



**Kirimania v Nguthari (Miscellaneous Application 18 of 2023)
[2023] KEELC 19234 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19234 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
MISCELLANEOUS APPLICATION 18 OF 2023**

CK NZILI, J

JULY 26, 2023

BETWEEN

JOHN GATOBU KIRIMANIA APPLICANT

AND

JACKSON GITONGA NGUTHARI RESPONDENT

RULING

1. Through an application dated May 10, 2023, the applicant seeks for stay of execution of the judgment or decree issued by the trial court on December 14, 2022 and for leave to appeal against the judgment out of time. The application is supported by the grounds and a supporting affidavit of John Gatobu Kirimania sworn on May 18, 2023. The applicant avers that his suit for breach of a sale agreement was dismissed and an order made for him to transfer LR No Nyaki/Giaki/Kiburine/604 to the respondent within 60 days from the date of the judgment. Further, he states that the respondent was ordered to pay him Kshs 50,000/= within 7 days of the transfer.
2. The applicant further avers that he only received the typed judgment on May 4, 2023. He, therefore, blames the inordinate delay on the court registry at the lower court and urges the court to stay the execution of the decree issued on December 14, 2022, otherwise, his appeal which has merits shall become nugatory and the substratum of the appeal affected.
3. The respondent opposes the application by a replying affidavit sworn by Jackson Gitonga Nguthari on May 25, 2023 on the basis that it is a non-starter, unmerited, an abuse of court process, filed after an inordinate delay which has not been explained.
4. Further, the respondent avers that the supporting affidavit was replete with falsehoods he stands to be prejudiced and the intended appeal is devoid of merits. Additionally, the respondent avers that he has been in occupation of the suit premises since 2004 and that the applicant only wants to frustrate his peaceful use and occupation of the suit land. On the aspect of security, the respondent avers that none



has been offered, he should not be denied the fruits of his judgment and that the lawyers on record lack the capacity to represent the applicant.

5. In written submissions dated June 27, 2023, the applicant submitted that he was entitled to an extension of time since an explanation for the delay has been sufficiently made, his intended appeal was meritorious and that the court has the discretion to grant the orders sought. To this end, the applicant relies on Section 79 G of the Civil Procedure Act, *First American Bank of (K) vs Gulab Shah and others* NRB HCC No 255 of 2000 (2003) 1 EA 65, *Kamlesh M Pattni vs DPP & others* (2015) eKLR, *Stanley Kangethe Kinyanjui vs Tony Keter & others* (2013) eKLR and *Mbukoni Services Ltd & another vs Mutinda Reuben Nzili & 2 others* (2021) eKLR.
6. On stay of execution, the applicant submitted that he had met the ingredients under order 42 rule 6 (2) Civil Procedure Rules. Reliance was placed on *Stanley Kiplagat Rono & another vs William Kiprotich Cherus* (2021) eKLR, *RWW vs EKW* (2019) eKLR, *Machira T/A Machira & Co advocates EA Standard No 2* (2002) KLR 63, *Lenah D Korir vs KU* (2012) eKLR and *Nduhiu Gitabi & another vs Ann Wambui Warugongo* (1988) 2 KAR. Section 79 G of the Civil Procedure Act provides that a court may admit the filing of an appeal out of time where there is a just cause or reason to do so.
7. In the case of *First American Bank of Kenya vs Gulap* (*supra*), the court observed that there must be an explanation of the delay and arguable points of the intended appeal and that the court's discretion was unfettered.
8. In *Stanley Kangethe vs Tony Keter* (*supra*), the court termed an arguable appeal as one which need not succeed, but which should be dealt with by the court.
9. What amounts to an inordinate delay and an explanation for the same depends on the circumstances of each case. In *Mbukoni Services Ltd* (*supra*), the court cited with approval *Lena Korir vs KU* (*supra*), that the decision whether to grant or not to grant leave to appeal out of time was discretionary.
10. In *Nicholas Arap Salat vs IEBC* (2014) eKLR, the court laid down the considerations as inter alia that extension of time was a creature of equity, enjoyed by he who acts equitably and that a party must lay basis, why the court should extend it.
11. In this application the applicant blames the lower court registry for the delay of over six months. The letters seeking for the typed judgment and proceedings have not been attached. As to when the lower court judgment or proceedings were finalized for collection and ready has not been indicated. If the applicant paid for the same and when such payments were done has not been demonstrated.
12. On the aspect of stay, the applicant knew that there was a window of 60 days, due to expire on February 14, 2023. He nevertheless delayed in applying for a stay of execution contrary to the holding in *Lena D Korir vs KU* (*supra*).
13. As to substantial loss, the same has to be demonstrated as held in *Mbukoni Service Station* (*supra*) and *James Wangalwa & another vs Agnes Naliaka Cheseto* (2012) eKLR.
14. Other than alleging that he was in occupation of the land, the applicant has not stated the nature and the particulars of the loss or damage likely to occur to him should the orders not be granted.
15. Similarly, the applicant has not offered any security for the due realization of the decree including the costs payable to the lower court suit should the intended appeal not succeed.
16. Doing the best I can in the circumstances, I allow the applicant to file his appeal out of time within 14 days from the date hereof and to pay Kshs 50,000/= as security for costs alongside the filing of the appeal. The prayer for a stay of execution is declined.



Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 26TH DAY OF JULY 2023**

In presence of

C.A John Paul

Masamba for applicant

HON. CK NZILI

ELC JUDGE

