



**Homes World Properties Ltd & another v Abok (Environment and Land Appeal E020 of 2023) [2023] KEELC 16826 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16826 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E020 OF 2023**

**MD MWANGI, J  
APRIL 13, 2023**

**BETWEEN**

**HOMES WORLD PROPERTIES LTD ..... 1<sup>ST</sup> APPELLANT**

**STEPHEN MWANGI KANYI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**WYCLIFFE ABOK ..... RESPONDENT**

*(In respect of the Applicant's Notice of Motion application dated 28th February 2023 seeking leave to appeal and appeal and appeal out of time and an order of stay of execution of the ruling of the Magistrate's Court)*

**RULING**

**Background**

1. The applicant in this matter prays for several orders, namely:
  - a. Spent
  - b. That leave be granted to the Appellants to file the annexed appeal out of time.
  - c. That this Honourable Court grants leave to appeal and allow the annexed memorandum of appeal and the accompanying documents duly filed.
  - d. Spent
  - e. That pending the hearing and determination of the appeal, this Honourable Court be pleased to grant an order of stay of the ruling dated and delivered on January 25, 2023 and any consequential orders delivered by the Senior Resident Magistrate Hon. Lawrence Musiega Lilima at Milimani Commercial Magistrate Court in ELC 339 of 2022.



- f. That an order be issued setting aside the previous order releasing the goods to the Respondent pending the hearing and determination of this appeal.
  - g. That the memorandum of appeal filed herewith be adopted and be confirmed as duly filed in this Honourable Court.
  - h. That the costs of this application be in the cause.
2. The grounds upon which the application is based are on the face of the application and in the supporting affidavit of Stephen Mwangi Kanyi. The Applicant avers that at the time of delivery of the ruling by the Magistrate's court, he was away in India for medical treatment and only came back later in the month of February 2023, hence the delay in filing the appeal within the stipulated period.
  3. The application is opposed by the Respondent by way of a replying affidavit sworn on March 17, 2023. The deponent deposes that the Applicant unlawfully evicted him from the house where he was a tenant without notice or a court order. He denies that he vacated the suit premises on his own volition as alleged by the Applicant. He avers that in the pleadings before the Magistrate's court, the Applicant had admitted removing his property and household items out of the suit premises.
  4. The Respondent further avers that the Applicant had not engaged an auctioneer to levy distress and there is no reason to continue holding his household items.
  5. It's the Respondent's case that the ruling before the Magistrate court was delivered in the presence of Counsel for both parties. He therefore argues that the Applicants have not offered any reason, let alone a valid one, why the appeal has been filed out of time. He states that the Applicant, is undeserving of the court's discretion to extend time since he has not offered a valid justification.
  6. The Respondent further argues that the Applicant has not demonstrated the prejudice he stand to suffer if at all. Granting the orders sought will be extending the Applicant's unlawful and brazen act of evicting him from the suit premises.
  7. The Applicant filed further replying affidavit of March 29, 2023.

**Court's directions.**

8. The court's directions were that the application be canvassed by way of written submissions.

**Issues for determination.**

9. I am wholly in agreement with the Applicant's identification of the issues for determination in this matter as hereunder: -
  - A. Whether the Applicants are entitled to leave to file the appeal out of time.
  - B. Whether the Applicants are entitled to an order of stay of execution of the ruling delivered on January 25, 2023, in the Magistrate's Court.
  - C. Whether the Applicants are entitled to an order setting aside the previous order releasing the goods to the Respondent pending the hearing and determination of this appeal.
  - D. Who bears the costs of the application.



## Determination

### A. Whether the Applicants are entitled to leave to file the appeal out of time.

10. Section 79G of the *Civil Procedure Act* grants the court discretion to extend time within which an appeal may be filed if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.
11. The Supreme Court of Kenya in the case of *Mombasa County Government –Vs- Kenya Ferry Services & Another* (2019) eKLR reiterated its decision in the Nick Salat case concerning extension of time 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 the delay in making the application for extension (of time) and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant”
12. The Supreme Court went ahead to spell out the principles that the court should consider in exercising such discretion namely;
  - i. Extension of time is not a right of the party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
  - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis,
  - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
  - v. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
  - vi. Whether an application has been brought without undue delay; and
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration, for extending time.”
13. In this matter, the Applicant has explained that he was away in India for medical treatment occasioning the delay. The court further notes that the delay in this matter was for 3 days only. It is not inordinate delay.
14. One of the rights enshrined under the Constitution of this country is the right to a fair hearing. This right must include the right to be heard on appeal by a higher court where a party is dissatisfied with the decision of a court or tribunal of the first instance. I see no reason to deny the Applicant this right to appeal. I am satisfied with the explanation for the slight delay.
15. Accordingly, the Applicant is granted both the right to appeal as sought as well as leave to appeal out of time. The draft memorandum of appeal shall be deemed as duly filed upon payment of the assessed court filing fees in the next 7 days from the date of this ruling.



**B. Whether the Appellant is entitled to an order of stay of execution of the ruling of the Magistrate's Court pending the hearing and determination of the intended appeal.**

16. Grant of stay of execution pending appeal is provided for under Order 42 rule 6 of the *Civil Procedure Rules*. An Applicant for an order of stay of execution of a decree or an order pending appeal is obligated under Order 42 rule 6(2), to satisfy the following conditions, namely:
  - a. That substantial loss may result to the applicant unless the order is granted.
  - b. That the application has been made without unreasonable delay, and
  - c. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
17. In his submissions, the Applicant submits that he stands to suffer irreparable loss which cannot be compensated in damages should this court not grant him a stay of execution order as the present appeal will be rendered nugatory. I must point out that the Applicant's submissions on that aspect resonates more with the grant of an interlocutory injunction rather than a stay of execution pending appeal.
18. My understanding of the Applicant's case from my reading of his application and the memorandum of appeal is that he is holding the Respondent's household goods and personal documents as lien for alleged arrears of rent from the Respondent despite not having procedurally excised his right for rent under the law.
19. The remedy of distress for rent is available to a landlord under the *Distress for Rent Act*, in case of rent arrears. However, that does not seem to be the case here. In this matter, the Appellant/Applicant has not exercised the right of distress. The Applicant has not in any way explained the legal basis for his action of holding onto the Respondent's goods.
20. From the foregoing I don't find the substantial loss that the Applicant stands to suffer if the order for stay of execution is not granted without having establishing the legal basis for his action. This court is not convinced that the applicant is entitled to the orders sought; he has not satisfied the conditions under Order 42 rule 6 of the *Civil Procedure Rules*. The prayer for stay of execution is hereby declined.

**C. Whether the Applicants are entitled to an order of setting aside the previous order.**

21. This prayer in essence calls upon this court to determine the appeal summarily. It is the main ground in the memorandum of appeal by the Appellant. No justification has been offered for this prayer. I find no basis whatsoever in law for the grant of such an order at this stage. The court declines that prayer.

**D. Costs.**

22. Since the Applicant's application has partly succeeded on one part and partly failed on the other part, I find it appropriate to grant an order that the costs of the application be in the cause.

**Conclusion.**

23. Accordingly, the court makes the following orders: -
  - a. The Applicant is granted both the right to appeal as sought as well as leave to appeal out of time. The draft memorandum of appeal shall be deemed as duly filed upon payment of the assessed court filing fees in the next 7 days from the date of this ruling.
  - b. The prayer for stay of execution pending appeal is declined.



- c. The prayer to set aside the previous order (issued by the Magistrate's court) releasing the goods to the Respondent pending the hearing and determination of the appeal is declined.
- d. The costs of the application shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF APRIL 2023.**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Ms. Wasilwa for the Appellant/Applicants.

No appearance for Respondent.

Court Assistant – Yvette.

**M.D. MWANGI**

**JUDGE**

