



Macharia v Kariuki & another (Environment & Land Miscellaneous Case E017 of 2022) [2023] KEELC 17274 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17274 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND MISCELLANEOUS CASE E017 OF 2022**

YM ANGIMA, J

MAY 11, 2023

BETWEEN

PETER KANIA MACHARIA APPLICANT

AND

MARGARET WANJIRU KARIUKI 1ST RESPONDENT

PETER NJOROGE 2ND RESPONDENT

RULING

A. The Applicant's Application

1. By a notice of motion dated 09.12.2022 brought under Section 1A, 1B, 3A of the *Civil Procedure Act* Cap. 21 of the Laws of Kenya, Order 9 Rule 9, Order 42 Rule 6 of the *Civil Procedure Rules*, 2010, (the Rules), Article 40 of *the Constitution* of Kenya, 2010 and all other enabling provisions of the law the Applicant sought, inter alia, leave of court to file an appeal out of time and a stay of execution of the judgment and decree of the Hon. S.N. Mwangi (SRM) dated 16.09.2022 in Nyahururu MC ELC No. 306 of 2018 – Peter Kania Macharia –vs- Margaret Wanjiru Kariuki & Another pending the lodging, hearing and determination of his intended appeal.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Applicant, Peter Kania Macharia, on 09.12.2022 and the supplementary affidavit sworn on 23.02.2023. The Applicant stated that he was aggrieved by the judgment and decree of the trial court and that he intended to lodge an appeal against the same to this court. He contended that his title deed for Parcel No. 2457 stood the risk of being cancelled and that he stood the risk of being evicted therefrom. He further contended that he stood to suffer substantial loss in the absence of a stay of execution since he had invested heavily on the property. The Applicant further stated that the delay in filing his appeal within the prescribed period was due to the fact that he had to change advocates after judgment.



B. The Respondents' Response

3. The Respondents filed a replying affidavit by the 2nd Respondent, Peter Njoroge, on 09.01.2023 in opposition to both the application for leave to file an appeal out of time and the application for stay. The Respondents stated that they had not extracted the decree and neither had they taken any steps to execute hence there was no risk of eviction as claimed by the Applicant.
4. It was contended that the Applicant had not demonstrated that he shall suffer substantial loss in the absence of a stay and that he had not indicated what security shall be offered for due performance of the decree should the intended appeal ultimately fail. The Respondents urged the court to balance their rights as successful litigants against the Applicant's right of appeal and dismiss the application with costs.

C. The Directions on Submissions

5. When the application was listed for inter partes hearing, it was directed that it shall be canvassed through written submissions. Consequently, the parties were given timelines within which to file and exchange their submissions. The record shows that the Applicant's submissions were filed on 27.02.2023 whereas the Respondents' submissions were not on record by the time of preparation of the ruling.

D. The Issues for determination

6. The court has perused the Applicant's notice of motion dated 09.12.2022 together with the supporting affidavit, the Respondents' replying affidavit in opposition thereto as well as the Applicant's supplementary affidavit. The court is of the opinion that the following issues arise for determination:
 - a. Whether the Applicant has made out a case for leave to file an appeal out of time.
 - b. Whether the Applicant has made out a case for stay of execution pending appeal.
 - c. Who shall bear costs of the application.

E. Analysis and Determination

a. Whether the Applicant has made out a case for leave to file an appeal out of time

7. The court has considered the material and submissions on record on this issue. The Applicant submitted that it had satisfied the principles for extension of time to lodge its intended appeal out of time. It was submitted that the delay in filing the instant application was not inordinate and that the delay had been satisfactorily explained.
8. The Applicant contended that in addition to the delay occasioned by the change of advocates, he had also received a copy of the judgment of the trial court just a few days before expiry of the deadline for lodging an appeal and that he received certified copies of the proceedings of the trial court after the prescribed period for filing an appeal. The Applicant relied, inter alia, upon the cases of *Joseph Nduati & 2 others -vs- County Government of Nairobi & 2 others* [2021] eKLR and *Leo Sila Mutiso -vs- Rose Helen Wangari Mwangi* [1999] 2 EA 231 and urged the court to allow the application.
9. In the *Leo Sila Mutiso* Case (supra) it was held, inter alia, by the Court Appeal that:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court



takes into account in deciding whether to grant an extension of time are: First, the length of delay, second, the reason for the delay; third (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted.”

10. The court has considered the material on record against the factors to be considered in an application for extension of time. The court has noted that the period of delay was about 3 months. The court has also considered the explanation for the delay. The explanation is not entirely satisfactory but it can do for purposes of the instant application. It is trite law that a litigant does not require a certified copy of proceedings and judgment of the trial court in order to lodge an appeal. Order 42 rule 1 of the Rules simply requires the filing of a memorandum of appeal. A certified copy of the decree can be filed later. It is also not clear why the Applicant could not have lodged his appeal immediately after judgment and then effect a change of advocates later.
11. This court doesn't have to consider whether or not the intended appeal has reasonable prospects of success at this juncture as long as the same is not plainly frivolous. There is no evidence on record to demonstrate that the Respondents shall suffer any significant prejudice by the late filing which cannot be compensated by an award of costs. In the result, the court is inclined to allow the Applicant's prayer for extension of time taking into account the circumstances of this case.

b. Whether the Applicant has made out a case for the grant of a stay pending appeal

12. The court has considered the material and submissions on record on this issue. The Applicant submitted that he had satisfied the requirements for the grant of a stay pending appeal and cited several authorities in support of his submissions. The court is, however, not inclined to consider the merits of the application at this juncture for at least two reasons. First, the court is of the opinion that it would be premature to consider the application under Order 42 rule 6(2) of the Rules since no appeal has been filed by the Applicant thus far. He has just been granted such leave and he is yet to file and pay for the memorandum of appeal envisaged under Order 42 rule 1 of the Rules. Second, the only file which is available to the court is the Miscellaneous File which was opened for the purpose of the application for leave. The court is of the opinion that an application for stay pending appeal under Order 42 of the Rules can only be competently handled in an ELC appeal file properly designated as ELCA. Consequently, the Applicant shall be granted an opportunity to file his application in the appropriate file for hearing on merit.

c. Who shall bear costs of the application

13. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. It is evident from the nature of the application for leave to file an appeal out of time that the default to lodge it within the prescribed period squarely lies with the Applicant. Accordingly, the court is of the opinion that the Applicant shall bear costs of the application for leave to lodge his intended appeal out of time.

F. Conclusion and Disposal Orders

14. The upshot of the foregoing is that the court finds merit in the application for leave to lodge an appeal out of time. However, the court finds that the application for stay of execution pending appeal was



prematurely and irregularly filed in the ELC Miscellaneous file instead of an ELCA file. Accordingly, the court makes the following orders for disposal of the matter:

- a. Leave be and is hereby granted to the Applicant to file his intended appeal out of time.
- b. The Applicant shall file his intended appeal in an ELCA file within 7 days from the date hereof in default of which the leave granted shall lapse.
- c. The Applicant shall be at liberty to file his application for stay pending appeal in the ELCA file upon filing his appeal.
- d. The Applicant shall bear the costs of the application for leave to appeal out of time.

Orders accordingly.

RULING DATED AND SIGNED AND DELIVERED AT NYAHURURU THIS 11TH DAY OF MAY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Mwereru holding brief for Mr. Gitonga for the Applicant

N/A for the Respondents

C/A - Carol

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Y. M. ANGIMA

JUDGE

