



**Ambundo v Shiundu & another (Environment & Land Case
73 of 2014) [2023] KEELC 17012 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17012 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 73 OF 2014
DO OHUNGO, J
APRIL 25, 2023**

BETWEEN

LYSTONE SACHIEL AMBUNDO PLAINTIFF

AND

HARRISON OMMUMIA SHIUNDU 1ST DEFENDANT

JACKTONE MALIKA LAWI 2ND DEFENDANT

RULING

1. I delivered judgment in this matter on January 17, 2023 as follows:
 - a) The defendants to vacate the parcel of land known as Kisa/Mundeku/633 within 90 (ninety) days from the date of delivery of this judgment.
 - b) In default, the plaintiff shall be at liberty to evict the defendants from the parcel of land known as Kisa/Mundeku/633.
 - c) Considering the relationship between the parties, I make no order as to costs.
2. By Notice of Motion dated March 29, 2023, the defendants now seek the following orders:
 1. [Spent]
 2. That this Honourable court be pleased to issue a stay of execution of orders of the court in Kakamega ELC 73 of 2014 issued on January 17th 2023 and all consequential orders therefrom pending hearing and determination of the intended appeal.
 3. That this Honourable court be pleased to extend time for the applicant to file a notice of appeal in this matter.



4. That the notice of appeal attached herein be and hereby be deemed as duly filed.
 5. That such other orders be made as are just and expedient in the interest of justice.
 6. That costs of this application be provided for.
3. The application is supported by an affidavit sworn by the first defendant. The plaintiff opposed it through his replying affidavit sworn on April 3, 2023. Although an order was made that the application be canvassed through written submissions, only the applicants filed submissions.
 4. I have considered the application, the affidavits, and the submissions. The applicants seek extension of time to file a notice of appeal against the judgment and stay of execution of the judgment pending hearing and determination of the intended appeal.
 5. As noted earlier, judgment was delivered in this matter on January 17, 2023. In terms of Rule 75 of the Court of Appeal Rules, 2010, Notice of Appeal was to be lodged within fourteen days from January 17, 2023. In other words, by the end of the day on January 31, 2023.
 6. Section 7 of the *Appellate Jurisdiction Act* provides:

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: ...
 7. The guiding principles in an application such as the present one were identified by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR as follows:

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of 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 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; ...
 8. The present application was filed on March 29, 2023, about two months after the time for filing Notice of Appeal had lapsed. The applicants claim that they only became aware of the judgment when they



were served with eviction order dated February 17, 2023 and that they could not trace the advocate who was previously on record for them. In his replying affidavit, the plaintiff has confirmed that the decree was served upon the applicants on February 20, 2023.

9. In the circumstances of this case, a delay of two months is not inordinate, more so considering that the application was filed within the 90 (ninety) days stay that was given in the judgment. I will therefore grant extension of time to file a notice of appeal against the judgment.
10. The applicants also seek stay of execution pending appeal. This court's jurisdiction to grant stay of execution pending appeal is guided by Order 42 rule 6 (1) and (2) of the [Civil Procedure Rules, 2010](#) which provides as follows:

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.

(2) No order for stay of execution shall be made under sub rule (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.

11. The essence of the foregoing is that an applicant seeking stay of execution pending hearing and determination of an appeal must demonstrate that substantial loss will result to him if stay is not granted, and that the application has been made without unreasonable delay. As Platt Ag JA (as he then was) stated in [Kenya Shell Limited v Benjamin Karuga Kibiru & another](#) [1986] eKLR, substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted. Further, the applicant is required to give such security as the court may order for the due performance of the decree.
12. In the judgment delivered on 17th January 2023, the court ordered the defendants to vacate the parcel of land known as Kisa/Mundeku/633 within 90 (ninety) days from the date of delivery of the judgment and in default they be evicted. I have already found that there has been no inordinate delay in bringing the present application.
13. Whereas I appreciate that substantial loss may result to the applicants if they are evicted, their right of appeal must be balanced against the plaintiff's right to enjoy the fruits of his decree. To balance



the rights of the parties, I will impose timelines to motivate proactive compliance on the part of the defendants.

14. In view of the foregoing, I find merit in Notice of Motion dated March 29, 2023. I make the following orders:
- a. Time for the defendants to file Notice of Appeal in respect of the judgment delivered in this matter on January 17, 2023 is hereby extended.
 - b. The defendants to file and serve Notice of Appeal in respect of the judgment delivered in this matter on January 17, 2023 within 14 (fourteen) days from the date of delivery of this ruling. In default, Notice of Motion dated March 29, 2023 shall stand dismissed with costs to the plaintiff.
 - c. Upon the defendants timeously complying with (b) above, there shall be stay of execution of the judgment and decree herein pending hearing and determination of the defendants' appeal to the Court of Appeal.
 - d. The stay shall remain in force for a period of only 1 (one) year from the date of delivery of this ruling, unless otherwise extended in the appellate court.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF APRIL 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff

Mr Sunkule for the defendants

Court Assistant: E. Juma

