



**Chepkwony v Boit (Environment and Land Appeal 4 of 2023)
[2023] KEELC 19906 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19906 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 4 OF 2023
A OMBWAYO, J
SEPTEMBER 21, 2023**

BETWEEN

CLEOPHAS CHEPKWONY APPLICANT

AND

WILSON KIPSANG BOIT RESPONDENT

(Application for leave to appeal out of time against the judgment of the Hon. Senior Principal Magistrate Z.J. Nyakudi delivered on June 15, 2023 in Molo CMCC ELC No E044 of 2021.)

RULING

1. The applicant prays for orders that there be a stay of execution of the judgment delivered on the June 15, 2023 pending the hearing of the application inter-parte. The applicant be granted leave to appeal out of time against the whole judgment of the Hon. Senior Principal Magistrate Z.J. Nyakudi delivered on June 15, 2023 in Molo CMCC ELC No E044 of 2021.
2. The application is based on grounds that the judgment herein was delivered on June 15, 2023 in Molo CMC ELC No E44 of 2021. The judgment was delivered against the applicant in his absence as the last time the matter was in Court, the Magistrate was not present and no notice was issued upon the Applicant. The applicant had no idea till very late after judgment had been entered. That the respondent is unlikely to suffer any prejudice. The application is supported by the affidavit of Cleophas Chepkwony, which the applicant that amplifies the grounds. The respondent failed to file a replying affidavit and therefore I do find that the fact are not controverted.
3. The factors to be considered when determining an application for extension of time are found in various judicial pronouncements of the courts.



4. In *Paul Wanjobi Mathenge v Duncan Gichane Mathenge* [2013] eKLR this court discussed those factors as follows:

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance...”

5. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR laid down the principles that govern the exercise of discretion in applications for extension of time as follows:“

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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

6. I have considered the application and do find that the applicant has demonstrated that the judgment was delivered in his absence and that notice was not issued to the applicant. He states that he became aware of the judgment on July 14, 2023 and filed the application on July 21, 2023 those are 7 days after learning that judgment had been delivered. I do find that the delay in filing the application is not inordinate and that the applicant has explained the delay in filing the appeal. The respondent has not shown any prejudice to be suffered if the applicant is allowed to appeal out of time. The court has discretion to grant leave to extend time for filing an appeal but the discretion ought to be applied judiciously considering the above issues.

7. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:

“No order for stay of execution shall be made under subrule

- (1) unless—

8.

- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and



- 9.
- b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
10. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections IA and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions.
11. Section IA(2) of the *Civil Procedure Act* provides that
- "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective"
- while under section 1B some of the aims of the said objectives are;
- "the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties."
12. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely
- (a) that substantial loss may result to the applicant unless the order is made,
- (b) that the application has been made without unreasonable delay, and
- (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
- See *Antoine Ndiaye v African Virtual University* [20151 eKLR.
13. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:
- "No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."
14. The application before me has been made without inordinate delay and that the judgment requires the eviction of the applicant without specifying the grace period of time and therefore the court finds that if stay of execution pending appeal is not granted, the plaintiff shall suffer substantive loss.
15. I do find that the application has merit and do grant orders that there be a stay of execution of the judgment delivered on the June 15, 2023 and the decree issued on July 13, 2023, pending the hearing



of the appeal. The applicant be and is hereby granted leave to appeal out of time against the whole judgment of the Hon. Senior Principal Magistrate Z.J. Nyakudi delivered on June 15, 2023 in Molo CMCC ELC No E044 of 2021. The appeal to be filed and served within 10 days from the date of this ruling. The applicant to deposit security for costs in court whose value is Kshs100,000/= or in terms of cash of a similar amount. Costs of the application in the appeal. Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 21ST DAY OF SEPTEMBER 2023.

A. O OMBWAYO

JUDGE

