



REPUBLIC OF KENYA



**Maina v Wanjohi & 3 others (Environment & Land Case 502 of 2017)
[2023] KEELC 19963 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19963 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 502 OF 2017**

**JG KEMEI, J
SEPTEMBER 21, 2023**

BETWEEN

JULIUS GATOTO MAINA PLAINTIFF

AND

JOHNSON GAITHO WANJOHI 1ST DEFENDANT

JACKSON MAINA RIITHIA 2ND DEFENDANT

LAND REGSITRAR THIKA 3RD DEFENDANT

HON ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. The application dated the 28/3/2023 has been filed by the 1st Defendant / Applicant seeking the following orders;
 - a. Spent
 - b. That there be stay of execution of the orders of eviction dated the 22/3/2020 to allow parties pursue Ca No. E572 of 2022 Johnson Gaitho Wanjohi Vs Julius Gatoto Maina & Others.
 - c. That the Court do set aside, vary or discharge its orders made on the 22/3/2023 pursuant to the application dated the 27/1/2022.
 - d. Costs be provided for.
2. The application is based on the grounds set out below:-
 - a. The Plaintiff/Respondent vide an application dated 27th January 2022 has obtained orders of eviction as against the 1st Defendant/Applicant.



- b. That the said application came up for hearing on 22nd March 2023 in the absence of the 1st Defendant/Applicant.
 - c. That failure to attend Court was inadvertent and highly regrettable as it was due to power outage occasioning technological failure of the gadgets used to log in during the online Court session.
 - d. That upon follow up on the very same day the 1st Defendant/Applicant's Counsel on record learnt that the matter proceeded in his absentia and eviction orders granted.
 - e. That further 1st Defendant / Applicant has already lodged an appeal at Ca No. E572 Of 2022 Johnson Gaitho Wanjohi Vs Julius Gatoto Maina & Others which is till on going.
 - f. That consequently in the event the Plaintiff/Respondent executes the orders, the appeal will be rendered nugatory.
 - g. That the unfortunate and unforeseen power outage occasioning technological failure of gadgets should not be visited upon the innocent litigant who stands to be rendered homeless and destitute.
 - h. That it's the interest of justice that this Honourable Court allows this application since no prejudice will be occasioned to the Respondent/Defendant.
 - i. That this Honourable Court has inherent powers to grant the orders sought.
2. The application is supported by the Affidavit of Chrispus Kanyi Kiruchi, Counsel for the 1st Defendant/Applicant sworn on 28/3/2022. The deponent states that he was unable to log in into the online Court session due to power outage on 22/3/2023 when the Plaintiff's application dated 27/1/2022 was coming up for hearing. That on follow up he learnt that eviction orders were granted. In addition that the 1st Defendant/Applicant has lodged an appeal CA No. 572 of 2022 and that the eviction orders if executed would render the appeal nugatory. That the application has been brought without any inordinate delay.
 3. Vide a Replying Affidavit sworn on 12/4/2022 Julius Gatoto Maina, the Plaintiff opposed the application. He termed the application as an abuse of the Court process with manifest intention to deny him the fruits of his Judgment.
 4. The deponent avers that the application dated 27/1/2022 seeking eviction orders against the 1st Defendant/Respondent was duly served and acknowledged. The 1st Defendant/Applicant therefore had adequate time to prepare and file a response to the application dated 22/3/2022. Admittedly, the deponent states that eviction orders against the 1st Defendant were issued on 23/3/2023. Further the reasons advanced by the 1st Defendant/Applicant as to failure to attend the hearing of the Motion are not convincing. There is no appeal before this Court to warrant stay of execution. There is also no evidence that the 1st Defendant/Applicant is likely to suffer in the event that the eviction orders are executed, moreso in the face of open defiance by the 1st Defendant of the Court orders by continuing to develop the property. In the premises he stands to suffer irreparable loss if the application is granted as the 1st Defendant will continue to deprive him of his land.
 5. On the issue of stay of execution, the deponent states that the 1st Defendant has no arguable appeal therefore nothing will be rendered nugatory. That the 1st Defendant/Respondent continues to be in possession of the suit property in total disobedience of the Court orders, finally litigation must come to



an end. That the 1st Defendant/Applicant has not offered any security to cater for the due performance of the decree of this Court.

6. The 1st Defendant/Applicant filed a further Affidavit on 11/5/2023 stating that he was unable to comply with the orders of this Court issued on the 17/11/2022 as he was working in Somalia and therefore unreachable. He was not aware of the orders of the Court or the condition to deposit Kshs. 100,000/- as directed by the Court. The deponent states that he has since deposited Kshs. 100,000/- with his Advocates in fulfillment of the conditions of the Court order. The deponent urged this Court to exercise its inherent powers under the provisions of Order 51 of the Civil Procedure Rules and extend time to allow him to comply with the Court orders issued on 17/11/2022. That he lives on the suit land with his family and if the orders sought are not granted he stands to suffer loss given that execution by way of eviction has been put in motion by the Plaintiff/Respondent.
7. On 9/5/2023 the parties elected to file written submissions within fourteen days. At the time of writing this Ruling only the Plaintiff/Respondent filed written submission on the 24/5/2023 which I have read and considered.
8. Despite directions of the Court to file written submissions the Applicant failed to file written submissions.
9. Relying on the provisions of Order 42 rule 6(2) of the Civil Procedure Rules, it was submitted that this is the second application with respect to orders of stay of execution being made by the Applicant. That the application does not meet the requirements set out under Order 43 rule 6 of the Civil Procedure Rules more so because the Applicant failed to comply with the conditional orders issued in his favour on 17/11/2022. Further that the Applicant has not demonstrated any substantial loss that he might incur which cannot be adequately compensated by an award of damages. That there is no evidence that the Applicant resides on the suit premises and that this application was only brought after he was served with eviction orders. In the opinion of the Respondent, the application seeks to aid the deprivation of the fruits of Judgment in favour of the Plaintiff.
10. It was the opinion of the Plaintiff/Respondent that the mere fact that a party has appealed a decision does not entitle them to automatic stay of execution. It was further submitted that the application discloses no grounds that would warrant or tilt the case in favour of the 1st Defendant/Applicant.
11. Finally, the Court was urged to dismiss the application the application with costs in favour of the Plaintiff.

Analysis and determination

12. The main issue for determination is whether the Application is merited.
13. The legal provisions for stay of execution are anchored in Order 42 rule 6 of the Civil Procedure Rules that;

“6. Stay in case of appeal [Order 42, rule 6.]

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the Application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty,



on Application being made, to consider such Application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

- (2) No order for stay of execution shall be made under sub rule (1) unless—
 - (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
 - (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.”

14. It is trite that for an Applicant to succeed in an Application of this nature, one must establish three conditions namely; establishment of substantial loss upon timely filing of the application and the furnishing of security.
15. This Court is guided by the decision in the case of *Butt Vs. Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal namely; -
 - a. The power of the Court to grant or refuse an Application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge’s discretion.
 - c. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicant at the end of the proceedings.
 - d. The Court in exercising its discretion whether to grant or refuse an Application for stay will consider the special circumstances of the case and its unique requirements.
16. The Applicant moved this Court vide the application dated 25/1/2022 seeking orders of stay of execution of the Judgment delivered 16/12/2021. Upon consideration the Court granted the orders in favour of the Applicant on 17/11/2022 in the following terms:-
 - a. Conditional stay of execution of the Judgment of 16/12/2021 was granted.
 - b. On payment of Kshs. 100,000/- being security of due performance of the decree within a period of 30 days and in default the orders would lapse.
17. From the record and as admitted by the Applicant the said orders were not complied and therefore lapsed.
18. Following the lapse of the said orders the Plaintiff/Respondent filed an application dated 27/1/2022 seeking orders of eviction against the 1st Defendant/Applicant. According to the record the Plaintiff/



Applicant was duly served with the said application. The 1st Defendant/Respondent despite service failed to file any response to the said application. The application having been unopposed, the same was allowed on the 22/3/2023 effectively issuing orders of eviction against the 1st Defendant.

19. As to whether the Court should consider staying execution orders issued on 22/3/2023 the Court finds that the Applicant has not demonstrated substantial loss that he might suffer if the orders are declined.
20. The Applicant has given reasons why his Counsel failed to attend Court on 22/3/2023. The reason is attributed to power outage or technological failure of his gadgets in his office. The Court finds that the Applicant has not presented any evidence in support of the reasons given.
21. In the end the application is found to be devoid of merit and is dismissed with costs in favour of the Plaintiff/Respondent.

The Notice of Motion dated the 6/6/2023

22. This application dated the 6/6/2023 was filed by the 1st Defendant Applicant seeking the following orders;
 - a. Spent
 - b. That this honourable Court be pleased to extend/enlarge time pursuant to orders granted on the 17/11/2022 to the 1st Defendant/Applicant to deposit Kshs 100,000/- as conditional precedent to the grant of stay orders pending the appeal.
 - c. Costs of the appeal be in the cause
23. The application is based on the grounds annexed thereto and the supporting Affidavit of the Johnson Gaitho Wanjohi, the 1st Defendant/Applicant who deponed that on the 17/11/2022 he obtained orders of conditional stay of execution requiring him to interalia deposit the sum of Kshs 100,000/- being security for the performance of the decree. That in the month of February 2022 he travelled to Somalia for work and lost touch with his advocates. In addition, that they were attacked in the month of February 2023 and resultantly lost all his belongings. That he sought refuge in friendly people's homes until he managed to cross the border to Kenya in the month of March 2023. That he was later served with eviction orders which prompted him to visit the Advocates offices who informed him about the proceedings in Court. That he sought for help from friends and raised the sum of Kshs 100,000/- but the sum could not be deposited in Court because it was out of the time provided for by the Court. Further that he has lodged an appeal CA No 572 of 2022, copy of the Memorandum of Appeal marked as JGW2 was annexed.
24. In addition, the deponent stated that failure to deposit the money in time was occasioned by factors beyond his control and for the reasons that he has young school going children who need his financial support. He urged the Court to exercise its inherent powers to extend time to enable him meet the conditions of stay of execution by depositing the sum of Kshs 100,000/-.
25. The Plaintiff/Respondent opposed the application vide his Replying Affidavit sworn on the 20/6/2023. He deponed that the application is an abuse of the process of the Court with the only intention being to deny the Plaintiff the fruits of Judgement. The deponent states that the application has been brought 6 months after the delivery of the ruling thus inordinately. That on the 23/3/2013 the Plaintiff obtained orders for eviction against the 1st Defendant. That the Applicant has not produced any evidence to show that he lost touch with his counsel on record or that he was away in Somalia. That the application is already defective and has been rendered hopeless by reason of delay of the



1st Defendant to comply with the Court orders of the 17/11/2022. He termed the application as a delaying tactic to hinder him from enjoying the fruits of his Judgement.

The written submissions

26. The Applicant filed written submissions on the 30/6/2023. Relying on the provisions of Order 50 Rule 6 of the *Civil Procedure Rules*, Applicant argued that it is deserving of the orders of extension of the orders. Order 50 rule 6 of the *Civil Procedure Rules* provides as follows;

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

27. The Applicant also relied on the principles of enlargement of time to file appeal out of time set out by the apex Court in the case of *Nicholas Kiptoo Arap Korir Salat Vs. IEBC & 7 Others* (2014)eKLR.

28. In sum the Applicant states that he was away in Somalia in February thus lost contact with his advocates on record and was not in a position to track the progress and outcome of his application. That failure to grant the extension will be prejudicial to him as his family is dependent on the land for their livelihood. Inter alia that he is willing to pay the deposit ordered by the Court.

29. The Plaintiff/Respondent in opposition to the application filed written submissions on the 22/6/2023. Relying on the *case of Nicholas Salat*, the Respondent argued that for the Court to grant an extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. The Respondent submitted that the delay in complying with the orders of the Court was 6 months. Without proper explanation the delay is inordinate. That the action of the Applicant is indicative of lack of seriousness and indolence in the matter.

30. The Plaintiff/Respondent placed reliance on the decision of *Dilpack Kenya Limited Vs. William Muthama Kitonyi* (2018)eKLR where the Court stated as follows:-

“ ... It is therefore clear that whereas inadvertence may be a ground for extension of time, the nature and quality of the inadvertence must be disclosed for consideration by the Court. It therefore does not suffice to simply state that the failure to comply with the prescribed timelines was due to inadvertence, as the Applicant did in this case.”

31. The principles or extension of time were stated in the case of *Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 7 Others* where the Court stated as follows:-

- a. 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;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;



- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - e. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
32. As explained elsewhere in this Ruling orders of conditional stay of execution of Judgment issued on 17/11/2022 the Applicant had 30 days to comply with those orders. As at 17/12/2022 there is no evidence of such compliance hence the orders lapsed automatically.
33. It is trite that extension of time is a discretionary remedy. The Applicant bears the burden of laying the basis to the satisfaction of the Court. It is also the case that whether the Court should exercise the discretion to extend time or not is a consideration to be made on a case by case basis. It is the reason for delay in complying with the orders that should be explained to the satisfaction of the Court.
34. In this case the Applicant avers that he travelled to Somalia in the month of February, 2022 and was unable to access his Counsel while in Somalia. The Court finds that the Applicant has not placed any evidence before this Court to support whether or not he travelled to Somalia in the first place and secondly when indeed he returned back in Kenya.
35. In his Supporting Affidavit under paragraph 13 thereof the Applicant deponed that failure to deposit the amount were factors beyond his control since he has young children who depend on him. This explanation casts doubt as to the real reason why the Applicant did not comply with the orders of the Court. It would appear that this application was provoked by the service of eviction orders upon the Applicant by the Plaintiff/Respondent.
36. It was averred by the Applicant that he returned to the country in March 2023. If that be so, it has not been explained why it took the Applicant three (3) months to file the application for enlargement of time. In the circumstances of this case, the Court finds that there was inordinate delay in filing the application. Further that the delay has not been explained to the satisfaction of the Court.
37. In the end the Court finds that the application is devoid of merit and it is dismissed with costs to the Plaintiff/Respondent.
38. Final orders:-
- a. The Notice of Motion dated 28/3/2023 be and is hereby dismissed.
 - b. The Notice of Motion dated 6/6/2023 be and is hereby dismissed.
 - c. In both applications costs shall be favour of the Plaintiff/Respondent.
39. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 21ST DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;



Omondi HB Gachie for Plaintiff

Wachira HB Kanyi for 1st Defendant

2nd, 3rd and 4th Defendant - Absent

