



Nyangilo & another v Ochieng & 2 others (Environment and Land Appeal E041 of 2022) [2023] KEELC 21865 (KLR) (22 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21865 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E041 OF 2022
GMA ONGONDO, J
NOVEMBER 22, 2023**

BETWEEN

BENJAMIN OPIYO NYANGILO 1ST APPLICANT

JACK ODHIAMBO NYAGILO 2ND APPLICANT

AND

JACK OKOTH OCHIENG 1ST RESPONDENT

CALVINCE OCHIENG ODHIAMBO 2ND RESPONDENT

ESTATE OF PHILIP OCHEING MUGESA 3RD RESPONDENT

(Being an application for leave to lodge the record of appeal out of time against the Judgment and decree of the Learned Resident Magistrate's Court at Mbita of the Learned Hon. Mr. Nicodemus Moseti delivered on 17th August, 2022 in SRMCC No. MC. ELC No. 23 of 2019)

RULING

1. On 24th May 2023, the two applicants/appellants filed an application by way of a notice of motion dated 19th May 2023 through Nchoe, Jaoko & Company Advocates seeking the following orders;
 - a. Spent.
 - b. There be granted Stay of the implementation of the decree pursuant to the Judgment delivered on 17th August, 2022 in SRMCC No. MC. ELC No. 23 of 2019, Mbita Court pending hearing and determination of the intended appeal or the appeal.
 - c. That leave of the Honourable Court be granted to the Applicants/appellants to file and lodge the record of appeal out of time, against the Judgment and decree of the Learned Resident Magistrate's Court at Mbita, Hon. Mr. Nicodemus Moseti delivered on 17th August, 2022 in SRMCC No. MC. ELC No. 23 of 2019.



- d. That costs of this application be provided for.
2. The gravamen of the application is the 1st applicant's supporting affidavit of nineteen paragraphs sworn on even date and copies of documents marked as "B1" and "B2" being memorandum of appeal and letter by Mbita Law Courts respectively. In summary, the applicants stated that upon delivery of judgment by the trial court, they lodged a memorandum of appeal on 7th September 2022 and wrote letters on 14th September 2023 and 14th October 2023 requesting typed and certified copies of proceedings from the trial court. That thus, the process of obtaining the relevant court documents to enable them lodge the record of appeal, took longer than the prescribed time. That the respondents have commenced construction of a structure on the suit parcels of land (Numbers 1659, 1660 and 1661 at Gendo village, East Kubia in Suba Sub-County) and the ensuing confrontation thereon may result in blood shed. That the application has been without delay and that the appeal has good chances of success.
 3. The respondents were duly served with the application as disclosed in the affidavits of service sworn on 2nd October 2023, 5th June 2023 and 23rd June 2023 by Jaoko Alexander, learned counsel for the applicants. Be that as it may, there was no reply to the application by the respondents.
 4. Hearing of the application was by way of written submissions pursuant to this court's directions of 14th June 2023.
 5. By the applicants' submissions dated 19th May 2023, learned counsel for the applicants made reference to the leave sought and stated that they lodged the memorandum of appeal within the prescribed period of time. That the application was duly served on the respondents and did letters requesting for typed and certified copies of proceedings and decree on 14th September 2022. That it is the discretion of the court to grant orders sought in the application and that no prejudice will be occasioned on the respondents if the same are granted.
 6. So, it is this court's duty to resolve whether the applicants have established the triple conditions for stay of execution under Order 42 Rule 6 of the [Civil Procedure Rules, 2010](#) namely that;
 - a. The applicants are bound to suffer substantial loss if the stay order is not granted,
 - b. The application has been brought without delay and
 - c. Such security as the court orders Security for the due performance of such decree or order as may ultimately be binding on the applicant has been given by that applicant.
 7. On the first issue, the applicants asserted that the applicants have constructed a structure on the suit parcels of land and the ensuing confrontation may result to blood shed over it. Pursuant to section 13 (7) (a) of the [Environment and Land Court Act, 2015 \(2011\)](#), this court is mandated to grant interim preservation orders over the suit parcels of land herein pending the hearing and determination of the prospective appeal.
 8. Also, the appeal has trial issues including jurisdiction of the trial court over the matter. The right of access to justice and unlimited right to fair hearing of the appeal are provided for under Articles 48, 50 (1) and 25 (c) of the [Constitution](#) of Kenya, 2010. Further, in *Butt-v-Rent Restriction Tribunal* (1979) KLR, it was held;

“.....The appellant has an undoubted right of appeal.....”



9. In the case of Board of Governors, *Moi High School Kabarak and another-v-Malcolm Bell* (2013) eKLR, the Supreme Court of the Republic of Kenya observed that the Court may exercise its inherent jurisdiction and make any essential or ancillary orders to sustain its constitutional mandate;

“...of safeguarding the character and the integrity of the subject matter of the appeal, pending the resolution of the contested issues.”
10. On delay, Order 50 of the *Civil Procedure Rules*, 2010 provides for time. The application was lodged close to three months after the delivery of judgment by the trial court. The applicants have given plausible reasons for the delay as stated in paragraphs 2 and 5 hereinabove.
11. Sections 75 of the *Civil Procedure Act* (Cap 21) sets out the orders from which appeal lies. In section 7 of the *Appellate Jurisdiction Act* Chapter 9 of the Laws of Kenya, this court has powers to grant extension of time as sought in this application.
12. As regards security, the same is at the discretion of the court. See also *Kenya Shell Ltd-versus Kibiru and another* (1986) eKLR and *Halai and Another versus Thornton and Turpin (1963) Ltd (1990) eKLR*.
13. To that end, it is the finding of this court that the instant application has merit.
14. *A fortiori*, the application is hereby allowed in terms of the stay and leave sought in the application as stated in paragraph 1 (b) and (c) hereinabove.
15. The applicants’ counsel to file a record of appeal out of time within the next thirty days from this date failure of which the orders of stay and leave granted herein to lapse automatically.
16. It is so ordered.

DATED, DELIVERED AND SIGNED AT HOMABAY THIS 22ND DAY OF NOVEMBER 2023.

G.M.A ONG’ONDO

JUDGE

Present.

1. Mr. A. Jaoko learned counsel for the applicants/appellants.
2. Luanga, Court Assistant.

