



REPUBLIC OF KENYA



KENYA LAW
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**Owuor v Adar (Environment and Land Miscellaneous Application
E036 of 2022) [2023] KEELC 16777 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16777 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E036 OF 2022**

E ASATI, J

APRIL 13, 2023

BETWEEN

DANES DINGA OWUOR APPLICANT

AND

JOHN MAX ADAR RESPONDENT

*(An application to file an appeal out of time against the judgement
delivered on October 10, 2022 in Nyando PMC ELC No 33 of 2019
John Max Adwar v Joannes Dinga Owuor by Hon SO Temu SPM)*

RULING

Introduction

1. This ruling is in respect of the notice of motion application filed by Joannes Dinga Owuor, the applicant, pursuant to the provisions of sections 79G, 1A, 3A, and 63 of the [Civil Procedure Act](#) and Order 42 Rule 6 [Civil Procedure Rules, 2010](#). The application seeks for orders that;
 - a. The applicant be granted leave to file an appeal out of time against the judgement delivered on October 10, 2022 in Nyando PMC ELC No 33 of 2019 John Max Adwar v Joannes Dinga Owuor by Hon SO Temu SPM and consequently the Memorandum of appeal filed as E45 /2022 be deemed duly filed.
 - b. That upon granting prayers 1, 2, and 3 above there be stay of execution of the judgement delivered on October 10, 2022 in Nyando Pmc El Case No 33 of 2019 pending the hearing and determination of the appeal herein.
 - c. Costs of the application be provided for.
2. The grounds of the application are contained on the face of the Notice of Motion and in the Supporting Affidavit sworn by the applicant on December 18, 2022.



3. The application was opposed vide the averments contained in the Replying affidavit sworn by the applicant on January 11, 2023.
4. The application was canvassed by way of written submissions

The Applicant's Case

5. The case of the applicant is that he together with his counsel were not present in court when the judgement was delivered as they had no notice of the date of delivery of the judgement. That they came to learn of the delivery of the judgement on November 28, 2022, got a copy of the judgement and applied for proceedings for appeal purposes. That it is not true that he was in court when the judgement was read. That by the time he learnt of the judgement, the time for filing appeal had already expired. That he was aggrieved by the judgement and wishes to appeal on the grounds shown in the Memorandum of Appeal annexed to the application and filed in court as ELC Appeal No E45 of 2022. That the judgement is predicated upon complete misapprehension of the law by the trial court and that he believes the appeal has high chances of success. That the nature of the impugned judgement is that it makes a way for the applicant's eviction from land he has occupied with his family for a period of over 20 years. He therefore prays for leave to appeal out of time and to have the Memorandum of Appeal annexed to the application deemed as having been properly filed. He also prays for stay of execution of the judgement pending determination of the appeal.

The Respondent's Case

6. The Respondent's case is that the judgement was delivered on October 6, 2022 and not on October 10, 2022 as indicated in the application. That the application was filed after much delay and as an afterthought. That the applicant has not demonstrated substantial loss which he will incur if the order of stay is not granted. That the applicant has not provided any form of security for due performance as required by order 42 rule 6 (2) (b). That the application is frivolous and an abuse of the court process and should be dismissed with costs.
7. The Respondent submitted in the alternative that if the court finds merit in the application then the same be granted on condition that the Respondent's Bill of costs dated November 9, 2022 be assessed and the assessed costs be deposited in a joint interest earning account in the joint names of the Advocates on record as security for due performance pending hearing and determination of the appeal.

Determination

8. I have considered the application, the affidavits filed by the parties and the submissions made. As regards leave to appeal out of time, I am not convinced that the applicant was not aware of the delivery of the judgement until after expiry of the time for filing appeal. The Court record clearly shows that the judgement was delivered in open court in the presence of both parties and their Counsel on November 6, 2022. No reason has been given why the court would lie and record so. However, noting that the applicant has already filed the Memorandum of Appeal, albeit out of time, and that the Respondent has in his submissions indicated that the orders can be granted on condition that security be provided, I am inclined to grant the prayer.
9. As regards stay of execution of the judgement, there is no dispute that the parties herein were the parties in Nyando PMC ELC No 33 of 2019 in which judgement has already been delivered. A copy of the judgement annexed to Supporting Affidavit shows that among the orders made were an order of permanent injunction restraining the applicant from dealing in any way with the suit land and an order of eviction of the applicant from the suit land. The applicant states that he has been living on



the suit land with his wife and children for over 20 years. In my view there is sufficient cause to issue orders of stay of execution pending the hearing and determination of the appeal

10. I therefore allow the application and make the following orders:
- a. Leave is hereby granted to the applicant to file the appeal out of time. The Memorandum of Appeal filed as E45 of 2022 be deemed to have been properly filed within time.
 - b. There be stay of execution of the judgement pending hearing and determination of the appeal on condition that the applicant deposits security for due performance in the sum of Kshs 100,000/= in a joint interest earning account in the names of Counsel for the parties herein within 45 days hereof failing which the order of stay of execution will lapse.
 - c. Costs of the application to the Respondent.

Orders accordingly.

RULING DATED AND SIGNED AT KISUMU, DELIVERED VIRTUALLY THIS 13TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Neville - Court Assistant

No appearance for the Applicant

Chemoiyai for the Respondent

