



**Obunga & another v Onsase (Environment and Land Miscellaneous Application
6 of 2023) [2023] KEELC 21826 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21826 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 6 OF 2023
MN KULLOW, J
NOVEMBER 29, 2023**

BETWEEN

SIMEON OHURU OBUNGA 1ST APPLICANT

BRUNO ONGUTE ACHUTI 2ND APPLICANT

AND

JOSEPH OMWOYO ONSASE RESPONDENT

RULING

1. By Notice of Motion dated 12th May, 2023, the Applicants sought for the following orders: -
 - a. Spent.
 - b. That the Applicants be granted leave to file their appeal out of time.
 - c. There be a stay of execution pending the final determination of the intended Appeal.
 - d. Costs of this Application be provided.
2. The application is premised on the 4 grounds on its face and on the 1st Applicant's Supporting Affidavit sworn on even date. The applicant avers that they were not aware of the trial court case filed in Rongo Law Courts vide Misc. Application No. 6 of 2009; they were neither informed of the case before the court nor of the judgment of the court delivered on 26/2/2009 and the Decree issued on 31/07/2017.
3. It is his contention that their advocate on record visited Rongo Law Courts and it is then that they got the documents relating to the trial court case, a decree and mutation forms signed by the Executive Officer of Rongo Law Courts.
4. He maintained that the suit in the trial court was against their deceased father who died in the year 1972. That the subject land in question was registered in their late father's name and no succession had been instituted in respect of their father's estate.



5. It was further their claim that the land dispute tribunal and the trial court, Rongo Law courts were not vested with the requisite jurisdiction to entertain the dispute. He thus urged the court to allow the Application *ex-debito justitiae*.
6. The application was opposed. The Respondent filed a Replying Affidavit sworn and dated 16.05.2023. It is his contention that succession proceedings in respect to the estate of Nehemiah Obunga Onchieri, the Applicants' deceased father; were undertaken and thereafter the Land Disputes Tribunal proceedings were filed and concluded. He annexed the various pleadings in the succession cause and the Land Disputes Tribunal marked as "JOO 1- 7" in support of his averments.
7. It was his claim that this court lacks the requisite jurisdiction to entertain the intended Appeal since the order of eviction which the Applicants seeks to challenge was issued by Ogembo Law Courts and thus he contended that the correct appellate court ought to have been Kisii ELC Court, pursuant to sections 5 as read with section 12 of the *Civil Procedure Act*. He therefore dismissed the intended Appeal as being misconceived and mischievous and urged the court to dismiss the same.
8. The Application was disposed of by way of written submissions. Both parties filed their rival submissions which I have read and considered.

Analysis And Determination

9. It is my considered opinion that the issues for determination arising therefrom include;
 - i. Whether this court can enlarge time to file an Appeal.
 - ii. Whether an Order for Stay of Execution can issue against and the judgment delivered on 17/12/2008 and Decree dated 31/07/2017.

I. Whether This Court Can Enlarge Time To File An Appeal

10. Section 79G of the *Civil Procedure Act* empowers the court to enlarge time within which to lodge an Appeal notwithstanding that the time required to file the same has since lapsed.
11. 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 v 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 v Kenya Airways Ltd*, {2003} KLR 486)
12. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman v Kumarasamy* [1964] 3 All ER 933.
13. The first principle to be established is the length of the delay and the reason for the delay if any. The present Application was filed on the 12th May, 2023 whereas the judgment and decree of the trial court was issued on the 26/2/2009 and 31/7/2017 respectively. 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.

14. The Applicants in explaining the delay of over 14 years has stated that they were not aware of the case before the trial court in Rongo Law Court; they were not informed of the judgment or decree of the Rongo Law Court and only became aware of the existence of the case when they were served with an Order dated 30/3/2023 from Ogembo Law Courts.
15. The Respondent dismissed the claims by the Applicants and dismissed the Application as being an abuse of the court process.
16. As held earlier in the ruling, the burden is on the party seeking the indulgence of the court to give a satisfactory and sufficient explanation for the delay to warrant the exercise of the discretion in his favor. It is the Applicants claim that they were neither aware of the case in the trial court nor were they informed of the judgment and decree issued therein. I have carefully looked at the annexures adduced by the Respondent, particularly Annexure “JOO 3 & 4” Proceedings and verdict of the Land Dispute Tribunal and Decree dated 31/07/2017 respectively.
17. It is important to note that the verdict of the Land Tribunal was adopted as the judgment of the court and the Decree in question resulted therefrom. Further, from the tribunal proceedings, I have noted that the Applicants herein fully participated in the proceedings and therefore the explanation tendered that they were not aware of the case or of the judgment of the court is false and the same is intended to mislead this court. The maxim of equity is clear in this regard; he who comes to equity must come with clean hands. A party with a good cause of action ought to pursue it with reasonable diligence.
18. I therefore find the explanation given by the Applicants for the over 8 years delay is not sufficient and satisfactory in the circumstances, it is evident that the Applicants were fully aware of the proceedings relating to the land in dispute and even participated in the tribunal proceedings, they cannot therefore assert that they were not aware of the judgment or decree when the award of the tribunal was adopted as the judgment of the court.
19. Having held that there has been no sufficient explanation for the over 8 years delay in filing the instant Application to the satisfaction of the court, I find that the remaining elements to be established and proved fall by the way and discussing the same would amount to an academic exercise. In view of the same, I find that prayer No. (b) on leave to Appeal out of time has not been proved to the required threshold and the same therefore fails.

II. Whether an Order for Stay of Execution can issue against the judgment delivered 17/12/2008 and Decree dated 31/07/2017

20. 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. 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”.
21. 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.
22. 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.
23. The first ground to be established is whether substantial loss may result to the Applicant unless stay of execution is granted. 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.”
24. It is upon the Applicant to demonstrate the loss he is likely to suffer if the order for stay of execution sought is not granted. The onus is on the Applicant to give sufficient cause to the court to enable it to exercise its discretion in granting the orders as sought.
25. I wish to point out that Applicants have not demonstrated any substantial loss that they are likely to suffer in their Supporting Affidavit. A cursory look at the body of the Supporting Affidavit, the Applicants have solely deposed on the issue for leave and there is no demonstration of the prerequisite elements to be proved for the grant of an order for stay of execution.
26. The second element to be established is whether the Application has been filed without undue delay. As earlier stated, the instant Application has been filed after 8 years since the delivery of the judgment sought to be stayed. There has not been a satisfactory explanation for the reason for the delay and as stated hereinabove, the Applicants cannot allege that they were not aware of the case against them when the proceedings of the tribunal clearly show that they were aware and fully participated in the said proceedings.
27. Having held that the Applicants have neither demonstrated the substantial loss that they are likely to suffer nor satisfactorily explained the 8 years delay in filing the instant Application, I find that they have not proved their claim to the required threshold to warrant the grant of the orders sought.
28. Be that as it may, having held that the Applicant 9has not proved his claim to warrant the grant of leave to appeal out of time, the orders for stay of execution would be untenable owing to the fact that there is no appeal to be rendered nugatory and would simply aid the Applicant in denying the Respondents an opportunity to enjoy the fruits of their judgment. There has to be an end to litigation.
29. In the upshot, I accordingly find that the Application dated 12th May, 2023 is not merited and the same is hereby dismissed with costs to the Respondents. It is so ordered!

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON THE 29TH DAY OF NOVEMBER, 2023.



MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of:-

..... for the Applicant

..... for the Respondents

Court Assistant- Tom Maurice/ Victor

