



**Cheruiyot v Ruto (Environment and Land Miscellaneous Application
E012 of 2022) [2023] KEELC 18365 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18365 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E012 OF 2022**

MC OUNDO, J

JUNE 15, 2023

BETWEEN

WILLIAM KIPROTICH CHERUIYOT APPLICANT

AND

JOHN KIPGNETICH RUTO RESPONDENT

RULING

1. Pursuant to a Judgment delivered by the Bomet Magistrates' Court on the October 27, 2021 in Civil Suit No 56 of 2018, the Applicant has now filed the present Application by way of a Notice of Motion dated July 5, 2022 under the provisions of Order 51 and 42 Rule 6 of the *Civil Procedure Rules*, Article 159(2)(d) of the *Constitution*, Section 1A, B, and 3A, of the Civil Procedure Rules where he seeks for orders of stay of execution of the Judgment pending the hearing and determination of an intended Appeal, as well as leave to Appeal out of time.
2. The application is supported on the ground therein as well as on the Supporting Affidavit sworn by the Applicant dated July 5, 2022 to the effect that pursuant to the passing of the judgment by the trial Magistrates' court, the Applicant filed his Notice of Appeal on November 12, 2021 which was within the 30 days stipulated period. Subsequently he had asked for and paid for the typed proceedings as per the annexed invoice. In the meantime the Respondent proceeded to extract a Decree dated November 22, 2021 and instructed auctioneers to commence execution. That he had received the certified copy of the proceeding on January 13, 2022 wherein he had proceeded to file an application for stay orders in the same court and which application had been denied vide a ruling dated February 16, 2022. He then filed a Miscellaneous Application No 17 of 2022 before the Bomet High Court seeking leave to file an appeal out of time. The application was also dismissed via a ruling of June 28, 2022 for lack of jurisdiction and the court had directed parties to file their application before the Environment and Land Court, Kericho. That no party stood to be prejudiced were his application allowed and he was willing to abide by any condition granted by the court pursuant to his application.



3. The application was opposed by the Respondent's Replying Affidavit dated August 19, 2022 in which he deponed that the same was not merited as there had been no plausible explanation as to why the Applicant had taken six months to regularize the intended appellate process having received the invoice for payment of the typed proceedings on November 6, 2022 and having delayed payment until the November 12, 2022 wherein he never bothered to obtain a certificate of delay.
4. Further reasons were that the application was a fishing expedition, there was no good and sufficient cause for not filing the appeal within 30 days as stipulated by the law, the Applicant had always applied tactics to prolong the matter by filing application upon application even in a court that had no jurisdiction. That the matter had been litigated for a period of four years and the Respondent stood to suffer great prejudice if the extension was granted. That the application ought to be dismissed with costs.
5. By an order of October 25, 2022, the application was disposed of by way of written submissions to which the Applicant framed their issues for determination as follows;
 - i. Whether this court has jurisdiction to allow an appeal out of time.
 - ii. Whether this court has jurisdiction to grant orders of stay of execution.
6. The Applicant then proceeded to submit on the first issue for determination that indeed the court had jurisdiction to allow an appeal out of time so as to further the cause of justice and to ensure under the rules of natural justice that substantive justice was delivered to a deserving litigant as is stipulated under the provisions of Articles 47(1) and 159(2) of the *Constitution*.
7. That he had filed a notice of appeal on November 12, 2021 in anticipation of an appeal and had promptly made payments of the typed proceedings in preparation of the appeal indicating that he was a keen litigant.
8. That the Notice of Appeal was intended to give sufficient notice of the Appellant's desire to file the appeal as he awaited for the typed proceedings and judgment. That payment had been made within the stipulated 30 days.
9. Reliance was placed in the decision in the case of *Patricia Cherotich Sawe vs IEBC & 4 Others [2015]eKLR* to submit that the court should take cognizance of the necessary steps taken by the Applicant with the intention of filing this appeal and in compliance with the provisions of Section 79G of the *Civil Procedure Act*.
10. That the typed proceedings had only been availed to him on the January 13, 2022 as evidenced in the annexure marked as 'WKC 6' of the Appellant's supporting affidavit, which was way beyond the 30 days period stipulated in law to file an appeal. Reliance was also placed on the decision in *Edith Gichungu Koine vs Stephen Njagi Thoithi [2014]eKLR*.
11. That he had filed an application on the February 9, 2022 before the Chief Magistrates' court in Bomet seeking, to stay any form of execution pending his intended appeal, which application the court had declined vide its ruling of March 16, 2022. The Applicant relied on the decision in *Kamlesh Mansukhalal Damki Patni vs Director of Public Prosecutions & 3 Others [2015] eKLR* to submit that despite having been denied stay orders at the Magistrates' court at Bomet, he without clear advice from the registry as to where appeal matters involving land sale agreements and land disputes were to be heard at the Bomet court station, had been instructed to promptly file a Miscellaneous Application No 17 of 2022 at the High Court at Bomet as there wasn't an Environment and Land Court at Bomet.



12. The Application had subsequently been dismissed vide the Bomet High Court ruling of June 28, 2022 wherein the Applicant had been directed to pursue their case at the Environment and Land Court at Kericho for which he filed the current application nine months after the impugned judgment of October 27, 2021 had been delivered and by then he was out of time to appeal.
13. That the Applicant had attached a draft Memorandum of Appeal marked as 'WKC 4' in his supporting affidavit which Memorandum raised triable issues that were weighty and ought to be given the necessary consideration by granting him leave to file his appeal out of time in order that he gets an opportunity to be heard on merit as was held in the case of *Richard Ncharpi Leiyagu vs Independent Electoral Boundaries Commission & 2 others [2013] eKLR*.
14. On the second issue for determination on whether the court had jurisdiction to grant the orders of stay of execution, it was the Applicant's submission that the law was clear that where an Applicant intended to exercise his undoubted right of appeal, and in the event it were eventually to succeed, he should not be faced with a situation in which he would find himself unable to get back his money. That the Respondent, who had a decree in his favour should not, if the Applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree.
15. That the Respondent had proceeded to instruct auctioneers to commence execution but was not successful owing to the fact that the Appellant at the time was a Mau forest evictee who was attempting to settle down having been evicted from Sogoo area within the Maasai Mau forest in Narok, by the Government in its attempt to conserve the Mau forest water catchment area.
16. That as was held in *RWW vs EKW [2019] eKLR*, the purpose of a stay of execution order pending appeal, was to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. That whereas the Respondent was entitled to realize the fruits of his judgment, the Applicant equally had a right to preserve the subject matter of the intended execution. His contention was that the stay of execution ought to issue in his favour to enable him file his appeal as he enjoys the peace of mind he desperately required in his attempt to start life afresh in Salгаа area of Nakuru County. That being granted the leave to file an appeal out of time would not occasion any injustice to the Respondent herein.

Respondent's written submissions.

17. In response and in opposition to the Applicant's application, the Respondent framed their issues for determination as follows;
 - i. Whether the Applicant demonstrated due diligence in observance of timelines set in law for filing appellate process;
 - ii. Whether the grant of relief shall occasion the Respondent prejudice;
 - iii. Whether the intended appeal is meritorious and/or arguable;
18. He then proceeded to submit on the first issue for determination that the Applicant had all along been exhibiting a high level of indolence during entire litigation process by cleverly placing delaying tactics at every stage. That the Principal Magistrate in Bomet having delivered judgment on October 27, 2021, the Applicant filed his Notice of Appeal on November 12, 2021 and choose not to file a substantive memorandum of appeal. That he had applied for typed copies of proceedings and an invoice for payment was subsequently generated on November 6, 2021 which was not paid until the November 12, 2021, which was six days later.



19. That the Applicant had neither informed the Court as to when the proceedings were made available to them nor bothered to secure a Certificate of delay when it became apparent that the certified copies of proceedings could take long to be availed. That his conduct did not paint a picture of a litigant who had been keen on pursuing an appellate process.
20. That no sufficient reasons had been given by the Applicant as to why it had taken him close to 9 months to seek the indulgence of the Court. The Respondent relied on the decision in the case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission (sic) to submit that the Supreme Court of Kenya had held that an extension of time was not a right of a party as it was an equitable remedy only available to a deserving party at the discretion of the Court.
21. That the Applicant was obligated to strictly follow the 30 days period stipulated by law in filing of his appellate process but despite having the benefit of a Counsel, choose not abide by the practice of the Court. That the delay of un-explained nine (9) months was inexcusable and he did not deserve the discretion of the Court. That the Application was an afterthought and an abuse of Court process.
22. On whether the grant of relief shall occasion the Respondent prejudice, it was his submission that having sold his entire inheritance in the hope finding greener pastures, he fell into the Applicant's trap and had been surviving at the mercy of well-wishers. That the Applicant had chosen to frustrate him from enjoying the fruits of justice by filing numerous application and therefore he stood to suffer a great degree of prejudice if the orders were to issue as they would have the effect of prolonging the litigation which had span over 5 years to date.
23. On the last issue as to whether the intended appeal was meritorious and or arguable, the Respondent submitted that the Applicant's draft Memorandum of Appeal was a mere frivolity, not meritorious and raised no prima facie issues. That he had failed to demonstrate to the court that the intended appeal was arguable and in the circumstances the same fell short of the parameters within which the Court could exercise its discretionary powers. That the Court should exercise its unfettered discretion and find the same unmeritorious and an abuse of Court process and thereafter dismiss it with cost.

Determination.

24. I have considered, the Applicants' Application and the supporting affidavit as well as the Respondent's response, the written submissions of both parties as well as the authorities' herein cited. The judgment and decree sought to be stayed herein was delivered on the October 27, 2021 by the Magistrates' Court at Bomet in Bomet PMCC No 56 of 2018 wherein the Applicant being dissatisfied with the same has now filed the present Application by way of a Notice of Motion dated July 5, 2022 (which is about 9 months later) seeking stay of execution of the said judgment and Decree as well as for an extension of time to file his appeal.
25. I find two issues for determination arising therein namely:
 - i. Whether the court should enlarge time to enable the Applicant file his Appeal after the expiry of the statutory period.
 - ii. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
 - iii. What orders this Court should make.
26. Section 79G of the *Civil Procedure Act* which gives an appellate court discretion to extend time for filing an Appeal from the subordinate Court to the High Court.(read Land and Environment Court) stipulates as follows;



‘Every Appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order Appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order:

Provided that an Appeal may be admitted out of time if the Appellant satisfies the court that he had good and sufficient cause for not filing the Appeal in time.’

27. In the case of *Nicholas Kiptoo Arap Korir Salat vs The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR* the court held that:

‘It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the Applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the Applicant.

We derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
 1. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
 1. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to- case basis;
 1. Where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 1. Whether there will be any prejudice suffered by the Respondent, if extension is granted;
 1. Whether the application has been brought without undue delay; and
 1. Whether in certain cases, like election petitions, public interest should be a consideration for extending time’

28. Has the Applicant herein fulfilled the above requirements so as to be granted leave to file his Appeal out of time?

29. The gist of the matter in question is that Judgment in the trial court was delivered on the October 27, 2021, the Applicant has now filed the present application dated July 5, 2022 seeking to file his Appeal out of time so as to stay execution of the decree arising from the Judgment.

30. The extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court. The Applicant’s submissions/explanation was that he was unable to file his Appeal on time because pursuant to the delivery of the judgment on October 27,



2021, he had filed a Notice of Appeal on November 12, 2021 in the Bomet High Court in anticipation of an appeal and promptly made payments of the typed proceedings. That in the meantime, the Respondent had proceeded to extract a Decree dated November 22, 2021 and instructed auctioneers to commence execution. That subsequently, he filed an application in the trial court dated the February 9, 2022 wherein he had sought to stay execution pending his intended appeal. Vide a ruling of March 16, 2022, his application had been declined. He then filed a Miscellaneous application No 17 of 2022 at the High Court at Bomet because there was no Court for environment and land matters in Bomet. This subsequent application was also dismissed vide the Bomet High Court ruling of June 28, 2022 wherein he had been directed to pursue his case at the Environment and Land Court at Kericho and this was nine months after the impugned judgment of October 27, 2021 had been delivered. That he was out of time to appeal.

31. That the typed proceedings had only been availed to him on the January 13, 2022 which was way beyond the 30 days period stipulated in law to file an appeal. That his appeal raises triable issues as per his draft Memorandum of Appeal and it ought to be given the necessary consideration by granting him leave to file his appeal out of time so that he could get an opportunity to be heard on merit.
32. I have further taken into consideration the fact that this was an alleged land sale agreement where money had exchanged hands but which agreement did not go through and none of the parties were/or are in possession/occupation of the suit land No CIS Mara/ Olulunga/11201. The Respondent in my view has not demonstrated the kind of prejudice, if any he would suffer if the application was allowed keeping in mind that he had sought (in his Complaint) for specific performance and in the alternative a return of the purchase price of the suit land.
33. Having considered the Application, the supporting affidavit and the submissions hereto, I find that a plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary favour. There has been a valid and clear reason, upon which discretion can be favorably exercised in the present circumstance and in the upshot, the Application for enlargement of time to enable the Applicant file his Appeal after the expiry of the statutory period is herein allowed the interim orders of status quo herein granted on the October 20, 2022 shall remain in force pending the hearing and determination of the Appeal.
34. Further directions are that;
 - i. The time within which the Applicant should file his Appeal is extended by forty-five (45) days from the date of this ruling.
 - ii. If the Applicant has not been supplied with the documents required to prepare the record of Appeal, the Applicant's Counsel to liaise with the Deputy Registrar and ensure that the same are supplied to him within fifteen (15) days of this order.
 - iii. Should the Applicant not file the Appeal within the time stipulated in (i) above, the window granted to file the Appeal as well as the interim orders shall automatically lapse.
 - iv. The Applicant shall bear the costs of this Application
- 35 Orders accordingly.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 15TH DAY OF JUNE 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

