



REPUBLIC OF KENYA



KENYA LAW
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**Kisundi v Kisia & another (Environment & Land Case 4 of 2017)
[2023] KEELC 21348 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21348 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 4 OF 2017
MN KULLOW, J
OCTOBER 31, 2023**

BETWEEN

FRANCIS SARU KISUNDI PLAINTIFF

AND

BENJAMIN OGADA KISIA 1ST DEFENDANT

**PIUS ANUMU AMARA (SUED AS THE LEGAL ADMINISTRATORS OF JAVAN
KADARI KISIA, DECEASED) 2ND DEFENDANT**

RULING

1. By Notice of Motion dated 10th May, 2023 and filed under Certificate of Urgency, the Applicants sought the following Orders: -
 - a. Spent.
 - b. There be a Stay of Execution of the Judgment dated 17th October, 2022 and Decree issued by this Honourable Court on 15th November 2022 pending the hearing and determination of this Application.
 - c. This Honourable Court be pleased to extend time for the Applicants herein to file their Notice of Appeal out of time against the Judgment of this Honourable Court delivered on 17th October, 2022.
 - d. Upon Prayer 3 being granted, there be stay of execution of the Judgment dated 17th October, 2022 and Decree issued by this Honourable Court on 15th November, 2022 and the status quo prevailing in respect to all that parcel of land known as Suna East/ Kakrao/ 4021 & 4022 prior to delivery of the said judgment be maintained pending the hearing and determination of the intended Appeal.
 - e. The costs of this Application be provided for.



2. The application is based on 10 grounds on its face and the 1st Applicant's Supporting Affidavit sworn on even date, on his own behalf and on behalf of the 2nd Applicant. He averred that vide the Judgment dated 17/10/2022, the honourable court allowed the Respondent's claim and ordered that the Respondent be registered as the proprietor of the whole of land parcel no Suna East/ Kakrao/ 4021 & 4022. That the Court further ordered them to execute all the necessary transfer documents to facilitate the transfer of the suit parcels in favor of the Respondent and in default, the Deputy Registrar was directed to execute the said documents, within a period of 60 days which has since lapsed.
3. It is his claim that the said judgment was delivered virtually in their absence but when they learnt of the outcome thereof, they instructed their previous advocate to lodge an Appeal on their behalf. Thus, owing to their verbal discussion with their previous advocate on record on the costs implication and the Appeal process, they reasonably believed that the Notice of Appeal had been filed within time.
4. However, it is their contention that they were shocked to find out sometimes around April, 2023, that the Notice of Appeal was never filed. It is their claim that they made this discovery when they visited the court registry to inquire about the typed proceedings. Upon learning of the inaction by their previous advocate, they engaged the services of their present advocate hence the instant Application.
5. It is their claim that they are still desirous in proceeding with the intended Appeal; which they maintained raised arguable and triable issues on the Respondent's entry and stay on the suit parcel, which they argued was consensual.
6. He further deposed that they are apprehensive that the Respondent may proceed to execute the said judgment and have the suit parcels transferred in his name and may thereafter proceed to dispose off the same to third parties. They thus contend that this action may defeat and render the intended Appeal nugatory.
7. He averred that they are ready and willing to comply with any direction that the court may make and solely blamed the delay of filing the instant Application and Notice of Appeal on their previous advocate. He maintained that no prejudice would be caused on the Respondent if the orders sought are granted and urged the court to allow the Application.
8. The Application was opposed. The Respondent filed a Grounds of Opposition dated 14th June, 2023. He dismissed the Application as being premature, devoid of merit and further that the same had been filed by a stranger without leave of court.
9. It was also his contention that the Applicants have not met the threshold and the necessary conditions for the grant of the orders sought of extension of time and stay orders. Thus, he urged the court to dismiss the Application with costs.
10. The Application was disposed of by way of written submissions. Both parties filed their rival submission together with authorities which I have read and considered.

Analysis and Determination

11. I have read and considered the Application, the Affidavits and Grounds of Opposition on record, the rival written submissions as well as the authorities cited. I am therefore of the considered opinion that the issues arising for determination are: -
 - i. Whether Leave can be granted to the Applicants to file the Notice of Appeal out of time.
 - ii. Whether an Order for Stay of Execution can issue against the judgment and decree issued on 17/10/2022 and 15/11/2022 respectively.



I. Whether Leave can be Granted to the Applicants to File the Notice of Appeal Out of Time

12. The Application was filed pursuant to section 7 of the Appellate Jurisdiction Act; which provides as follows; -

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired...”

13. The Applicants have attributed the delay in filing the Notice of Appeal on the inaction and omission by their previous Advocate on record; who failed to file the Notice of Appeal within the strict timelines despite being given sufficient instructions to file an Appeal against the judgment of this court on time. It is their claim that they only learnt that the Notice had never been filed sometimes in April, 2023 hence the instant Application. They thus pray that such error and mistake on the part of their previous advocate on record, should not be visited on them nor prejudice their right to appeal.

14. It is also their assertion that the intended Appeal raises arguable and triable issues with high chances of success. They maintained that the Respondent’s entry and occupation of the suit parcels of land was consensual and they should be allowed to ventilate the intended appeal on merit.

15. The Respondent on the other hand maintained that the delay of over 6 months in filing the instant Application was not sufficiently explained. It was his contention that the Applicants had a duty to always follow up on the progress of their matter and cannot solely rely on the inaction of their previous advocate on record. He thus urged the court to dismiss the Application.

16. The principles to be considered in exercising the court’s discretion on extending/enlarging time to file an appeal include; the period of delay, the reasons for the delay, the chances of success of the intended appeal and the degree of prejudice to the respondent if the application is granted. See *Leo Sila Mutiso v Rose Hellen Wangeri Mwangi* Civil Appeal 255/ 1997, *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR [2013] eKLR.

17. The Supreme Court in *Nicholas Kiptoo Korir Arap Salat v IEBC & 7 Others* [2014] eKLR also laid down pertinent guiding principles for the extension of time to lodge an appeal as follows: -

“(T)he underlying principles a court should consider in exercise of such discretion include:

1. Extension of time is not a right of any 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 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 Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.



7.”

18. With these principles in mind, I will proceed to address each of the grounds outlined in the above-mentioned cases in order to establish whether the Applicants have satisfactorily met each of the said principles. Even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. See [*Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* \[2018\] eKLR.](#)
19. The first question to be answered is whether the Applicant has tendered a satisfactory explanation for the delay in filing the Notice of Appeal. As stated hereinabove; the Applicants have solely attributed the 7 months’ delay on the inaction/omission on the part of their previous advocate on record, who despite being given sufficient instructions to proceed and lodge an Appeal against the judgment of the court, failed to act on the said instruction hence the failure to comply. The Respondents argued that the onus was on the Applicants to conduct due diligence and follow up on the progress of their case.
20. I have critically considered the rival explanation tendered by both parties, on the 7 months delay in the filing the Notice of Appeal and the instant Application. The orders sought herein are discretionary in nature and the Applicants have a duty to approach the court in good faith and with clean hands. While I do agree with the Respondent that the Applicants had a duty to follow up on the progress of their matter and cannot solely blame the delay on the inaction of their previous advocate, I do also acknowledge the explanation given by the Applicants and the circumstances of the case.
21. The Applicants have explained that they duly instructed their previous advocate on record to lodge an appeal against the judgment delivered on 17/10/2022 and even discussed the costs implications thereto. Owing to the said instructions, they reasonably believed that the same was filed within timelines. It was also their claim that they visited the court registry to inquire on the progress of the typed proceedings and it is then that they found out that the Notice of Appeal had never been filed. I find this explanation plausible and sufficient in the circumstances. Further, the Respondent has not demonstrated any carelessness and/or deliberate inaction on the part of the Applicants themselves.
22. Chances of success of the intended Appeal. The Applicants aver that the intended Appeal raises arguable and triable issues with high chances of success. It is their contention that the Respondent’s entry and stay on the suit parcels nos Suna East/ Kakrao/ 4021 & 4022 was consensual and thus this court erred in making a determination that the Respondent’s occupation and use of the suit parcels for a period of over 12 years, entitled him prescriptive rights capable of registration by virtue of adverse possession. I note that the said issue goes to the substantive issue of ownership of the suit land and in my view, the intended Appeal raises triable and arguable issues.
23. The final question is whether any prejudice will be caused to the Respondent and whether the same can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant. The Applicants maintained that no prejudice would be occasioned on the Respondent while the Respondent dismissed the Application as being frivolous and a delay tactic used by the Applicant to delay the execution of the decree.
24. The effect of the said decision is to order the registration of the Respondent as the proprietors of the suit parcels in place of the Applicants, by virtue of his continued occupation and use of the same for a period in excess of the statutory period of 12 years. The intended Appeal on the other hand seeks to determine the issue of ownership with finality. This in my view will not prejudice the Respondent. Moreover, the interest of justice dictates that a party is accorded reasonable opportunity to ventilate their claims including at the Appellate stage.



25. In view of the foregoing, I will proceed to grant the Applicants herein the benefit of doubt, owing to the nature of the dispute and in the interest of justice by extending time within which to file the Notice of Appeal.

II. Whether an Order for Stay of Execution can Issue Against the Judgment and Decree Issued on 17/10/2022 and 15/11/2022 respectively

26. Order 42 Rule 6(1) of the *Civil Procedure Rules, 2010* empowers the court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. It sets out the grounds to be considered and provides as follows:-

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.

27. The purpose and objective of the order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not rendered nugatory. The 3 conditions that must be satisfied by an Applicant to warrant the grant of an order of stay of execution pending appeal, as provided under Order 42 Rule (2) above includes: -

i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;

ii. The application is brought without undue delay and

iii. 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.

28. The first ground to be established is whether substantial loss may result to the Applicant if an Order for stay of execution is not granted. As to what amounts to substantial loss; courts have held that it is what has to be prevented by preserving the *status quo*. In *Shell Ltd v Kibiru and Another* [1986] KLR 410 Platt JA stated that;

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”

29. It is the Applicants contention that effect of the judgment of the court was to order the registration of the suit parcels in the name of the Respondent and to compel them to execute the necessary transfer documents within 60 days. In default, the Deputy Registrar was directed to execute the said documents to facilitate the said transfer and registration in favor of the Plaintiff/ Respondent. They are now apprehensive that if the said decree is executed and the suit parcels are transferred and registered in the name of the Respondent, he may proceed to alienate and transfer the subject parcels to third parties and thus render the intended Appeal nugatory.

30. The Respondent on his part deposed that the Applicants had not clearly established and demonstrated the substantial loss that they are likely to suffer. He argued that the Applicants have never been in occupation or use of the suit land and thus cannot suffer any substantial loss.

31. I have considered the rival claims of the parties herein on the issue of substantial loss. The effect of the judgment was to order the registration of the Respondent as the absolute proprietor of the suit



parcel in place of the Applicants. Upon such registration as the absolute owner of the suit properties, it automatically follows that he would be at liberty to deal with the suit land in a manner he so wishes/pleases. As held above, the intended appeal raises substantive issues of ownership of the subject parcels.

32. In view of the foregoing, I find and hold that the Applicant have satisfactorily proved that they are likely to suffer substantial loss unless orders for stay of execution is granted.
33. The second limb is whether the Application has been filed without undue delay. This court issued its Judgment and Decree on 17/10/2022 and 15/11/2022 Respectively while the instant Application was filed on the 10/05/2023, that is around 7 months from the date of the delivery of the judgment. The issue of delay and the explanation thereto has been exhaustively explained hereinabove and I do not wish to reiterate the same. Consequently, I do find that the explanation for the delay tendered is sufficient and said period does not amount to inordinate delay.
34. The last limb to be proved is on the deposit of security for costs for the due performance of the decree as the court my direct. The Applicants at paragraph 21 of their Supporting Affidavit have demonstrated their willingness to comply by any conditions on the deposit of security as may be set by the court.
35. In the case of *Aron C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates* the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

36. The circumstances and competing rights and interests of both parties herein must be taken into consideration. An Order for stay of execution is aimed at preserving the substratum of the Appeal and ensuring that the Appeal is not rendered nugatory. Thus, in granting or refusing an Application for stay of execution, the court must ensure that no party is worse off by virtue of its order. In view of the foregoing and in the interest of justice, I find that there is need to allow the Application for stay of execution subject to strict conditions that must strictly be adhered to.

Conclusion

37. In the upshot, I accordingly find that the Application dated 10th May, 2023 is merited and I proceed to allow the same on the following terms: -
 - a. Leave be and is hereby granted to the Applicant to file the Notice of Appeal out of time against the Judgment and Decree of this Honourable Court delivered on 17/10/2022 and 15/11/22 respectively, within 14 days from the date of this Ruling.
 - b. Further, an Order for Stay of Execution of the Judgment and Decree of this court dated 17th October, 2022 be and is hereby issued pending the hearing and determination of the Appeal.
 - c. The Applicant is hereby Ordered to deposit ksh 100,000 as security for costs within 45 days from the date of this Ruling.



- d. Failure to comply with order (a) and (c) hereinabove, Order (b) and hereinabove shall automatically lapse.
- e. No orders as to costs.

DATED, SIGNED AND DELIVERED IN VIRTUALLY AT MIGORI THIS 31ST DAY OF OCTOBER, 2023.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Mr. Imbaya for the Applicants/ Defendants

Mr. Mulisa for the Respondent/ Plaintiff

Court Assistant - Tom Maurice/ Victor

