



Mulili v Mutisya & another (As the administrators of the Estate of the Late Philip Mutisya Mwove) (Environment and Land Miscellaneous Application 13 of 2023) [2023] KEELC 21011 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21011 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 13 OF 2023
CA OCHIENG, J
OCTOBER 26, 2023**

BETWEEN

RICHARD MUSYOKI MULILI APPLICANT

AND

KILONZO MUTISYA 1ST RESPONDENT

KILUU MUTISYA 2ND RESPONDENT

**AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE PHILIP
MUTISYA MWOVE**

RULING

1. What is before Court for determination is the Applicant's Notice of Motion Application dated the 14th February, 2023 where he seeks the following Orders:
 1. Spent
 2. That pending the hearing and determination of this Application, this Honourable Court be pleased to issue an Order for stay of execution of the implementation of the Judgment dated and delivered on 15th December, 2022 and all consequential Orders thereto.
 3. That the Draft Memorandum of Appeal annexed hereto be deemed as duly filed upon payment of requisite fees.
 4. That pending the hearing and determination of the intended appeal, this Honourable Court be pleased to issue an Order for stay of execution of the implementation of the Judgment dated and delivered on 15th December, 2022 and all consequential orders thereto.



5. That in the alternative, this Honourable Court be pleased to set aside the Judgment delivered on 15th December, 2022 and the decree in its entirety and be pleased to Order that the suit be heard afresh before a court of competent jurisdiction.
6. That cost of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Richard Musyoki Mulili where he deposes that he is the legal representative of the Estate of Mulili Mitu. He explains that land parcel number Matungulu/kawethei/5 hereinafter referred to as the 'suit land', belonged to his late father. He explains that on 15th December, 2022, Hon. Ole Keiwua held that the suit land belongs wholly to the family of Philip Mutisya Mwove and that he had no interest and/or claim over it. Further, that he is desirous of preferring an Appeal against the entire Judgment. He avers that despite his desire to lodge an Appeal, he was faced with financial constraints and as a consequence, the statutory prescribed time within which to file the Memorandum of Appeal lapsed. He reiterates that the delay is indeed excusable as no prejudice will be caused to the Respondents. He insists that the prospects of success of the intended Appeal are overwhelming and it is in the interest of justice if there is a stay of execution granted pending the said Appeal.
3. The Respondents opposed the instant Application by filing a Replying Affidavit sworn by the 1st Respondent KILONZO MUTISYA where he explains that they are the legal administrators of the Estate of Philip Mutisya Mwove (deceased). He insists that the instant Application is fatally and incurably defective in its entirety and ought to be dismissed with costs. He contends that in the year 1973 the families of Mulili Mitu (deceased) and Mulove Mitu (deceased) sold the suit land to their father Phillip Mutisya Mwove (deceased) through a written Sale Agreement. He confirms that Philip Mutisya Mwove (deceased) took possession of the land in 1973 and immediately began to develop it as well as established his matrimonial home thereon. He avers that the family of Philip Mutisya Mwove have been living peacefully, and enjoying quiet possession of the suit land, since 1973 without interference from anyone. He states that on 9th January, 2019 they were issued with an eviction letter from the Applicant demanding that they vacate the suit land within seven (7) days, failure of which, he would evict them. He contends that the Applicant alleges that the families of Mulili Mitu (deceased) and Mulove Mitu (deceased) sold to their father Philip Mutisya Mwove (deceased) land parcel Matungulu/Kawethei/4 and not the suit land. He argues that land parcel number Matungulu/Kawethei/4 is a market and not a residential area. He claims they have extensively developed the suit land, buried their loved ones thereon as well as occupied it continuously and uninterruptedly for 45 years. He reiterates that the Applicant has never brought such a claim for the past 45 years since their father Philip Mutisya Mwove (deceased) bought the land in 1973. Further, that Mulili Mitu (deceased) who was the Applicant's father and the registered owner had never claimed ownership of the suit land before his demise in 2004 yet they had been residing as neighbours since 1973. He deposes that the delay in lodging the Appeal has not been sufficiently explained and therefore the Applicant has failed to prove why the discretion of the Court to extend time should be exercised in his favour. Further, that extending time to appeal would be very prejudicial to them as the beneficiaries of the estate of Philip Mutisya Mwove as litigation must come to an end and litigants be allowed to enjoy the fruits of their Judgment. He reaffirms that the Applicant has not demonstrated that he stands to suffer substantial loss if the orders he has sought are not granted. Further, the Applicant has not given security for the due performance of the Decree and Order.
4. The application was canvassed by way of written submissions.



Analysis and Determination

5. Upon consideration of the instant Notice of Motion Application including the respective affidavits, annexures and rivalling submissions, the following are the issues for determination:
 - a. Whether the Applicant is entitled to enlargement of time to lodge his Memorandum of Appeal.
 - b. Whether the Applicant has satisfied the conditions for stay of execution pending the intended Appeal.
6. The Applicant in his submissions contends that he is entitled to orders of stay of execution pending Appeal, as he was not accorded a fair trial in the magistrate's court. He avers that he will suffer substantial loss unless the order for stay of execution are made as he is set to lose his inheritance that is registered in his late father's name. Further, that he has legal documents showing the ownership of the land including minutes from family meetings, in which the Respondents were in attendance and therefore fully aware of the family land allocation. He reiterates that the application has been filed without unreasonable delay. Further, that at the time of filing the instant Application, he was acting in person and being a layman, he acted as expediently as he could to ensure that he would have access to justice. To support his averments he relied on Section 1A (2) and 3 of the *Civil Procedure Act* and Order 42 Rule 6(2) of the Civil Procedure Rules as well as the following decisions: Sammy Maina Vs Stephen Kariuki (1984) eKLR; Antoine Ndiaye Vs African Virtual University (2015) eKLR and James Wangalwa & Anor Vs Agnes Naliaka Cheseto (2012) eKLR.
7. The Respondents in their submissions insist that the Applicant is not entitled to extension of time and referred to Section 79G of the *Civil Procedure Act*. They argue that for an Appeal to be admitted out of time, an Applicant has to sufficiently show that he had a good reason for not filing the same within the statutory period. Further, that Judgment was delivered on 15th December, 2022 while the instant Application was filed on 14th February, 2023. They insist that there was an inordinate delay of sixty (60) days in filing of the Appeal yet the Applicant has not offered sufficient reason for his delay. They contend that as per the draft Memorandum of Appeal, the main issue in contention is the trial court's jurisdiction in matters of adverse possession and the Respondents' possession of the parcel of land. Further, that the Applicant had the opportunity to address the issue of the trial court's jurisdiction at the trial court, which he never did. They further referred to Section 9(a) of the Magistrates Courts Act in respect to jurisdiction of the Magistrates Court to determine matters on environment and land. They further submitted that the Subordinate Court had the requisite jurisdiction to hear and determine matters of adverse possession given that the subject matter falls well within the pecuniary limits and territorial jurisdiction of the Honorable court and the Honorable Magistrate is duly gazetted as well as granted jurisdiction to handle cases involving occupation including title to land. They further insist that the instant Application is made in bad faith and the Applicant is not entitled to orders of stay of execution pending Appeal. Further, no security has been offered by the Applicant for due performance of the Decree. They reiterate that the Applicant has not established that he is likely to suffer any irreparable damage/loss as the subject matter is land which is an immovable asset and would be available to any party who would eventually succeed in the Appeal. To support their averments, they have relied on the following decisions: Mombasa County Government Vs Kenya Ferry Service & Anor (2019) eKLR; Evans Kiptoo v Reinhard Omwoyo Omwoyo [2021] eKLR; Abdul Aziz Ngoma v Mungai Mathayo & another [1976] eKLR; Laji Bhimji Shangani Builders & Contractors -Vs- City Council Of Nairobi [2012] eKLR; Patrick Ndegwa Munyua Versus Benjamin Kiiru Mwangi & Another [2020] eKLR; Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2



others [2014 eKLR; *Loise Kanyokora Warui V Gladys Njeri Muriuki* (2022) eKLR and *Evans Kiptoo V. Reinhard Omwonyo Omwoyo* (2021) eKLR.

8. As to whether the Applicant is entitled to enlargement of time to lodge his Memorandum of Appeal.
9. On enlargement of time to lodge a Memorandum of Appeal, Section 79G of the *Civil Procedure Act* provides that:

"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."

10. While Section 95 of the *Civil Procedure Act* stipulates thus:

"Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

11. Further, Order 50 Rule 6 of the Civil Procedure Rules states that:

"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."

12. Order 50, Rule 4 of the Civil Procedure Rules makes provisions on the period time stops running and states thus:

"Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act: Provided that this rule shall not apply to any application in respect of a temporary injunction."

13. In this instance, the Applicant seeks enlargement of time to file the Memorandum of Appeal. He explains that he failed to file the Memorandum of Appeal on time due to lack of resources. The Respondents have vehemently opposed the instant Application insisting that the Applicant has not demonstrated sufficient cause to warrant the orders sought. The Applicant contends that he has an arguable Appeal. I note the Judgment in the lower court case was delivered on 15th December, 2022 while the Applicant filed the instant Application on 15th February, 2023 which was sixty (60) days later. However, it is trite that from 21st December, upto 13th January, time stopped running. This in essence means the Applicant should have filed his Memorandum of Appeal by 5th February, 2023.



14. In the case of Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR, the Learned Judge stated that:

"Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in *Mwangi v Kenya Airways Ltd* [2003] KLR. They include the following:

- a. The period of delay;
- b. The reason for the delay;
- c. The arguability of the appeal;
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- e. The importance of compliance with time limits to the particular litigation or issue; and
- f. The effect if any on the administration of justice or public interest if any is involved.....

Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is not required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden."

15. While in the case of Kamlesh Mansukhalal Damki Patni Vs Director of Public Prosecution & 3 Others [2015] eKLR, the Court of Appeal stated that:

"It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of *the Constitution* which succinctly states that "judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution." Judicial officers are also state officers, and consequently, are enjoined by Article 10 of *the Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting *the Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.

For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice."



16. On perusal of the lower court proceedings, Judgment and draft Memorandum of Appeal, I note the Applicant has raised triable issues in the said draft Memorandum of Appeal. From the explanations by the Applicant, on his delay in filing the Memorandum of Appeal, I find it plausible. Even though the Respondents have vehemently opposed the instant Application, I am of the view since the Applicant only delayed for 10 days in filing the Memorandum of Appeal, I find it excusable. It is my considered view that since the Respondents are residing on the suit land, they will not suffer any prejudice if the orders sought are granted.
17. As to whether the Applicant has satisfied the conditions for stay of execution pending the intended Appeal.
18. I note the Applicant has sought for a stay of execution pending Appeal but is yet to file a Memorandum of Appeal. The Respondents have opposed the Application and contend that the Applicant has not issued any security for costs. Since the Respondents are the ones on the suit land, noting that the Court had directed the Applicant to transfer the suit land to them, I opine that there is no need for security for due performance of the Decree. Insofar as the Memorandum of Appeal is yet to be filed, but in the interests of justice so as not to render the intended Appeal nugatory, I direct that the obtaining status quo be maintained where no party should interfere with the suit land, pending the outcome of the intended Appeal.
19. In the foregoing, while relying on the legal provisions I have cited as well as associating myself with the quoted decisions, I will exercise my discretion to enlarge time to enable the Applicant file the Memorandum of Appeal.
20. In the circumstance, I find the Applicant's Notice of Motion dated the 14th February, 2023 merited and will allow it in the following terms:
 1. The Applicant be and is hereby directed to file and serve the Memorandum of Appeal within fourteen (14) days from the date hereof failure of which the Orders granted herein stand vacated.
 2. The obtaining status quo be maintained where no party should interfere with the suit land, pending the outcome of the intended Appeal.
 3. Costs of this application will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 26TH DAY OF OCTOBER, 2023

CHRISTINE OCHIENG

JUDGE

