



Musingila v Mbithuka (Environment and Land Miscellaneous Application E011 of 2023) [2023] KEELC 22477 (KLR) (19 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22477 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E011 OF 2023
LG KIMANI, J
DECEMBER 19, 2023**

BETWEEN

MUTUKU MUSINGILA APPLICANT

AND

JOHN MUTISYA MBITHUKA RESPONDENT

RULING

1. Before the Court is an Application dated 17th of October 2023 seeking the following orders:
 1. That the court be pleased to grant leave to the Applicant to appeal out of time against the judgment made by the Hon. J.W Wang'ang'a Senior Resident Magistrate on 8th December 2021.
 2. That the said leave do operate as a stay of proceedings.
 3. That costs of this application be provided for.
2. Grounds in support of the application are found on the face of the application and the supporting affidavit by the Applicant. The application relates to the judgement of the Hon. J. W. Wangang'a delivered in the Senior Principal Magistrate's Court Mutomo Land case E004 of 2021 on 8th March 2021. The Applicant herein was the Defendant in the said case and judgement was entered in favour of the Plaintiff therein.
5. The Applicant states that the urgency in this matter arises from the imminent threat of execution of the orders of eviction from the suit land, which, if carried out will cause severe and irreversible harm to his property rights and interests.



Respondent's Replying affidavit

6. The Respondent filed a replying affidavit stating that this application was made in bad faith and with the intention to deter the Respondent from realizing the fruits of the judgment by the trial court.
7. He deposed that the Applicant was given sufficient time to defend the suit before the trial court and thereafter to vacate the suit land. Indeed, the Respondent stated that the Applicant took two months to respond after service of summons and that he filed a scanty defence and he is inept of grounds to conduct proceedings in this court.
8. The Respondent further stated that the trial court issued a Notice to show cause seeking to have the Applicant committed to civil jail whereby he was on 3rd August 2022 released on a personal bond on the condition that he would voluntarily vacate the suit land and pay the Respondent the costs of the suit. The Applicant later made an application for stay of execution on 11th October 2022 and when the matter came up for inter-partes hearing, the Applicant had not served the said application to the Respondent.
9. On 21st December 2022, a ruling on the application for stay of execution was delivered where proceedings were set aside on condition that the Applicant would pay the Respondent Kshs. 20,000.00 as thrown away costs failure to which execution would revert. The Respondent states that the Applicant failed to act as directed by the court.
10. The Respondent then made a fresh application for execution and during the inter-partes hearing on 15th February 2023, the Applicant was allowed four months to vacate the suit land voluntarily and the matter was scheduled for mention on 7th June 2023. When the said date came, the Applicant claimed that he had not harvested his crops and required one more month and the matter was fixed for mention to confirm compliance after a month.
11. On 12th July 2023 when the matter was mentioned, the Applicant had not vacated the suit land and neither had he paid Kshs. 20,000.00 as ordered by the court.
12. The Respondent therefore deposes that seeking a stay of execution for a second time when the Applicant had previously been granted the same is an abuse of the Court's diplomacy and judicious time.
13. The Respondent further deposes that it would amount to a denial of justice to the Respondent and that a party who willfully disobeys court orders and is guilty of laches should not be entertained by this court and prayed that the appeal be disallowed with costs to the Respondent.

Hearing of the application

14. The hearing proceeded by way of oral submissions where the Applicant appeared in person and submitted that the Respondent came to the suit land claiming that it belonged to him while his land is Parcel 126 in Mutomo. That the court gave him the said land while he, the applicant owns and is on his land parcel known as 125. The Applicant stated that he understands that he can appeal the trial court's decision even though he was late in doing so.
15. The Respondent also appeared in person and submitted that during adjudication, the Respondent conducted proceedings with the Applicant's uncle and was awarded Land Parcel 126 while the Applicant's uncle was given 125.
16. He was opposed to the Applicant being given more time to appeal as he has not complied with the court's orders.



Analysis and Determination

17. The Applicant has sought leave to file his appeal out of time against the judgement of the trial court dated 8th December 2021. He also seeks an order that the said leave do operate as a stay of proceedings in the Senior Principal Magistrate's Court sitting at Mutomo Land case E004 of 2021. The judgement of the trial court was rendered in favour of the Respondent herein against the Applicant for trespass and restrained the Applicant from further trespass to the suit land.
18. The court has considered the application, the supporting affidavit, the replying affidavit and the submissions of the parties.
19. Section 79G of the *Civil Procedure Act* CAP 21 laws of Kenya provided that the period allowed for filing an appeal from a subordinate court to the High Court is 30 days. The provision is as follows:

“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 a good and sufficient cause for not filing the appeal in time”

20. In the case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 which is the locus classicus case for extension of time, laid down the parameters 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.”

21. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR the Learned Judges of the Supreme Court quoted with approval the following cases;

“The Court of Appeal has pronounced itself on this aspect severally. Recently, in *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR the Court of Appeal while referring to other authorities observed (at paragraph 12):

“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In *Henry Mukora Mwangi -vs- Charles Gichina Mwangi- Civil Application No. Nai. 26 of 2004*, this Court held:-

“It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in *Mwangi -vs- Kenya Airways Ltd.* [2003] KLR 486 in which this Court stated:-“Over the years, the Court has,



of course, set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported)*, the Court expressed itself thus:-

“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.”

22. The trial Court judgement was delivered on 8th December 2021 thus the period of delay in filing the present application on 17th October 2023 is around twenty-two months. The Applicant has not stated exactly what caused the delay in applying for an extension of time or explained the time-lapse. The Respondent has set out the proceedings that took place between the time when the judgement was entered and the filing of the current application. According to the Respondent, the application herein is brought in bad faith and with the intention to deter him from realizing the fruits of his judgement. He further contends that the application has no grounds in support.
23. The court is satisfied that the Applicant herein was aware of the judgement of the trial court and his options concerning the same. He indeed filed an application dated 11th October 2022 where he prayed for a stay of execution of the decree dated 21st April 2022. He also applied to set aside the judgement and for leave to defend the suit. A ruling on the application was delivered on 21st December 2022 and the application was allowed on condition that the Applicant would pay the Respondent the sum of Ksh.20,000/= within 30 days from the date of the ruling failure to which the orders would lapse and execution would revert. The Applicant did not pay the costs as ordered and it will be presumed that since the time has lapsed the orders lapsed.
24. Consequently, the process of execution proceeded between January 2023 and July 2023 as detailed in the affidavit of the Respondent herein. From the record it appears efforts by the Respondent to execute the judgement of the trial court have been met with great resistance from the Applicant herein.
25. The Court finds that in the circumstances of this case, the period of delay in filing the application is ordinate and excessive, especially taking into account that the Applicant was aware of the judgement and was actively involved in litigation in the same suit before the trial court. The court finds that the applicant chose not to take advantage of the order of the trial court made on 21st December 2023 setting aside judgment allowing him to be heard. He also failed to file an appeal within the time allowed by law if that was what he chose to do. In the circumstances, the court agrees with the Respondent that the application herein is an afterthought, brought in bad faith with the purpose of avoiding execution of the trial court judgement.
26. Further, the Applicant did not explain the cause of the delay in filing the appeal on time and the present application and indeed he did not address this issue at all. The court is of the view that the Applicant has failed in the tests for grant of an order of extension of time for filing an appeal as set out in Section 79G of the *Civil Procedure Act* “That he had a good and sufficient cause for not filing the appeal in time” and as stated in the cases cited above *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*(supra) and *Fakir Mohamed v Joseph Mugambi & 2 others* (supra) that is “The period of delay, the reason for the delay.”



27. The court therefore finds no reason to proceed with examination of the other tests for grant of extension of time that is “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.”
28. Having failed on the application for extension of time to file the appeal, the court finds that the prayer for a stay of proceedings of the trial court must also fail.
29. The upshot of the above is that the court finds the application dated 17th October 2023 to have no merit and the same is hereby dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT KITUI ON THIS 19TH DAY OF DECEMBER, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE - KITUI

