the Respondent is likely to execute the judgment herein at any time and it is in the interest of justice that the Applicant is given leave to appeal the judgment of the Hon J. M. Kituku outside of the prescribed time.



Response

3. The application was opposed by the Respondent through a Replying Affidavit sworn by Lucky Jego Zia sworn on the 18th day of October 2022. She stated that the judgment was delivered on 1st February 2022 in the presence of the Appellant's counsel who immediately applied for certified typed proceedings but no Memorandum of Appeal was filed within 30 days right of the appeal period provided by law. According to her, the alleged notice of appeal was signed on 2nd February 2022 a day after the judgment and therefore there was no delay from the trial court at all. That the present application and Memorandum of Appeal were filed on 31st August 2022 two weeks after the issuance of the decree which is an afterthought only meant to delay and derail the Respondent in the execution of the decree.
4. She asserted that the appellant slept on his right of appeal within the stipulated time in law for no reasonable explanation and that she contends that she will suffer no substantial loss or irreparable loss should the stay orders be declined. She stated that the Applicant only filed the application to file his appeal out of time on 31st August 2022 which is seven months after the said judgment was delivered by Hon J.M. Kituku on 1st February 2022.

Submissions

5. The applicant filed submissions on the 9th day of December 2022. Counsel submitted that the conditions for granting leave to file an appeal out of time are discussed in the case of *Stecol Corporation Limited v Susan Awuor Mudembi* (2021) eKLR where the court was referred to the case of *Edith Gichungu Koine v Stephen Njagi Thoitih* [2014] eKLR where the court held as follows;

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to the period of delay, the reasons for the delay, the degree of prejudice to the Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
6. On the issues of time, she submitted that the court needs to determine whether the duration of the delay was reasonable. She relied on the case of *Nzoia Sugar Company Limited v West Kenya Sugar Limited* (2017) eKLR submitting that inordinate delay is a matter of discretion of the court. That the applicant has to prove that the delay was not excessive by explaining what led to the delay. She submitted that the applicant has shown that the delay was caused by matters outside of his control and as such the court to find that the delay herein was in fact excusable.
7. On the second issue for determination of whether a stay of execution of the judgment pending appeal ought to be granted, she submitted that the principles guiding the grant of a stay of execution pending appeal are provided for under Order 42 rule 6 (2) of the *Civil Procedure Rules*. Counsel also relied on the case of *JMM v PM* [2018]eKLR submitting that the Respondent will not be prejudiced if the court grants the application for a stay of execution of judgment. Further, the applicant has a meritorious case and he is not pursuing this appeal with the intent to delay the Respondent from executing the judgment but rather protect his interests.
8. The Respondent on the other hand filed submissions on the 24th day of January 2023. Counsel submitted that a Notice of Appeal was signed on 2nd February 2022 a day after the judgment was read and as such, there was no delay from the trial court as alleged by the Applicant. It was his submission that an appeal from the trial court to this Honourable Court is commenced by way of a Memorandum



of Appeal as provided under Order 42 rule 1 of the [Civil Procedure Rules, 2010](#), and not a Notice of Appeal as alleged by the Applicant.

9. It was his submission that no certificate of delay has been annexed by the applicant to prove that the delay was occasioned by the trial court, he relied on the case of [Lawrence Nguthiru Riccardabw v George Ndirangu](#) [2015] eKLR. It was his submission that the Appellant filed no Memorandum of Appeal within 30 days from the date the judgment was delivered. That the present application and Memorandum of Appeal on 31st August 2022 which was two weeks after the issuance of the decree herein is an afterthought only meant to delay and derail the Respondent in the execution of the decree and enjoyment of the fruits of his judgment. According to him, the applicant only filed his application on 31st August 2022 which is seven (7) months after the said judgment was delivered which delay ought not to be excused.

Analysis and Determination

10. I have considered the application, grounds, affidavits, submissions, and authorities cited by counsels. The applicant seeks leave to file an appeal out of time and stay of execution of the judgment and decree pending the hearing of the intended appeal.

11. Section 79G of the [Civil Procedure Act](#) provides:

“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.”

12. It is not disputed that judgment in this matter was delivered on the 1st day of February 2022. The applicant asserted that they made several correspondences requesting to be supplied a signed copy of the Notice of Appeal which did not happen in good time. This, however, is far from the truth, the applicant went ahead to file a Memorandum of Appeal on the 31st day of August 2022 which is what the applicant ought to have filed and not a Notice of Appeal as has been alleged initially.

13. The applicant’s request to file an appeal out of time may only be accepted if it satisfies the court that it had good and sufficient cause for not filing the appeal out of time. The Supreme Court of Kenya in the case of [County Executive of Kisumu v County Government of Kisumu & others](#) [2017] eKLR while relying upon its decision in the case of [Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others](#) Application No 16 of 2014 (2014) eKLR the Hon. Judges reiterated the considerations to be made in such a case to be as follows:

- “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 for 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. Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the Court;



5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
14. This court has considered the amount of delay from 1st February 2022 to the filing of the application which was about 6 months. I am not satisfied that the applicant has satisfied this court with any tangible explanation as to the delay in making the application herein. I, therefore, find that the delay by the applicant is so inordinate as to make this court allow him the opportunity to challenge the judgment by the trial court.
15. On the issue of stay of execution, Order 42 Rule 6 of the *Civil Procedure Rules* provides as follows;
- “Stay in case of appeal [Order 42, rule 6.]
- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”
16. In the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 the court of Appeal gave guidance on how a court should exercise discretion in an application of a stay of execution and held that:
- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”



17. Flowing from the foregoing, I am equally not satisfied that the applicant has equally set out a case for himself for this court to grant him stay as has been sought. It is my considered opinion that the prayer for stay cannot also succeed.

18. The upshot is that application dated 15th August 2022 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI THIS 26TH DAY OF APRIL, 2023.

E.K. MAKORI

JUDGE

