



**Obwacha v Mwendia & 2 others (Miscellaneous Civil Application
3 of 2023) [2023] KEELC 22255 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22255 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
MISCELLANEOUS CIVIL APPLICATION 3 OF 2023
LC KOMINGOI, J
DECEMBER 14, 2023**

BETWEEN

ALFRED OBWACHA APPLICANT

AND

GRACE NDUATA MWENDIA 1ST RESPONDENT

WILSON NGAWAYA 2ND RESPONDENT

COUNTY GOVERNMENT OF KAJIADO 3RD RESPONDENT

RULING

1. This is the Notice of Motion application dated 4th May 2023, bought under;
sections 1A, 1 B, 3 and 3A of the *Civil Procedure Act*, order 51 rule 1 and order 42 rule 6 of the *Civil Procedure Act* and all other enabling provisions of law.
2. It seeks orders;
 1. Spent
 2. That this Hon. Court be pleased to allow applicant to appeal the judgement in Kajiado CMCC No. 377 of 2009- Grace Nduta Mwendia vs Alfred Obwacha on the 23rd February 2023 out of time.
 3. That this court be and is hereby pleased to order for stay of execution of the judgement delivered on February 23, 2023 in Kajiado CMCC No 377 of 2009- *Grace Nduta Mwendia v Alfred Obwacha* pending the hearing and determination of the appeal.



4. That this court be and is hereby to stay proceedings (sic) in Kajiado CMCC No. 377 of 2009- Grace Nduta Mwendia vs Alfred Obwacha pending the hearing and determination of the appeal.
 5. The costs of this application be in the cause.
3. This Application supported by the sworn Affidavit of Counsel for the Applicant, Joseph Gathiru dated May 4, 2023 and the Further Affidavit sworn by the Applicant dated June 13, 2023 on the grounds that the Applicant's former Advocate failed to file a Memorandum of Appeal on time as advised by the Applicant which caused the lapse of the 30 days appeal period stipulated by law.
 4. They sought for the application to be allowed stating that the lower court's judgement if not stayed would be detrimental to the Applicant.
 5. On the June 12, 2023, the court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.

The Applicant's for this submissions

6. In the submissions dated September 19, 2023 counsel submitted that the threshold for grant of stay of execution is outlined in order 42 rule 6 of the *Civil Procedure Rules* and elaborated in *Butt vs Rent Restriction Tribunal* [1979] had been established because the Applicant would suffer substantial loss if evicted from his matrimonial home citing Kimaru J. in *Century Oil Trading Company Ltd vs Kenya Shell Ltd.* Counsel submitted that the Respondents would suffer no loss or prejudice because they would still enjoy the fruits of the lower court's judgement if the appeal is disallowed as well as compensation by costs. Adding that there was no evidence that the Respondents would be in a position to refund a decretal sum paid to them if the Appeal succeeded.
7. Counsel added that the application was made without delay and if stay is not granted the appeal would be rendered nugatory because the lower court's orders for demolition of the Applicant's structures were irreversible. Counsel thus concluded by submitting that the Appeal was meritorious and the Applicant was willing to pay security as per order 42 of the *Civil Procedure Rules* should court deem it fit to order so making reference to *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014 eKLR.

The Respondent's submissions

8. They are dated October 9, 2023. Counsel submitted that the Applicant's application for stay of execution pending appeal is frivolous, vexatious and an abuse of the court process. It ought to be dismissed with costs to the 1st Respondent.
9. It is further submitted that the 1st Respondent continues to suffer irreparable loss since she first moved to court in 2009 after the appellant trespassed on to the suit plot. She has been subjected to mental agony, unnecessary expenses as well as time wastage in litigation.
10. Counsel has also submitted that the appellant has refused to listen to the wise counsel of his previous counsel that the intended appeal was an academic exercise and futile but that he has decided to file application herein through a different advocate hoping to get a favourable judgement.

He has put forward the cases of *Kenya Commercial Bank Ltd vs. Benjob Amalgamated Limited* (2017) eKLR; *Karanja vs. Ndirangu & another* (2021) KECA 57 KLR.



11. It is further submitted that litigation must come to an end. She prays, that the application be dismissed with costs.

Analysis and Determination

12. I have considered the application, the affidavit in support and the authorities cited. The issues for determination are:

- i. Whether the Application to file the Appeal out of time is merited.
- ii. Whether the Application has satisfied the threshold for grant of stay of execution pending appeal.

13. It is worth noting that extension of time is not an inherent entitlement of a litigant but granted at the court's discretion. In this regard, the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR stated:

Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.

14. It went on to outline the following grounds to be considered when courts are tasked with the determination of whether to extend time or not.

“... we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

15. I am guided by the aforementioned grounds in determining whether the Applicant is deserving of court's discretion to extend his time to file the Appeal.

16. It is the Applicant's case that he seeks to file the appeal out of time because his previous advocate delayed in acting on the instructions which subsequently delayed the appeal.



17. The court notes that the impugned judgement was delivered on 23rd February 2023. This application together with the Memorandum of Appeal were filed on 4th May 2023 which was about two months later.
18. The delay in filing the Appeal has not been explained. There is no evidence tendered before this court to show that the Applicant indeed instructed his previous counsel to file an appeal.
19. At the delivery of the judgement the court gave the Applicant sixty (60) days within which to take any appropriate action. He did not do anything.
20. Section 79 G of the Civil Procedure Act provides that;

“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.”
21. I agree with the 1st Respondents submissions that no good and sufficient reason has been given for not filing the appeal in good time. The delay is inordinate.
22. The upshot of the matter is that I find no reason to extend the time within which to file the Appeal.
23. In the circumstances, I need not consider the conditions for grant of stay of execution pending appeal under order 42 rule 6 of the Civil Procedure Rules.
24. I find no merit in this application and the same is dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14TH DAY OF DECEMBER 2023.

L. KOMINGOI

JUDGE.

In the presence of:

Mr. Gathiru for the Applicant.

Mr. Mumo for M/s. Maguta Kimemia & Associates for the 1st Respondent.

N/A for the 2nd, 3rd Respondents.

Court Assistant – Mutisya

