



Khamis & another v Khamisi & 4 others (Environment & Land Case 33 of 2018) [2023] KEELC 17403 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17403 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 33 OF 2018**

EK MAKORI, J

MAY 11, 2023

BETWEEN

THOMAS JERRY KHAMIS & ANOR PLAINTIFF

AND

AUSTIN SADALA KHAMISI 1ST DEFENDANT

CATHERINE WAITHIRA NDAMBIRI 2ND DEFENDANT

AGNES NYALE MWANGEMI 3RD DEFENDANT

JOSEPHINE MURINGO NDAMBIRI 4TH DEFENDANT

MERCY ROSELINE NDAMBIRI 5TH DEFENDANT

RULING

1. The applicants seek stay of execution of the judgment and or/ decree of this court dated 29th April 2020 - Olola J. In addition, all consequential orders/ proceedings be stayed pending the hearing of an intended appeal to the Court of Appeal, with costs. The application is opposed. The respondents have filed grounds of opposition and replying affidavit dated 5th October 2022 respectively.
2. The court directed that this matter be canvassed by way of written submissions.
3. This court - Olola J. delivered an ex parte judgment in favour of the respondents on 29th April 2020. An application to set aside the said judgment and reopen the proceedings was lodged on 28th July 2020. It was dismissed vide ruling dated 16th July 2021.
4. The applicants contend that they were dissatisfied with the judgment and ruling of this court and have lodged a stay application in the Court of Appeal and the application seeking extension of time within which to appeal to the Court of Appeal.



5. The applicants submits that the effect of the ex parte judgment and dismissal of application to set aside the ex parte judgment effectively gave way for the execution of the orders of this court that is that - Plot No 9106 (Orig. No 7748/2) CR No 65403 Mombasa North 111 Mainland North, Plot No 9105 (Orig. No 7748/1) CR No 65402 Mombasa Section 111 Mainland North and, Plot No 9107 (Orig. No 7748/3) CR No 65404 Mombasa Section 111 Mainland North the titles were to be revoked and the Registrar of Lands Mombasa to register the same in the names of the plaintiffs/respondents herein.
6. The application for extension of time within which to appeal to the Court of Appeal and the appeal itself, have already been lodged as per the annexures CWN-9 and CWN-2 Civil Application No 4 of 2022 and Appeal No 4 of 2022 respectively.
7. The applicants submit that the governing principles on grant of stay pending appeal to the Court of Appeal are as stipulated under Order 22 Rule 22 *Civil Procedure Rules* and Order 42 Rule 6 of the *Civil Procedure Rules* and as enunciated in the decisions in *Elena Korir v Kenyatta University* [2012] eKLR, and *Butt v Rent Restriction Tribunal* [1982] KLR 417 -
 - a) Substantial loss may result to the applicants unless the order is made,
 - b) The application has been made without unreasonable delay, and
 - c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicants has been given by the applicants.
8. The reasons for the delay in filing a timeous appeal has been explained by the applicants to be that they were unaware of the delivery of the ruling of this court dated 16th July 2021 as neither the court nor counsel who was representing them relay the same. It is further stated the former lawyer for the applicants failed to release the file to the incoming lawyer in good time.
9. The applicants contends that pursuant to Article 159 of the *Constitution* and to promote justice this court ought to extend time within which to appeal.
10. The applicants aver that they are not ready and willing to provide security, that imposing a condition such as the provision of security to the tune of Kshs 1,118,819/- being the decretal sum and collected rent from tenants on the suit premises to be deposited in a joint earning account of the advocates for the parties herein will be too draconian in these hard economic times, but that the title to this property be deposited in this court as security.
11. The applicants submit that there is an arguable appeal with probabilities of success and that if no stay is granted; the appeal will be rendered nugatory since the suit property would have been lost. The applicants urge the court to exercise its discretion and grant the orders sought.
12. The respondents contend that there is no Notice of Appeal yet as required by law. It is not a guarantee that the Court of Appeal will allow the extension sought. The decision in *Sparkle Properties Ltd v Johana Ngai & 9 others* [2020] eKLR is cited.
13. Further, that the threshold for the grant of stay pending appeal has not been met as laid in Order 42 Rule 6 of the Civil Procedure Rules. The applicant are accused by the respondent of laches and delays in filing the intended appeal timeously. The impugned judgment by this court was delivered on 29th April 2021 while the ruling was delivered on 16th July 2021, respectively. The current application was filed on 27th June 2022 - a period of about 2 years upon delivery of judgment and 1 year upon delivery of ruling respectively. The grounds of indolence on part of former counsel does not add up. Besides, the respondent contends that the impugned ruling addressed the issue of delays and laches by the applicants in the defence of their case before this court.



14. The respondent relied on the case of *Duncan Githiga Mwangi v Kanu Maendeleo ya Wanawake Muranga Brach* [2021] eKLR in stating that the applicants have not come to court with clean hands and have not disclosed all the facts relevant in this matter.
15. The respondent thinks that the applicants will not suffer any irreparable loss. It has not been demonstrated. And that since there is no valid Notice of Appeal in the Superior Court, it will be futile to issue the orders sought in this application as enunciated in the case of *James Mbatia Thuo & Empanus Mwangi v Kenya Railways & AG* [2018] eKLR.
16. The respondent submits that for stay to be issued in this matter, as per the requirements of Order 42 Rule (6) of the *Civil Procedure Rules*, security has to be provided but that the applicants in paragraph 18 of the supplementary affidavit, do not wish to deposit the decretal sum of Kshs 1,118,819/- the same according to them, is astronomical in this hard economic times. It is the respondent's view that no such stay should be grant as held in the case of *Charles Mwaniki v Coastal Kenya Enterprises Limited* [2017] eKLR, where failure to provide security was fatal to an applicant seeking stay pending appeal
17. The issues which spring from the foregoing for this court's determination is whether stay should be granted under the circumstances and who should bear costs of the current application.
18. On whether to grant stay, this court has been referred to the provisions of the *Civil Procedure Rules* and several authorities as to the principles applicable in grant of stay pending appeal. In *James Wangalwa & another v Agnes Nakiaka Cheseto* [2012] eKLR Gikonyo J. held as follows:

“The granting of stay of execution pending appeal by the High Court is governed by Under Order 42 Rule 6 of the *Civil Procedure Rules*. It is grantable at the discretion of the court on sufficient cause being established by the applicant. The incidence of the legal burden of proof on matters which the applicant must prove lies with the Applicant. See the *Halsbury's Law of England*, vol.17, paragraph 14:

14. Incidence of the legal burden in respect of a particular allegation, the burden lies upon the party for whom the substantiation of the particular allegation is an essential of his case.

Sufficient cause being a technical as well as legal requirement will depend entirely on the Applicant satisfying the court that:

- a) Substantial loss may result to the applicant unless the order is made,
- b) The application has been made without unreasonable delay, and
- c) Such security as the court orders for the due due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.”

19. The principles as restated in the above authority, which I hereby reaffirm, have been echoed by this court in several other authorities, which I need not cite.
20. The applicants contend that they will suffer substantial loss if no stay orders are granted. From the record, this matter involves both immovable and monetary claims. If the subdivisions of the suit properties happen, obviously the applicants may loss out if the same is passed to third parties.
21. However, substantial loss is not the only condition to meet before stay is granted. There is the element of delay which has to be explained. The impugned judgment and ruling by this court were delivered on



29th April 2021 and on 16th July 2021, respectively. The current application was filed on 27th June 2022 - a period of about 2 years upon delivery of judgment and 1 year upon delivery of ruling respectively. The delay is said to have been occasioned by former counsel who was not keen to pass information to his clients and ‘holding on’ the clients’ file and negating to pass it on to the current firm of advocates.

22. But a clear view of the history of the matter even during trial is telling as captured by Olola J. in dismissing the application to set aside the ex parte judgment herein dated 16th July 2021 as he observed as follows:

“The defendants had filed their Statement of Defence on 13th April 2018 and under the provisions of Order 7 Rule 5 of the *Civil Procedure Rules*, they were required to file statements and list of documents at the same time, concurrently and or within at least 15 days before the pre-trial conference. No reason has been given why this was not done as the previous advocate from their own annexures is said to have become unwell in November 2018 some 7 months later.

16. It follows therefore that the Defendants were aware of the suit and their failure to testify herein was out of their own lack of diligence and failure to furnish the court with the documents and statements they wished to rely on. Their conduct was reminiscent with that of a party who was out to deliberately mislead the court and delay the trial and the cause of justice

17. A party whose conduct discloses an intention to obstruct justice or delay court proceedings and take the court’s directions for disposal of a suit in a casual manner cannot expect the court to exercise its discretion in their favour”

23. The explanations for the delay in filing the current application and the intention to file an appeal to the Court of Appeal and seek enlargement of time to appeal out of time still hinges on the same reason – the conduct of their former lawyer who failed to inform them of the negative orders from this court.

24. As of now, it is not clear whether the Court of Appeal will extend the time within which to file an appeal. Strictly speaking, we have no appeal yet in the four corners to ponder whether to grant stay or not. This court will not speculate the outcome of that application for extension of time pending in the Superior Court. It is still moot.

25. No satisfactory grounds have been put across for the delay in bringing up the current application. The reasons placed forward remain the same as those Olola J. frowned on - unconvincing and reminiscent of parties meant to delay or obstruct justice.

26. On security, in their own words, the applicants are not ready to place any monetary security choosing the soft part of having the title documents subject of this suit placed as security in this court until the intended appeal is heard and determined. I need not address that limb in view of the applicants’ stand that is not on their aid.

27. The upshot is that application dated 27th of June 2022 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 11TH DAY OF MAY 2023.

E. K. MAKORI

JUDGE

In the presence of:-



M/s Mulemia holding brief for Mr. Nyongesa for the Plaintiff/Respondent

Court Clerk: Happy

In the absence of: -

Ms Kilonzo Aziz for the Defendants

