



Olegem v Mary (Suing as legal Attorney of Marco Mangerere Mabeya) & 2 others (Miscellaneous Application E004 of 2022) [2023] KEELC 22438 (KLR) (18 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22438 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
MISCELLANEOUS APPLICATION E004 OF 2022
EM WASHE, J
DECEMBER 18, 2023**

BETWEEN

LEKISHOW OLEGEM APPLICANT

AND

**GESARE MARORO ONDIKIE MARY (SUIING AS LEGAL ATTORNEY OF
MARCO MANGERERE MABEYA) 1ST RESPONDENT
LAND REGISTRAR, TRANSMARA 2ND RESPONDENT
BAMA AUCTIONEERS 3RD RESPONDENT**

RULING

1. The Applicant herein filed a Notice of Motion application dated 10th May 2023 (hereinafter referred to as “the present Application”) seeking for the following Orders; -
 - a. This Application be certified urgent and service of the same be dispensed with in the first instance.
 - b. Pending the inter-parte hearing and determination of this Application, this Honourable Court be pleased to issue a Stay of execution of the Proclamation Notice served by the 3rd Respondent upon the Applicant and the warrant of Attachment issued in Case No.56 Of 2018 Gesare Maroro Ondieki (suing As Legal Attorney Of Marco Mangerere Mabeya) v Lekishon Olegem And Another).
 - c. This Honourable Court be pleased to enlarge the time granted to the Applicant vide a Ruling of 21st February 2023 to;
 - i. Prepare, file and serve his Memorandum of Appeal from the decision of Hon. Robert Mobisa Oanda delivered on 30th of June 2022 in Kilgoris Spm ELC Case No. 56 Of 2018 Gesare



Maroro Ondieki Mary (suing As Legal Attorney Of Marco Mangerere Mabeya) v Lekishon Olegeem & Another.

- ii. Prepare, file and serve the Record of Appeal.
 - iii. Deposit a sum of KShs 200,000/- as security during the pendency of the appeal.
 - d. This Honourable Court do direct that the Memorandum of Appeal filed in Kigoris ELC Civil Appeal No. E002 Of 2023 Between Lekishon Olegen v Gesare Maroro Ondieki Mary (suing As Legal Attorney Of Marco Mangerere Mabeya) & Another be admitted and is properly on record.
 - e. This Honourable Court be pleased to affirm that there remains an Order for Stay of Execution against the Judgement of 30th June 2022 in Kilgoris Spm ELC Case No. 56 Of 2018 Gesare Maroro Ondieki Mary (suing As Legal Attorney Of Marco Mangerere Mabeya) v Lekishon Olegeem & Another pending the hearing and determination of the Appeal.
 - f. The costs of this Application abide the result of the said Appeal.
2. The prayers sought in the present Application are premised on the grounds contained in the body of the application and the supporting affidavit sworn on the 10th May 2023 and are summarised as follows; -
- i. The Honourable Court through a Ruling dated 21st February 2023 granted leave to the Applicant to file a Memorandum of Appeal and the Record of Appeal against the judgement delivered on the 30th of June 2022 in Kilgoris Spm ELC Case No. 56 Of 2018 Gesare Maroro Ondieki Mary (suing As Legal Attorney Of Marco Mangerere Mabeya) v Lekishon Olegeem & Another.
 - ii. Unfortunately, on the 21st February 2023 when the Honourable Court delivered the said Ruling, the Counsel for the Applicant was not present.
 - iii. The Counsel for the Applicant was not aware of the Ruling pronounced on the 21st of February 2023 until on the 10th of March 2023 when he was informed that this Honourable Court had granted leave of 30 days.
 - iv. Based on this information, Counsel for the Applicant filed a Memorandum of Appeal on the 20th of March 2023 and was assigned Kigoris ELC Civil Appeal No. E002 Of 2023 Between Lekishon Olegen v Gesare Maroro Ondieki Mary (suing As Legal Attorney Of Marco Mangerere Mabeya) & Another.
 - v. Despite taking this step, the Applicant's Counsel was shocked to learn that the Respondent's had instructed auctioneers to proclaim the assets of the Applicant stemming from a Warrant of Attachment issued in Kilgoris Spm ELC Case No. 56 Of 2018 Gesare Maroro Ondieki Mary (suing As Legal Attorney Of Marco Mangerere Mabeya) v Lekishon Olegeem & Another.
 - vi. It was only after the Counsel for the Applicant checked on the actual orders issued on the 21st of February 2023 that he realised of other directions which had been issued and they failed to comply with.
 - vii. The Applicant is now seeking for this Honourable Court to once again enlarge time to file the Memorandum of Appeal as the Memorandum of Appeal is viable and would cause irreparable loss if the same is not allowed to be heard on merit.



- viii. The Applicant submitted that the error on the Counsel should not be visited on the innocent Applicant and the prayers sought herein should be granted.
3. The present Application was duly served on the Respondent who opposed the same through a Replying Affidavit sworn on the 30th of May 2023 for the following grounds; -
- a. The Applicants have not been vigilant in the prosecution of the Appeal in this matter.
 - b. The Applicant's failure to attend the ruling on the 16th February 2023 was purely on the negligence and/or failure by their Counsel to check on the cause list and/or follow the progress of their own application.
 - c. The Respondent was of the view that the present Application was similar to the earlier application dated 27th September 2022 and the only words that had been changed was "extension of time" to "enlargement of time."
 - d. Further to that, the Respondent stated that the allegation by the Applicant to the effect that he was misguided by a Court Clerk on the orders which were issued on the 16th of February 2023 can not be a ground for granting the orders sought in the present application as the Counsel on record for the Applicant had an obligation to procure the ruling and comply.
 - e. Consequently, the none compliance by the Applicant's Counsel of the orders issued on the 16th February 2023 was of his own making and should not be used to deny the Respondent the fruits of his judgement.
 - f. In conclusion therefore, the Respondent sought to have the present application dismissed with costs.
4. The present application was then canvassed by way of written submissions by both parties.
5. This Honourable Court has indeed gone through the present application, the Replying Affidavit and the submissions by the parties and the issues for determination are as follows; -

Issue No. 1- Is There Sufficient Reason For The Applicant To Be Granted Leave To Enlarge Time To File The Memorandum Of Appeal And Record Of Appeal?

Issue No. 2- Is There Sufficient Ground For This Honourable Court To Issue A Stay Of Execution Of The Judgement Dated 30th June 2022?

Issue No. 3- Is The Applicant Entitled To The Prayers Sought In The Present Application?

Issue No.4- Who Bears The Costs Of The Present Application?

6. The Honourable Court having duly identified the said issues hereinabove, the same will now be discussed herein below.

Issue No. 1- Is There Sufficient Reason For The Applicant To Be Granted Leave To Enlarge Time To File The Memorandum Of Appeal And Record Of Appeal?

7. The first issue in the present Application is the enlargement of time and deem the Memorandum of Appeal filed on 11th of May 2023 as duly filed.
8. The Applicant submits that the Ruling pronounced on the 21st February 2023 granted the Applicant leave to file a Memorandum of Appeal within 7 days from the date of the Ruling and the Record of Appeal within 45 days thereafter.



9. In the meantime, the Applicant was also directed to pay a sum of KShs 200,000/- within 14 days from the date of the Ruling failure to which the said Order of Stay against the judgement pronounced on 30/06/2022 in Kilgoris Spm ELC Case No.56 Of 2018 would automatically lapse.
10. Unfortunately, the Ruling dated the 21st February 2023 was pronounced in his absence and the information he received from the Court Clerk was vague and did not inform him of the conditions given in the substantive ruling.
11. Due to this omission, the time within which the Memorandum of Appeal was to be filed lapsed and therefore it is imperative that the same be enlarged and deem the Memorandum of Appeal dated 27th February 2023 as duly filed.
12. Further to that, the Applicant is seeking to also extend the time within which the Record of Appeal will be filed therein.
13. The Respondent of the other hand is opposing the Applicant's prayer on the basis that the Applicant was indolent in the compliance of the Orders issued on the 27th of February 2023.
14. The Respondent is of the view that the Applicant was required to follow up the outcome of his own application and ensure that the orders of the Honourable Court are duly complied.
15. The none compliance of the orders issued in the Ruling dated 27th of February 2023 was therefore inexcusable.
16. It is true that this Honourable Court pronounced itself on this issue in the Ruling dated 21st of February 2023.
17. The Applicants have admitted that they are in default of the orders issued on the said 21st February 2023 due to not being aware of the same or being misguided by the Court Clerk.
18. The issue therefore that this Honourable Court will consider is whether the Respondent would be prejudiced if the said prayer to enlarge time is granted.
19. In the Honourable Court's considered view, the Applicant had expressed the need to file an Appeal before this Honourable Court against the Ruling of the Lower Court which leave was allowed in the Ruling dated 21st February 2023.
20. Although the Applicant failed to comply with the said Orders of 21st February 2023, the bigger picture is to ensure that substantive justice is achieved by hearing the intended appeal.
21. Any prejudice that might be visited on the Respondent is one that can be compensated by way of throw away costs from the Applicant.
22. In essence therefore, this Honourable Court is inclined to enlarge time once again for purposes of justice and allow the Applicant to canvass their intended Appeal as enshrined in the Kenyan Constitution, 2010.

Issue No. 2- Is There Sufficient Ground For This Honourable Court To Issue A Stay Of Execution Of The Judgement Dated 30th June 2022?

23. The second issue is whether the stay which was issued on the 21st of February 2023 on condition that a sum of KShs 200,000/- be deposited in Court should be issued once again pending the hearing and determination of the intended Appeal.



24. As stated in Issue No. 1 hereinabove, the aim of this Honourable Court is to ensure that substantive justice is done to all citizens of this great nation.
25. In view of the fact that this Honourable Court had indeed satisfied itself on the need to stay the execution of the Judgement pronounced on the 30th of June 2022 in the proceedings known as Kilgoris Spm ELC Case No.056 Of 2018 pending the hearing and determination of the intended Appeal, then it would be only fair these conditions still subsist until the Appeal is heard and determined.

Issue No. 3- Is The Applicant Entitled To The Prayers Sought In The Present Application?

26. Based on the determinations of the two issues hereinabove, this Honourable Court is inclined to grant the prayers sought in the present Application for the good of substantive justice between the parties.

Issue No.4- Who Bears The Costs Of The Present Application?

27. On the issue of Costs, the same will abide the outcome of the substantive appeal herein.

Conclusion.

28. In conclusion therefore, the following orders are hereby issued in determination of the present Application; -
- a. The Time Within Which The Applicant Is To File The Memorandum Of Appeal Is Hereby Enlarged And The Memorandum Of Appeal Dated 27th February 2023 Be And Is Hereby Deemed As Duly Filed.
 - b. The Applicant Is Directed To Prepare, File And Serve The Substantive Record Of Appeal Within 14 Days From The Date Of This Ruling.
 - c. An Order For Stay Of Execution Against The Judgement Of 30th June 2022 In Kilgoris Spm ELC Case No. 56 Of 2018 Be And Is Hereby Granted Pending The Hearing And Determination Of The Appeal Herein Upon Payment Of Kshs 200,000/- As Security Of Costs Within 7 Days From The Date Of This Ruling.
 - d. The Applicant Will Also Pay To The Respondent Throw Away Costs Of Kshs 30,000/- Within The Next 14 Days From The Date Of This Ruling.
 - e. Costs Of This Application Shall Abide The Outcome Of The Substantive Appeal.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 18TH OF DECEMBER 2023.

EMMANUEL.M.WASHE

JUDGE

In The Presence Of:

Court Assistant: Mr. Ngeno

Advocates For The Applicant: Mwendwa holding brief

Marete

Advocates For The 1st Respondent: Ms. Nyambisi holding

brief Nyamwange for



1st Respondent

