



Kagakii v Kimatta & 2 others (Environment and Land Miscellaneous Application E23 of 2023) [2023] KEELC 18708 (KLR) (17 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18708 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E23 OF 2023
FM NJOROGE, J
JULY 17, 2023

BETWEEN

SAMSON NGAHU KAGAKII PLAINTIFF

AND

GIDRAPH MUIRURI KIMATTA 1ST DEFENDANT

WILSON NJAU THAIRU 2ND DEFENDANT

PETER MUKIRAI WANJAU 3RD DEFENDANT

RULING

1. This is a ruling on an application dated 3/5/2023 filed by the plaintiff under section 3A,79G, 95 of the *CPA*, Orders 9 rule 9, 42 rule 6 and 51 rule 1 of the *Civil Procedure Rules*. It seeks stay of execution of judgment the resultant decree and all consequential orders in Nakuru CMELC Case No 342 Of 2018 –Gidraph Muiruri Kimatta vs Wilson Njau Thairu & 2 Others, (herein after the lower court case) pending the hearing and determination of an intended appeal, and that leave be granted to the applicant to file and serve its appeal out of time and /or that time for filing and serving of the appeal be extended, that the draft memorandum of appeal annexed to the application be deemed as duly filed and served upon payment of filing fees.
2. I must point out that Prayer No 2 that sought interim orders was granted when the application first came up for hearing under certificate; comprehensive directions were issued including a time frame for disposal of the application by way of written submissions and it would appear that no order was granted that the firm of Mirugi Kariuki & Co Advocates be allowed to come on record after judgment in place of the outgoing Ms Wachira Wekhomba Aim & Associates Advocates as sought in Prayer no 3. This court is compelled to consider that prayer on a preliminary basis. I hereby grant it, and consequently all the filings and service of process made by the firm of Mirugi Kariuki & Co advocates are hereby deemed as properly done and effected.



3. The background to the present application is that the 1st respondent herein filed the lower court case against the present plaintiff and two others, seeking to be declared the lawful owner of some land by virtue of purchase from the defendant, an order that the title deed in the name of the present applicant be revoked and a fresh one be issued in his name. Judgment was issued electronically in his favour on 19/8/2022 and in the absence of the parties and without the knowledge of the applicant or his erstwhile advocates. The applicant states that perchance his erstwhile advocates knew of the judgment's delivery they never informed him, and upon visits to their chambers they repeatedly informed him that the trial magistrate had been transferred to Mombasa and all should await a judgment notice, and they waited in vain for the judgment until service of a hearing notice for an application dated 5/12/2022 made the applicant aware that judgment had already been delivered in the matter. After that he sought to consult with his advocates in vain, and they finally informed him through their secretary on 28/4/2023 that they had ceased acting for him in the matter, hence his act of hiring of a new firm of advocates. The applicant complains that his erstwhile advocates ceased acting for him without informing him of the judgment, that the advocates' mistakes should not be visited upon him, and he now seeks leave since the time provided for the filing of an appeal is expired. He states that the delay that occasioned that time lapse was not deliberate in the circumstances, and by the execution of the decree which would cancel his title before the appeal is heard and determined he would suffer irreparable harm, and it is just and fair that execution be stayed pending appeal. He avers that the proposed appeal has high chances of success and raises weighty issues. He undertakes to abide by any conditions set by court.
4. The court ordered the application be disposed of by way of submissions, which were filed in compliance by the appellant on 25/5/2023 and by the respondent on 8/6/2023, and of which I have had regard while writing the present ruling.
5. Section 79G of the CPA provides for 30 days within which an appeal from a lower court decision ought to be lodged. However, it is correct that the law gives the court discretion to admit an appeal out of time if sufficient cause for not filing the appeal in time is given. The judgment in this case was delivered on 19/8/2022. By 18/9/2022 the applicant ought to have filed his appeal but he did not. He details the travails that beleaguered him which allegedly militated against compliance and which have led him to seek leave of court and extension of time. *Thuita Mwangi V Kenya Airways Ltd [2003] eKLR* outlined some factors to consider in determining an application for stay, including, period of delay, reason for delay, arguability of appeal, and degree of prejudice a respondent may suffer if orders sought were granted.
6. I have considered the plea by the applicant that his advocates failed him in his time of need by failing to inform him of the judgment. It can not be known from the application exactly when the advocates ceased acting for him, but the engagement of a new firm of advocates is symbolic of total breakdown in his relationship with the erstwhile advocates. In the midst of the breakdown in communication which was compounded by the transfer of the trial magistrate to a different station, judgment was delivered and the applicant states that he only learnt of the judgment when he was served on an unstated date with a hearing notice for a post judgment application dated 5/12/2022, but it would appear service was effected immediately before 28/4/2023, the latter date being when he visited his advocates to demand an explanation for the event. He states that he also later learnt that his erstwhile advocates had filed an application to cease acting dated 30/1/2023 which he was not served with and that a ruling on that application was delivered on 2/3/2023. That the account that the applicant relies on to seek extension of time. Are they sufficient cause within the meaning of Section 79G?
7. Article 48 of the *constitution* guarantees access to justice. Article 50 guarantees right to have any dispute resolvable by the application of law decided in a fair hearing before courts inter alia other independent bodies. I agree with the applicant's counsel when he states that the ultimate aim of the justice system



is to hear and determine disputes fully and on my part I think that the grounds advanced to explain the delay are sufficient.

8. I have examined the draft memorandum of appeal and the judgment of the court and in order not to prejudice the hearing and determination of the appeal, all I can state at the present juncture is that the proposed appeal is arguable.
9. As to whether stay of execution ought to be granted, I have considered the provisions of Order 42 rule 6(2). The considerations for the grant of a stay of execution order are whether there is an appeal in place, whether there is risk of substantial harm if the orders sought are not granted, whether the application has been made without unreasonable delay and whether the applicant is prepared to offer security.
10. I have already found that the delay in filing the present application was properly explained while dealing with the issue of extension of time to appeal herein above and consequently that finding applies to the orders of stay since they are sought within the same application.
11. As to whether the applicant would suffer substantial loss and the appeal be rendered nugatory it is this court's view that the instant dispute involves land and if the land is registered in the name of the 1st respondent and probably disposed of before the determination of the proposed appeal, then the appeal may be rendered nugatory. It would therefore be in the interests of justice to grant the stay sought in the instant application.
12. As regards conditions for a stay, I will provide for them later on in the orders, since it is a court that imposes conditions and it does not have to follow the litigants' proposals.
13. It suffices to state here that the applicant has demonstrated by the application at hand that he deserves the orders sought. Consequently, I grant the application dated 3/5/2023 and I issue the following orders:
 - a. The execution of judgment and decree and all consequential orders in Nakuru CMELC Case No 342 Of 2018 –Gidraph Muiruri Kimatta vs Wilson Njau Thairu & 2 others is hereby stayed pending the hearing and determination of the applicant's intended appeal;
 - b. The time within which the applicant shall file his appeal against the judgment of the lower court in Nakuru CMELC Case No 342 of 2018 –Gidraph Muiruri Kimatta Vs Wilson Njau Thairu & 2 Others is hereby extended by 30 days with effect from the date of this order.
 - c. The applicant shall within 14 days hereof file and serve his memorandum of appeal.
 - d. The applicant shall within the 30 days' extension period provided in order no (b) herein above file his record of appeal and serve it together with submissions on the appeal and leave it to the discretion of the court as to whether to admit oral submissions at any other stage of the appeal process.
 - e. As a condition for the grant of the orders sought, the applicant shall deposit the assessed costs in full of the lower court proceedings in court within 30 days of service of demand by the 1st respondent's advocate.
 - f. As a condition, in default of compliance with the orders in (b) (c) and (d) herein above either singularly or cumulatively, the orders of extension of time and stay of execution shall stand vacated at the expiry of the 30 days' extension period granted in order no (b) herein above.
 - g. The costs of the present application shall abide by the outcome of the appeal.



**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 17TH
DAY OF JULY, 2023.**

MWANGI NJOROGE

JUDGE, ELC, NAKURU

