



Morusoi & another v Maritim (Environment and Land Miscellaneous Application E012 of 2023) [2023] KEELC 21090 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21090 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E012 OF 2023
MC OUNDO, J
OCTOBER 26, 2023**

BETWEEN

GRACE CHELANGAT MORUSOI 1ST APPLICANT

BEATRICE CHEROTICH MORUSOI 2ND APPLICANT

AND

JOSEPH KIPROTICH MARITIM RESPONDENT

RULING

1. Pursuant to a Judgment delivered on the 7th February, 2023 by the Magistrates' Court at Kericho in Kericho Chief Magistrate in ELC *Suit No. 23 of 2020*, the Applicants have now filed the present Application by way of a Notice of Motion dated 20th March, 2023 brought under Section 1A, 3A and 95 of the *Civil Procedure Act*, Order 42 Rule 6 and Order 50 Rule 5 of the *Civil Procedure Rules* and all enabling provisions of the law, where they seek for leave to Appeal the said judgment out of time. The Applicants further seek orders of stay of execution of the Judgment in Kericho Chief Magistrate ELC *Suit No. 23 of 2020* pending the hearing and determination of their Application and the intended Appeal.
2. The application is supported by the grounds therein as well as by the sworn affidavit of the 1st Applicant, of an equal date.
3. The Applicants' argument was that after the judgement was delivered on the 7th February, 2023, the court file in the instant matter could not be traced and retrieved in the registry to enable them lodge the intended Appeal in time.
4. That their advocate on record made several follow-ups on the progress of tracing the file with no success as evidenced by the letter dated 27th February, 2023 herein marked as annexure 'GCM 1'.



5. That the file was only retrieved on the 13th March, 2023 when the period of filing the Appeal had already lapsed as evidenced by an email excerpt confirming the same marked as ‘GCM 2’. That leave to extend time for them to file an Appeal out of time is discretionary for which they sought that the discretion be exercised in their favour so as to enable them challenge the decision of the trial court.
6. That they had annexed their Memorandum of Appeal as “GCM 3” which showed that the intended Appeal had overwhelming chances of success. That an arguable Appeal did not necessarily mean one that must succeed but rather, one that ought to be fully heard by the court. That there would be no prejudice suffered by the Respondent by the delay in filling the Appeal on time which was excusable.
7. That the Respondent was in the process of executing the said judgement which comprised hiving off 2.5 acres from parcel of land known as Kericho/Cheborgei/270 now Kericho/Cheborgei/1137 and 1138 where the Applicants have built their matrimonial home and which was their only source of livelihood. That they were ready and willing to abide by any orders, conditions and directions that the court may impose.
8. That it was only fair and just that there be a stay of execution of the said judgement pending the hearing and determination of the intended Appeal. That the intended Appeal had high chances of success and unless the orders sought were granted, the Applicants were likely to suffer substantial and irreparable loss and damages as they would be evicted.
9. The application was opposed by the Respondent vide his Replying Affidavit sworn on the 19th April, 2023. His contention while relying on the provisions of Section 79G of the *Civil Procedure Act* and the decision in the cases of *Gerald M’limbiwe v Joseph Kangangi* [2008] eKLR and *Nicholus Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* was that there was no Appeal in place to which the Applicants were asking the court to admit out of time save for an annexed a draft Memorandum of Appeal. That the court could not therefore invoke its powers under section 79G of the *Civil Procedure Act* to admit a non-existent Appeal.
10. That the Applicants had not explained why they did not file the Appeal within the prescribed time and no proper reasons had been given by the said Applicants as to why they failed to attend court on 7th February, 2023 when the impugned judgment was delivered despite knowledge of the said date.
11. That the Applicants’ explanation that the file was missing was not tenable as the registry was categorical that the file was always available. That their Advocates having been based in Kericho, they ought to have attended the registry to inquire about the file instead of resorting to the use of email as a mode of correspondence.
12. That an admission of an Appeal or extension of time was not a right hence a party had to lay a basis for the same to which the Applicants had not discharged that burden. That a mere assertion that the Applicants would suffer irreparable loss, without giving evidence of how they would suffer was not a ground for extension of time. In the alternative since he had been in possession of the suit land since 1977 when he purchased it until the year 2013, he was the one who would suffer irreparable loss.
13. With regard to granting the orders of stay of execution pending the hearing of the intended Appeal, the Respondent while relying on the provisions of Order 42 Rule 6 (2) deponed that the court could only issue such orders if the Appeal had already been filed and since the Applicants had not filed the same, the stay orders sought could not be granted.
14. That the Applicants had not demonstrated the substantial loss they would suffer which substantial loss was a factual issue which ought to have been raised and supported by evidence.



15. The Respondent further deponed that since the Applicants had not offered any security for stay orders, in the event that the court allowed the instant application, the assessed costs be deposited in a joint interest account. The Respondent thus urged the court to dismiss the Applicants' Application with costs.
16. The application was disposed of by way of written submissions to which I shall herein summarize

Applicants' Written Submissions.

17. In support of their application dated 20th March 2023, the Applicants herein gave the background of the matter before framing their issues for determination as follows:
 - i. Whether the court should grant leave to the Applicants to Appeal out of time.
 - ii. Whether the court should grant a stay of execution pending the hearing and determination of the instant Application and the Appeal.
18. On the first issue for determination, the Applicants, placed their reliance on the provisions of Section 79G and Section 95 of the *Civil Procedure Act* as well as the decision in the cases of *Vincent Sunday Yier v Foam Mattress Limited* [2004] eKLR and *Nicholus Mutuku Mwasuna v Patricia Mueni Kilonzo* [2022] eKLR, to submit that the Court should exercise its discretion and grant them leave to challenge the decision of the lower court, out of time because there was a good and sufficient cause for not filing the Appeal in time.
19. That they had clearly pointed to the court the events that befell the lower court file in the instant matter, that the same had been misplaced hence it would have not been possible for them to file an Appeal in a file that was missing. That they had not been negligent.
20. That it was only when a failure to comply with rules made the Appeal process hopeless and ineffective, that the same should be considered worth driving the litigant from the seat of justice. That the court had a mandate to invoke the unfettered jurisdiction enshrined in Article 159 (2) (d) of the *Constitution* to cure any issue of procedural technicalities for ends of justice to be met. Reliance was placed in a combination of the decisions in the case of *Evans Kiptoo v Reinhard Omwoyo Omwoyo* [2021] eKLR, *Raila Odinga v Independent Electoral and Boundaries Commission & 4 Others* [2013] eKLR and *Jaldesa Tuke Debelo v IEBC & Another* [2015] eKLR.
21. The Applicants while relying on a combination of the decisions in the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR, *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 and *Nicholus Kiptoo Arap Korir Salat's case (supra)* submitted that in the application of this nature, the court ought to consider the period of delay, reason for delay and the arguability of the Appeal in exercising its discretion to either grant the leave to Appeal out of time or not.
22. On the reasons for delay, the Applicants reiterated that after the judgement was delivered on 7th February 2023, the court file in the instant matter went missing and could not be traced from the registry to enable them lodge the Appeal on time. That their Counsel had made several follow-ups on the progress of retrieving the file without success. That their letter dated 27th February, 2023 annexed to the instant application clearly showed that the said letter was physically presented to the court registry and the same was copied to the court administrator and executive officer Kericho law courts hence the Respondent's position that the Applicants were following up on the issue via email was false and misleading. That further, an email extract annexed to their Application shows their tedious process of trying to retrieve the file.



23. That from the email extract, on 28th February, 2023, the civil registry officials had conceded that the file was missing until the 13th March 2023 when the said officials wrote via the same email that the file was now available for any necessary action.
24. That the Applicants did all they could in their power to have the file availed early enough for purposes of filing the Appeal, however their efforts were not successful. That the delay in not filing the Appeal on time was occasioned by the mistake from the civil registry and the same should not be visited on them.
25. In regard to the length of delay, the Applicants while relying on the decision in the case of *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR where the court had held that 2 months was not inordinate, submitted that the impugned judgement was delivered on the 7th February 2023 wherein the instant Application had been filed in court on the 20th March, 2023 a period that was less than 2 months. The same was thus timeously filed.
26. As to whether the intended Appeal had high chances of success, the Applicants submitted that one of the grounds of Appeal was that the learned Magistrate had erred in law and fact in failing to find that the Respondent's suit was statutorily time barred thus occasioning the miscarriage of justice. The intended Appeal thus had high chances of success.
27. On whether the court should grant a stay of execution pending the hearing and determination of the instant application and Appeal, the Applicants while relying on the Provisions of Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules*, and the decisions in the case of *Butt v Rent Restriction Tribunal* [1979] eKLR, *Tarbo Transporters Ltd v Absalom Dova Lubasis* [2012] eKLR, and *Elena Daudoladova Korir v Kenyatta University* [2014] eKLR, submitted that as long as a valid reason for granting the stay was presented, the court should always exercise its discretion and grant the stay orders. That stay orders pending Appeal was designed so that no one would be worse off by the virtue of a court's order, if such order did not introduce any disadvantage but administers the justice that the case deserves.
28. The Applicants further relied on the decided case in *Nicholus Mutuku Mwasuna's case* (*supra*) to submit that although traditionally the courts considered a sufficient cause, substantial loss and furnishing of security before granting stay orders, courts were no longer limited to the three parameters as they were also expected to give effect to the overriding objectives stipulated in sections 1A and 1B of the *Civil Procedure Act*.
29. On the issue regarding substantial loss, the Applicants submitted that preserving the current state of affair was necessary to prevent substantial loss, as any such loss would render the Appeal a mere academic exercise. That if the execution was allowed, they would lose their land whereupon they had constructed their matrimonial homes and had lived for 30 years.
30. That a substantial loss was a loss that carried some degree of value, regardless of whether it was significant or minor. That the Respondent had obtained a certificate of costs amounting to Kshs. 223,950/= but the said Respondent had also admitted in paragraph 18 of his submissions that he was not a man of means hence he would not be able to repay the sum if a stay of execution was not granted which would then occasion the Applicants substantial loss. Reliance was placed on a combination of decided cases in *Silverstein v Chesoni* [22] 1KLR 867, *Tropical Commodities Suppliers Ltd and Others v International Credit Bank Limited* (in liquidation) 92004) EALR 331, *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR and *Nicholus Stephen Okaka & Another v Alfred Waga Wasonga* [2022] eKLR.
31. With regards to the intended Appeal being arguable, the Applicants relied on the decided cases in *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR, and Stanley *Kangethe Kinyanjui v*



Tonny Ketter & 5 Others [2013] eKLR to reiterate that the thrust of the Appeal being that the learned magistrate erred in law and fact in failing to find that the Respondent's suit was statutorily time barred thus occasioning the miscarriage of justice, the said Appeal had a prima facie case which the court should determine hence it was not frivolous.

32. On the issue of furnishing of security, the Applicants reiterated that they were ready and willing to abide by any orders, conditions and directions that the court may impose. They thus submitted that having met both the conditions for the leave to Appeal out of time and for the grant of stay of execution orders, the court allows their Application.

Respondent's Submissions

33. The respondents opposed the application seeking leave to file an Appeal out of time while placing reliance on the Provisions of Section 79G of the *Civil Procedure Act* where they submitted that there must be an Appeal filed for the court to invoke its jurisdiction. Further reliance was placed in the decided case in *Gerald M'limbine's case* (*supra*) and *Ndungu Mubindi James & another v Cecilia Wanjiku Waweru* [2020] eKLR to submit that the Applicants had only annexed a draft Memorandum of Appeal to their application hence the court could not invoke its inherent powers under section 79G of the *Civil Procedure Act* to admit a non-existent Appeal.
34. The Respondent, while relying on the decision in *Nicholus Kiptoo Arap Korir Salat's case* (*supra*) on the principles of extension of time reiterated that the Applicants had not given proper reasons for not attending court on 7th February, 2023 when the judgment was delivered despite being aware of the date. The Applicants' explanation that the file was missing was not tenable as the registry was categorical that the file was always available in the registry.
35. The Respondent further reiterated that an admission of an Appeal or extension of time was not a right hence a party had to lay a basis for the same. The Applicants had not discharged that burden. That a mere assertion that the Applicants would suffer irreparable loss, without giving evidence of how they would suffer was not a ground for extension of time. They thus submitted that the Applicants had not made out a case for admission of Appeal out of time or even for extension of time.
36. Regarding the grant of stay orders, the Respondents while relying on the provisions of Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules* and the decision in the case of *Ndungu Mubindi James case* (*supra*) submitted that for a stay of execution orders to be granted, there must be an Appeal filed.
37. The Respondent further relied on the *Butt's case* (*supra*) to submit that the Applicants ought to substantiate the substantial loss that they would suffer. That it was not sufficient to merely state that they would suffer loss if the costs were paid. That the mere fact that the decree holder was not a man of means did not necessarily bar him from benefiting from the fruits of his judgement. That it was not sufficient to merely state that the decretal sum was a lot of money and the Applicant would suffer loss if the money was paid.
38. On the requirement of furnishing security, the Respondent submitted that the Applicants ought to have shown and met the condition of payment of security for due performance of the decree. That should the court grant an order of stay, the Applicants should deposit a sum of Kshs. 223,950/= in court or in a joint account of Counsel for the parties as security.

Determination.

39. I have considered, the Applicants' Application, the supporting affidavit as well as the written submissions of both parties. The judgment and decree sought to be stayed herein was delivered on



the 7th February, 2023 by the Chief Magistrates' Court at Kericho in ELC *Case No. 23 of 2020*. The Applicants have now filed the present Application seeking the orders as herein above cited.

40. I find three issues for determination arising therein namely:
- i. Whether the court should enlarge time to enable the Applicants file their Appeal after the expiry of the statutory period.
 - ii. Whether the Applicants have satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
 - iii. What orders should this Court make.

41. Section 79G of the *Civil Procedure Act* which gives an appellate court discretion to extend time for filing an Appeal from the subordinate Court to the High Court (read Environment and Land Court) stipulates as follows;

“Every Appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order Appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an Appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the Appeal in time.”

42. In *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR the court held that:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the Applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the Applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the Respondent, if 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” [emphasis supplied].”



43. Have the Applicants fulfilled the above requirements so as to be granted leave to file their Appeal out of time?
44. It has been submitted that after the delivery of the judgment of 7th February 2023, the court file went missing and could not be traced within reasonable time for the Applicants to file their Appeal within time. That the file had only been retrieved on the 13th March, 2023 when the period for filing the Appeal had already lapsed. I have taken note of the letter dated 27th February, 2023 and the email extract herein marked as annexures “GCM 1’ and ‘GCM 2’ respectively.
45. It is clear that Section 79G of the Civil Procedure Act permits such filing of an Application for leave out of time if the Appellant satisfies the Court that he had good and sufficient cause for not filing the Appeal in time.
46. The case of Mwangi v Kenya Airways Ltd [2003] KLR laid down three conditions to be fulfilled with regard to delay which are:
- i. The length of delay
 - ii. The reason for the delay.
 - iii. Possibly, the chances of Appeal succeeding if the Application is granted and
 - iv. The degree of prejudice to the Respondent if the Application is granted.
47. The judgment of the Magistrate’s Court was delivered on 7th February 2023. The court file then went missing wherein the Applicants’ Counsel had made a follow-up on the progress of tracing it. It had only been retrieved on the 13th March 2023 when time to file the Appeal had lapsed. The Applicants then filed this Application which was accompanied with their Memorandum of Appeal. In my view, the Applicants acted diligently and expeditiously in the various steps they took with a view to lodging an Appeal.
48. The Court is, therefore, inclined to grant and hereby grants leave to, the Applicants to file their Appeal out of time so as to enable them exercise their right of Appeal.
49. On the second issue as to whether the Applicants had satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal, Order 42 Rule 6 of the Civil Procedure Rules stipulates as follows:
- “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.”

50. There are three conditions for granting of stay order pending Appeal under Order 42 Rule (6) (2) of the *Civil Procedure Rules* to which :
- 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.
51. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma v Abuoga* (1988) KLR 645 where their Lordships stated that;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
52. The purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine v Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), the Court held that: -
- “The purpose of the application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory”.
53. As the Applicant’s had rightly stated in their submissions, Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions according to Section 1A (2) and 1B of the *Civil Procedure Act*.
54. It therefore follows that all the pre-overriding objective decisions must now be looked at in the light of the said provisions. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.
55. On the first condition of proving that substantial loss may result unless stay order is made, the Applicants herein contend that they would suffer irreparable loss if stay was not granted as Respondent was in the process of executing the said judgement which comprised hiving off 2.5 acres from parcel of land known as Kericho/Cheborgei/270 now Kericho/Cheborgei/1137 and 1138 where the Applicants have built their matrimonial home and which was their only source of livelihood having lived there for over 30 years.
56. Having taken into consideration that it is not the duty of the Court to deny successful litigants the fruits of their Judgment, I find that if the orders sought are not granted, there is a higher risk of injustice being occasioned.
57. On the second condition, there is no dispute that the impugned judgment was delivered on 7th February, 2023 and the Applicants filed the present Application and the Memorandum of Appeal on 20th March, 2023. I find that the said application was brought without undue delay.



58. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the [Civil Procedure Rules](#) stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Applicant has pledged his willingness to deposit security for due performance of any decree that may be binding on him. In the case of [Arun C. Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others](#) [2014] eKLR the court had 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.”

59. The grant of stay remains a discretionary order that must also take into account the fact that the Court ought not to make it a practice of denying a successful litigant the fruits of their judgment.

60. So as not to prevent an Appeal, I shall allow the said application dated the 20th March, 2023 on the following terms;

- i. Stay of the execution of the judgment/decreed herein is granted pending hearing and determination of the Applicants' intended Appeal.
- ii. The Applicants shall within 30 days from the date of delivery of this ruling, deposit Kshs. 223,950/= (Two hundred and twenty-three thousand, nine hundred and fifty) in Court. In default, the stay shall automatically lapse.
- iii. If the Applicants have not been supplied with the proceedings required to prepare the record of Appeal, their Counsel shall liaise with the Deputy Registrar of this court and ensure that the same are supplied within fifteen (15) days of this ruling.
- iv. The Applicants shall within forty-five (45) days from the date of this ruling compile, file and serve upon the Respondent a complete record of Appeal.
- v. Should the Applicants not file their Appeal within the time stipulated in (iv) above, the window granted to file the Appeal shall automatically lapse.

There shall be no Costs.

DATED AND DELIVERED AT KERICHO VIA TEAMS MICROSOFT THIS 26TH DAY OF OCTOBER 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

