



Murwithania & 3 others v M'ikiara & another (Both as the Legal Representative of M'ikiara Atuankure) (Miscellaneous Application E013 of 2023) [2023] KEELC 17723 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17723 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
MISCELLANEOUS APPLICATION E013 OF 2023**

CK NZILI, J

MAY 31, 2023

BETWEEN

**MARY KATHURE MURWITHANIA 1ST APPLICANT
HARRIET KINANU GUANTAI 2ND APPLICANT
JOHN MUTUMA MURWITHANIA 3RD APPLICANT
MOSES KINOTI MURWITHANIA 4TH APPLICANT**

AND

**MOSES KIMATHI M'IKIARA 1ST RESPONDENT
JOHN MURIUKI M'IKIARA 2ND RESPONDENT
BOTH AS THE LEGAL REPRESENTATIVE OF M'IKIARA ATUANKURE**

RULING

1. The application for determination is dated March 23, 2023, in which the court is asked to stay the orders issued on December 2, 2022 pending the hearing and determination of the intended appeal. The second prayer is for the court to grant leave for the applicants to file their appeal out of time. The reasons are contained on the face of the application and the supporting affidavit of Mary Kathure Murwithania on behalf of the other applicants sworn on March 23, 2023. She averred that she was born in 1963 in the suit premises where she resides to date. That following the judgment, the certified judgment was not ready for collection and remains undated and uncertified. That an eviction notice was served alongside the decree, they have attached the draft memorandum of appeal, copies of letters seeking proceedings and judgment requests for the perusal of the file, copy of the eviction notice, and the decree as annexures marked MK 1, 2(a) & (b), 3 and 4 (a) & (b) respectively. The application was served upon the respondent on March 28, 2023, and an affidavit was filed on 6.4.2023.



2. In written submissions dated April 26, 2023, the applicants observed that they were yet to be supplied with a certified copy of the judgment. On substantial loss, the applicants submitted that the suit land was likely to be alienated to third parties and hence be beyond their reach if the appeal was to succeed, which, as held in *Otieno James Ayuko vs Paul Osoo Warega & others* (2022) eKLR, was a demonstration of substantial loss. As to delay, the applicants submitted that the eviction notice was served on March 23, 2023, when certified copies of the judgment had not been supplied. Therefore, it was submitted that the delay and the reason are explained, which is attributable to the court. On security, the applicants submitted that they were willing to abide by any reasonable orders and conditions the court may direct to cushion the respondents. Reliance is placed on *Focin Motorcycle Co Ltd vs Ann Wambui & another* (2018) eKLR on the proposition that it is the court that determines security as well as *Arun C Sharma vs Ashana Raikundalia t/a Raikundlaia & Co Advocates and 2 others* (2014) eKLR that security is not aimed at punishing the judgment debtor but serves the purpose of binding the applicant since in a civil process, a judgment was like a debt. The court observed that to give security was a mark of good faith on the part of an applicant.
3. Mr. Muthomi, counsel for the respondent, submitted that judgment was delivered on December 2, 2022, while this application was filed after almost three months, which was too late in the days. Even though the respondent was given seven days to file a response, none was filed as of May 10, 2023.
4. To stay or not to stay execution of a decree falls under the discretion of the court upon compliance with the parameters set under Order 42 Rule 6 of the *Civil Procedure Rules* and Sections 1A, 1B & 3A *Civil Procedure Act* as read together with Article 159 of the *Constitution* on the overriding objective of the court to expeditious dispense substantive justice.
5. Regarding leave to file an appeal out of time, Section 79 G of the *Civil Procedure Act* provides that the court may admit an appeal out of time for good reasons and on such terms as it may find just.
6. In *Otieno James Ayuko vs Paul Osoo* (*supra*), the court cited with approval *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No 255 of 1997, that it was discretionary for the court to extend the time while considering the length of the delay, reasons for the delay, merits of the appeal and the degree of prejudice to the opposite party. Further, the court cited with approval *Ratman vs Kumarasny* (1964) 3 ALL ER 933, that the burden was on the party seeking indulgence to explain to the satisfaction of the court why the discretion should be exercised in his favor and if none, there will be no indulgence.
7. Again, the court cited with approval *Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet* (2018) eKLR, that even though in law there was no maximum or minimum period of delay, anyone seeking the relief must explain the cause of the delay.
8. Regarding the success of the intended appeal, the court cited with approval *KCB Ltd vs Nicholas Ombija* (2009) eKLR and *Stanley Kangethe vs Tony Ketter and 5 others* (2013) eKLR, that all that a party should do is to demonstrate arguability of the intended appeal but not to persuade the court on its probability of success, so long as held in *Bhagwanji Shah vs Jamndas and Co Ltd* (1959) EA 838, a party explains the nature of the judgment and the reasons for desiring the appeal.
9. In this application, the delay of 3 months is attributed to the failure of the registry to supply a typed and certified copy of the judgment. There are letters attached seeking the same from December 13, 2022 after payments were made on December 5, 2022. The decree was also signed on February 14, 2023.
10. In my view, the circumstances reflect that the applicants did all that they could but were delayed by the court registry. I find the delay sufficiently explained. The draft memorandum of appeal also raises some arguable points of law. The prejudice for not, according to the applicants, his absolute right of



appeal, as opposed to payment of costs to the respondent, would weigh more on the applicants than the respondents.

11. As to stay, the applicants have sufficiently demonstrated the irreparable loss and damage should the eviction occur before they ventilate their intended appeal. The applicant has also offered to post sufficient security for due satisfaction of the decree should the appeal not succeed. It is also in the interest of justice to preserve the substratum of the appeal.
12. Consequently, I grant leave for an appeal to be filed out of time. The same shall be filed and served within seven days from the date hereof. Equally an order of stay of execution is granted for six months pending the hearing and determination of the intended appeal. At the filing of the intended appeal, the applicant shall deposit Kshs 50,000/= security for costs and desist from making any new developments on the suit land pending the hearing and determination of the intended appeal.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 31ST DAY OF MAY 2023**

In presence of

C.A John Paul

Wambua for applicant

HON. CK NZILI

ELC JUDGE

