



**Kandagor v Yegon & another (Environment and Land Miscellaneous Application
E09 of 2023) [2023] KEELC 20803 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20803 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E09 OF 2023
JM ONYANGO, J
OCTOBER 17, 2023**

BETWEEN

SAMSON KIMOSOP KANDAGOR APPLICANT

AND

SAMUEL CHERUNGE YEGON 1ST RESPONDENT

MATHEW KIBET KIPTIKIGEN 2ND RESPONDENT

RULING

1. The Applicant filed an application dated 21st February, 2023 pursuant to Order 9 Rule 9, Order 43 Rule 1,2 and 3, Order 50 Rule 6, Order 51 Rule 1 and Order 22 Rule 52 of the [Civil Procedure Rules](#) as well as Sections 3 and 3A of the [Civil Procedure Act](#) seeking leave to file an appeal out of time against the decision of Honourable Biwot in Kabarnet ELC no 3 of 2017. He also sought a stay of execution pending appeal.
2. The application is based on the grounds set out on the face of the Notice of Motion the Applicant's Supporting affidavit sworn on 21st February, 2023. The main ground upon which the application is based is that the time within which to file the appeal has lapsed. He states that he was not aware of judgment until the Respondents attempted to evict him.
3. The application is opposed by both Respondents. The 2nd Respondent filed Grounds of Opposition dated 27th February, 2023 in which he pointed out that by the time the Applicant filed the application, the 30 days within which to file an appeal had not elapsed and therefore the application was premature, defective and an abuse of the court process.
4. He also stated that the court lacked the jurisdiction to extend time for filing an appeal and that the applicant ought to have filed his appeal instead of filing an application for extension of time.



5. The 1st Respondent filed a Replying affidavit sworn on 14th April, 2023 in which he deposes that the application is misconceived, frivolous, made in bad faith and that it is an abuse of the court process. He avers that the applicant has not given sufficient reasons why he did not file his appeal on time. He refutes the Applicant's allegation that he was not aware of judgement as the proceeding show that he was represented on the date the judgment was delivered. He denies that he has tried to evict the Applicant and states that the Applicant willfully removed his temporary structures on the suit property after delivery of the judgment. He adds that the application is an afterthought aimed at denying the Respondent the fruits of their judgment.
6. In response to the Replying Affidavit, the applicant filed a Further Affidavit refuting the claims in the Replying Affidavit. He maintains that he is possession of the suit property and that he carries on business thereon hence he would suffer loss if the application is not granted.
7. The application was canvassed by way of written submissions and all the parties filed their submissions which I have carefully considered.

Parties Submissions

8. In his submissions dated 27th April, 2023 learned counsel for the applicant relied on the case of *Thuita Mwangi v Kenya Airways Ltd* (2003) eKLR where the court summarized the factors that the court ought to consider before granting an application for leave to file an appeal out of time as follows:-
 - 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 the time limits to particular litigation or issue and
 - f. The effect if any, on the administration of justice.
9. It was his contention that the period of delay was two months, which was not inordinate. He further contended that his appeal has high chances of success.
10. With regard to stay of execution, he submitted that the Applicant was currently in occupation of the suit property and if he is evicted before his appeal is heard and determined, he shall suffer substantial loss. He also submitted that the applicant is ready to abide by any conditions regarding security for costs as the court may impose.
11. On his part learned counsel for the 1st Respondent submitted that appeals from subordinate courts to the High court are supposed to be filed within 30 days as provided under Section 79G of the *Civil Procedure Act*. It was his submission that the judgment in CMELC Case no 3 of 2017 was delivered on 24th January, 2023 and by the time the Applicant filed the instant application on 21st February, 2023 the 30 days had not elapsed. He therefore ought to have filed the appeal instead of applying for leave.
12. Counsel further contended that even if the time for filing the appeal had lapsed, the Applicant ought to have first filed an appeal then sought leave to have the appeal admitted out of time. He relied on the case of *Gerald M'limbine v Joseph Kangangi* (2008) eKLR where Emukule J observed as follows:

“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek the



court's leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court process under section 79B"

13. On the question of stay, he submitted that there is no substantive appeal and therefore a stay cannot be granted. He added that the Applicant had not demonstrated that he would suffer substantial loss if the stay was not granted nor did he have an arguable appeal.
14. Learned counsel for the 2nd Respondent also submitted that the application was filed prematurely as 30 days had not yet elapsed from the time the judgment was delivered when the Applicant filed the instant application.
15. He concurred with counsel for the 1st Respondent that under section 79G one ought to file an appeal before applying to have it admitted out of time.
16. It was further submitted on behalf of the 2nd defendant that the prayer for stay could not be granted as no appeal had been filed.

Analysis and Determination

17. The issues for determination are twofold:-
 - i. Whether the Applicant should be granted leave to appeal out of time.
 - ii. Whether a stay of execution should be granted
18. It is not in dispute that judgment was delivered in CMELC Case no 3 of 2017 on 21st February, 2023. The Applicant who alleges that he was dissatisfied with the said judgment ought to have filed his appeal within 30 days from the date when judgment was delivered, that is on or before 24th February, 2023. However, the Applicant moved the court on 21st February, 2023 vide the instant application seeking leave to appeal out of time. Clearly the application was made prematurely as the time for filing the appeal had not lapsed.
19. On this ground alone, the application fails as leave to appeal against a judgment of the lower court need not be granted before the expiry of 30 days which is the statutory period provided under Section 79G of the *Civil Procedure Act*. The application was therefore premature and superfluous. I will not delve into the discourse regarding whether or not the appeal ought to have been filed before applying to have it admitted as that does not arise since the instant application was not brought pursuant to Section 79G of the *Civil Procedure Act*.
20. As to whether the applicant is entitled to an order of stay of execution pending appeal, I agree with counsel for the Respondents that in the absence of an appeal the question of stay pending appeal does not arise. For the avoidance of doubt, the interim order for stay that was granted pending the hearing and determination of this application is hereby discharged/vacated.
21. The upshot is that the application lacks merit and it is struck out with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 17TH DAY OF OCTOBER, 2023.

J.M ONYANGO

JUDGE

In the presence of;



Mrs. Lelei for the Applicant

Miss Matoke for Mr. Nyagaka for the 2nd Respondent

Miss Nyaribo for Miss Cheptinga for the 1st Respondent

Court Assistant: A. Oniala

