Ochieng v Munda & 2 others (Environment and Land Miscellaneous Application E001 of 2023) [2023] KEELC 21398 (KLR) (23 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21398 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2023

MN KULLOW, J

OCTOBER 23, 2023

BETWEEN

OTIENO BOLIVERS OCHIENG ..... APPELLANT

AND

ABEL APIYO MUNDA ..... 1ST RESPONDENT

SAMWEL ONYANGO OKEYO ..... 2ND RESPONDENT

GODWIN ODOYO T/A KARIERO PROPERTIES ..... 3RD RESPONDENT

RULING

1. By Notice of Motion dated 30th June, 2023, the Applicant sought the following orders: -
   a. Spent.
   b. That this Honourable Court be pleased to grant leave to the Applicant/ Appellant to file Memorandum of Appeal out of time.
   c. This Honourable Court be pleased to grant an order for stay of execution of the judgment and consequential orders issued on the 4th April, 2023 in Rongo PM ELC No. 9 of 2019 pending the hearing and determination of this Application.
   d. The costs of this Application be provided for.
2. The application is premised on the 10 grounds on its face and on the Applicant's Supporting Affidavit sworn on even date. The applicant contends that the delay in filing the Appeal was occasioned by the failure of the court to serve his advocate on record with the judgment notice and they were therefore not aware that the matter had been fixed for judgment on the 4th April, 2023. It is his claim that they only learnt that the judgment had been delivered on 19th June, 2023 when they were served with the Respondent's Bill of Costs.

3. It is further his claim that he is aggrieved by the said judgment and the consequential orders arising therefrom; whose effect was to order his eviction from the suit parcel and a refund of Kshs. 660,000/ = to the Respondent and he intends to appeal against the same.

4. It is his contention that the time within which a party can appeal has since lapsed hence the instant Application. He maintained that the Application was filed without unreasonable delay and the intended Appeal raises triable issues with high chances of success. He thus urged the court to allow the Application in the interest justice since the same would not occasion any prejudice to the Respondents.

5. The application was opposed. The 1st Respondent filed a Replying Affidavit dated 18.09.2023. He averred that the judgment of the trial court was delivered by notice to all parties and dismissed the instant application as being a delaying tactic.

6. It was his contention that the delay occasioned in filing the instant application is unreasonable and the same has not been satisfactorily explained.

7. On the order for stay of execution of the trial court judgment, it was his claim that the Applicant had neither disclosed any reasonable ground or satisfied the court that he stands to suffer substantial loss nor demonstrated his willingness to provide security as required under order 42 rule 6(2) (b) of the *Civil Procedure Rules*. He therefore urged the court to dismiss the application and allow him to realize the fruits of his judgment.

8. The Application was canvassed by way of written submissions. The 1st Respondent filed his submissions dated 22.09.2023 together with authorities which I have read and considered. Despite being given sufficient time to file his submissions, at the time of writing this Ruling, there were no submissions by the Applicant. Be as it may, I will proceed to render my decision as hereunder, the Applicant's failure to file submissions notwithstanding.

Analysis and Determination

9. It is my considered opinion that the issues arising for determination include;

    i. Whether this court can extend time to lodge the Memorandum of Appeal.

    ii. Whether an Order for Stay of Execution can issue against and the judgment delivered on 4/4/2023 and all the consequential orders therefrom.

I. Whether this court can enlarge time to lodge the Memorandum of Appeal

10. The principles to be considered in exercising the court's discretion on whether or not to enlarge time to file appeal were set out in the case of *Leo Sila Mutiso vs Rose Hellen Wangeri Mwangi* Civil Appeal 255/ 1997, the court, in considering the exercise of discretion to extend time, held as follows: -

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted."

(See also *Mwangi vs Kenya Airways Ltd*, {2003} KLR 486)

11. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman vs. Cumarasamy* [1964] 3 All ER 933.

12. The first principle to determine is the length of the delay and the reason for the delay if any. The present Application was filed on the 30th June, 2023 while the judgment of the trial court was delivered on the 4th April, 2023. The Application was therefore filed within 2 months and 26 days. 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 vs Paul Kipkorir Kibet* [2018] eKLR.

13. The Applicant attributed the delay in filing the Appeal within time on the failure to be notified of the date scheduled for the delivery judgment. It is his claim that parties were advised that the judgment would be issued on notice; however, he only became aware that judgment had been delivered on 19th June, 2023, when he was served with the Respondent's Bill of Costs.

14. The Respondent on the other hand dismissed the said averments and maintained that the notice of delivery of judgment was duly served upon all advocates through the Rongo Notice Board WhatsApp forum, the said information was therefore in the public domain. He thus contended that the explanation was not satisfactory and the Application is merely a delaying tactic.

15. I have considered the rival position by the parties. It is not in dispute that the trial court judgment was not delivered on the earlier scheduled date and parties were advised that the same would be issued on notice. While the Applicant contends that he was not aware of the said notice, the Respondent stated that the said notice was availed in the Rongo Notice Board WhatsApp platform, which is a public domain. There is no guarantee that the Applicant or his advocate is a member in the said forum, there is also no guarantee that the said advocate/ applicant actually read the said message or had the means to access the said message.

16. That said, even though there has been delay, the said delay is not so inordinate as to deny the Applicant an opportunity to ventilate his grievances on Appeal. I will therefore give the Applicant the benefit of doubt and find that the explanation for the delay given is plausible and satisfactory.

17. The next principle to be considered is the chances of success of the intended Appeal. I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the intended appeal at this stage. The Applicant need not persuade the court on the probability of success of his intended appeal but rather should demonstrate the arguability of the appeal; that the intended appeal raises triable issues that may overturn the judgment rendered.

    See *Kenya Commercial Bank Limited vs. Nicholas Ombija* [2009] eKLR and *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR.

18. The Applicant in his Supporting Affidavit has demonstrated the effect of the Judgement dated 04.04.2023 and how the same will affect him in the event that he is evicted from the suit property and he is compelled to pay the Kshs. 660,000/- I have also looked at the draft Memorandum of Appeal and I note that the same touches on pertinent issues on ownership of the suit land, which in my opinion are arguable and triable points. The Applicant will have an opportunity to satisfy the court on the merits of his Appeal and the Respondent will equally have an opportunity to respond to the said issues upon the filing of the intended Appeal.

19. The final element to be proved is the degree of prejudice to the Respondents if the Application is allowed. The degree of prejudice entails balancing the competing interests of the parties; the injustice to the applicant in denying him an extension to exercise his right of appeal, against the prejudice to the

respondent in realizing the fruits of his judgment, the need to balance the interests of a party who has a decision in his favour against the interest of a party who has constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes. As explained in the foregoing paragraphs; the intended Appeal seeks to determine the substantial issues in dispute with finality. Both parties will have an opportunity to present their case and thus it cannot be said that the same will be prejudicial to the Respondents.

20. In the premises, I find that enlarging time and allowing the Applicant to pursue the Intended Appeal would not unduly prejudice the Respondent. The intended appeal will only seek to answer the real and triable issues arising from the judgment and consequently settle the matter with finality. Further, in the event of any prejudice, the same can be compensated by way of costs. I therefore hold in favor of the Applicant.

21. In view of the above, I am inclined to exercise my discretion in favour of the Applicant as no substantial prejudice will be occasioned on the Respondents. I accordingly allow that Prayer (b) on enlarging time to file the Intended Appeal.

II. Whether an Order for Stay of Execution can issue against the Judgment and Decree delivered 04/04/2023

22. 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 defeated. In the case of *Consolidated Marine. vs. 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".

23. 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. Order 42 rule 6(2) 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.

24. The import of the provisions in order 42 rule (2) above is to clearly outline the three prerequisite conditions for the granting of an order for stay pending Appeal as follows:

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.

25. It is now well settled that an Applicant must demonstrate the substantial loss that he is likely to suffer unless an order for stay of execution is granted. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs 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."

26. I have looked at the Applicant's Supporting Affidavit and it is important to note that the Applicant neither touched on the issue of stay of execution nor demonstrate the substantial loss that he is likely to suffer.

27. The Respondents on the other hand maintained that the Application is devoid of merit since the Applicant has not demonstrated the substantial loss he is likely to suffer.

28. The question that therefore follows is whether the said failure is fatal despite the effect of the trial court judgement, which ordered for the eviction of the Applicant from the suit land and a payment of the Kshs. 660,000/=

29. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the Court while addressing the issue of substantial loss held 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."

30. It is common ground that substantial loss is that which must be prevented and it goes to the heart of an Order for stay of execution. The Applicant herein has not demonstrated the substantial loss that he is likely to suffer, either to the satisfaction of the court or at all. This court cannot therefore litigate on behalf of the Applicant herein and pre-empt substantial loss that he will suffer. Substantial loss should neither be inferred nor be implied; an Applicant is duty bound to demonstrate the nature of loss that they are likely to suffer should an order for stay of execution be denied.

31. In view of the foregoing, the Applicant having failed to prove and/or demonstrated the substantial loss that he is likely to suffer unless an Order for stay of execution is granted; I find no basis to hold that the Respondents should be denied the right to enjoy the fruits of their judgment.

32. Having found that there was no demonstration of substantial loss, it may not be necessary to consider the other pre-requisite conditions but I shall nonetheless do so briefly. On whether the Application has been filed without undue delay; the judgment in question was delivered on the 4th April, 2023 while the present Application was filed on the 19th June, 2023, 3 months 26 days. The Applicant explained the delay earlier in the ruling, which explanation I find to be sufficient in the circumstances as held above.

33. The final element to be proved is on the deposit of security for costs as the court may direct. Again, from a look at the Applicant's Supporting Affidavit, there is no indication and/or demonstration of

his willingness and readiness to deposit security for costs for the due performance of the decree in the circumstance. No commitment has been exhibited by the Applicant on the deposit of security for costs.

34. In the case of *Aron C. Sharma vs. 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."

35. The totality of the foregoing is that the Applicant has not satisfied the 3-limb test provided under the Civil Procedure Rules to the required standard. In the circumstances thereof, I find that the Applicant has not proved Prayer No. (c) on stay of execution to warrant the grant of the orders sought. Consequently, prayer (c) fails.

Conclusion

36. In the upshot, I accordingly find that the Application dated 19th June, 2023 is Partially merited and I accordingly allow the same on the following terms: -

    a. Leave be and is hereby granted to the Applicant to file his Memorandum of Appeal within 21 days from the date of this Ruling.

    b. The Applicant/ Intended Appellant if further directed to file his Record of Appeal within 60 days from the date of this Ruling.

    c. Costs of the Application to abide the Intended Appeal.

DATED, SIGNED and DELIVERED Virtually at MIGORI on the 23RD day of OCTOBER, 2023.

MOHAMMED N. KULLOW

JUDGE