



Cheburet (Suing as the administrator of the Estate of Cheburet Tuitoek – Deceased) v County Government of Baringo & 2 others (Environment & Land Case 77 of 2014) [2023] KEELC 22275 (KLR) (11 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22275 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 77 OF 2014
JM ONYANGO, J
DECEMBER 11, 2023**

BETWEEN

SAMWEL CHEBURET (SUING AS THE ADMINISTRATOR OF THE ESTATE OF CHEBURET TUITOEK – DECEASED) PLAINTIFF

AND

COUNTY GOVERNMENT OF BARINGO 1ST DEFENDANT

THE DISTRICT LAND REGISTRAR BARINGO CENTRAL .. 2ND DEFENDANT

THE MINISTRY OF LANDS & HOUSING 3RD DEFENDANT

RULING

1. This ruling determines the Plaintiff/Applicant’s Notice of Motion dated 31st May, 2023 and the 1st Defendant’s application dated 12th April 2023. In the application dated 31st May, 2023 the Applicant seeks orders that:
 - a. Spent
 - b. Pending the hearing and determination of this application inter partes, there be orders of stay of execution of the judgment and Decree issued herein on 20th December, 2022 by Hon. Justice S.M Kibunja.
 - c. The time for giving Notice of intention to appeal from the judgment of the Superior court herein delivered by Hon. Justice S.M Kibunja on 20th December, 2022 be extended and/or enlarged.
 - d. Leave be and is hereby granted to the Applicant to appeal against the judgment delivered on 20th December, 2022 out of time.



- e. That there be a stay of execution of the judgment and Decree issued herein on 20th December, 2022 pending the hearing and determination of the intended appeal.
 - f. That the costs of this application be in the cause.
2. The application is premised on the grounds outlined on the face of the Notice of Motion. It is also based on two supporting affidavits, one by the Applicant and the other by his former advocate, Amos K. Magut. Both affidavits were sworn on 31st May, 2023. The main reason advanced by the applicant is that he was not aware of the judgment as he did not receive the Notice of Delivery of Judgment as it was sent to his former advocate's email address which was no longer in use.
 3. In support of his prayer for stay, he avers that he is likely to suffer substantial loss as he is faced with imminent eviction yet he intends to file an appeal in the Court of Appeal. He also avers that he is willing to abide by any conditions that the court may impose.
 4. In his affidavit, Mr. Magut explains that the Notice of Delivery of judgment was sent to his former e-mail address which he had stopped using in 2019 after it mal-functioned. He has annexed a copy of the closing submissions he claims to have filed on 26th October, 2022 which show that he was using a different e-mail address. He has also averred that he was not served with a Notice of entry of judgment and he only learnt of the judgment when he was served with an application dated 12th April, 2023 seeking that the O.C S Kabarnet Police Station provides security to enable the 1st Defendant implement the judgment.
 5. The application is opposed by the 1st Defendant through the Replying Affidavit of Jacob Chepkwony, the County Secretary of the 1st defendant sworn on the 15th June 2023. In the said affidavit, he deposes that the Applicant was aware of the judgment since his former advocate was served with a Notice of Delivery of Judgment via email on 9th December, 2022. He deposes that there is nothing to show that the said email was not received. It is his further deposition that the Applicant is feigning ignorance about the judgment and misleading the court that his advocate had changed his email address as indicated on the submissions dated 24th October, 2022 as the said submissions were never filed in court.
 6. He deposes that the present application was filed on 5th June, 2023 which is two months after the application for eviction and 6 months after delivery of the judgment has been filed after inordinate delay without any cogent explanation.
 7. He further deposes that after delivery of the judgment, the Applicant has embarked on massive destruction of the suit property by indiscriminately cutting down trees and converting the land into a quarry and he is therefore in contempt of the judgment. He is of the view that the Applicant has approached the court with unclean hands and he has not met the conditions for stay pending appeal.
 8. In the application dated 12th April, 2023, the 1st defendant seeks orders that the judgment and decree of the court delivered on 20th December 2022 be implemented by the OCS Kabarnet Police Station by providing security to the Applicant during the eviction of the judgment debtor from the land parcel known as BARINGO/KAPCHEMUSWO/577.
 9. It is based on the grounds that the Respondent has refused and/or neglected to voluntarily obey the decree and judgment of the court despite being served with the same. It is also the Applicant's contention that it is impossible to implement the judgment without the assistance of the police.
 10. It is further based on the Supporting affidavit, Reuben Rutto, the CEC Lands, Housing and Urban Development of 1st Defendant/ Applicant sworn on 12th April, 2023 and the Supplementary affidavit of Julius Tarus, the County Attorney of the 1st Defendant sworn on the 30th May 2023.



11. In his affidavit, Mr. Rutto deposes that even though the judgment delivered on 20th December 2022 ordered the Plaintiff/ Respondent to vacate the suit property within 90 days, he has refused /and/or neglected to do so. He has annexed a copy of the email dated 9th December, 2022 notifying the parties of the date of delivery of the judgment to his affidavit as evidence that the Respondent was aware of the judgment date. He therefore seeks the assistance of the police to implement the said judgment.
12. In his Supplementary Affidavit, Mr. Tarus has pointed out that following the delivery of the judgment, the Respondent embarked on massive destruction of the suit property by cutting down trees and turning a portion of the suit property into a quarry. He has averred that he personally visited the suit property and took photographs which he has annexed to his affidavit. He is of the view that the Respondents actions are contrary to the judgment of the court.
13. The application is resisted by the Respondent through his affidavit sworn on 31st May, 2023 in which points out that he was not aware of the judgment as his advocate was not served with a Notice of delivery of Judgment since the email address that was used had malfunctioned. He also averred that his advocate was not served with a copy of the judgment or decree and that the application was therefore premature.
14. The court directed that both applications be dealt with simultaneously and that the same be canvassed by way of written submissions. The plaintiff and 1st Defendant filed their respective submissions which I have carefully considered.
15. I will first determine the application dated 31.5.23 as its outcome will have a bearing on the one dated 12th April, 2023.
16. In the application dated 31st May, 2023 the court needs to determine whether to enlarge time within which to file the Applicant's appeal and whether to grant an order for stay of execution pending appeal.
17. The principles that should guide the court in an application for enlargement of time were set out in the case of Nicholas Kiptoo Arap Salat v IEBC & 7 Others (2014) eKLR, where the Court held that:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;



6. whether the application has been brought without undue delay;”
18. In his submissions, learned counsel for the Applicant summarized the contents of the affidavits in support of the application and urged the court to grant the application. He relied on the cases of Charles Karanja Kiiru v Charles Githinji Muigwa (2017) eKLR, Edith Gichungu Koine v Stephen Njagi Thoithi (2014) eKLR and Stelco Corporation Ltd v Susan Awuor Mudemba (2021) where the courts granted the applications for enlargement of time. The facts in the said cases are however distinguishable from the instant case as the delay in the said cases was sufficiently explained.
19. In the instant case, the Applicant has averred that he was not aware of the judgment until as his former advocate did not receive the Notice of delivery of Judgment since it was sent to his old email address which was no longer in service. He adds that between 22nd November and March 2023, he kept on inquiring from his advocate if the judgment had been delivered but he was informed that no notice of delivery of judgment had been received. He was later unable to contact his former advocate until late April 2023.
20. Mr. Amos Magut, the Applicant’s former advocate swore an affidavit in which he stated the he did not receive the Notice of delivery of Judgment as he had changed his email address. Although he claims to have indicated his new email address on submissions allegedly filed on 26.10.2022, the said submissions are not in the court file nor were they forwarded to Justice Kibunja as in his judgment, he only referred to the submissions filed by counsel for the defendants.
21. Be that as it may, even after the Applicant was made aware of the judgment in April 2023, and particularly noting that there was already an application seeking to implement the judgment, it is surprising that he did not deem it fit to file his application for enlargement of time until 5th June 2023. The absence of an explanation for this extra delay of more than a month does not augur well for his case. As was observed by the Supreme Court in Civil Application No. 3 of 2016 - County Executive of Kisumu –vs- County Government of Kisumu & 7 Others at page 5:-
- “ 23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court.
22. What can be gleaned from the above authorities is that in an application for enlargement of time, it is necessary for an applicant to explain the entire period of delay to the satisfaction of the court in order for the court to exercise its discretion in his favour.
23. Additionally, Mr. Julius Tarus has annexed photographs to his Replying affidavit indicating that after delivery of the judgment, the Applicant has cut down trees and turned the suit property into a quarry. These acts of destruction are not only prejudicial but they are contrary to the judgment of the court requiring the Applicant to vacate the suit property. I am constrained to agree with counsel for the Respondent has not come to court with clean hands.
24. Since the Applicant has failed to explain the entire period of delay to my satisfaction and engaged in activities on the suit property which are prejudicial to the Respondent and contrary to the judgment, I am disinclined to exercise my discretion in his favour and the application for enlargement of time is disallowed.
25. Having declined to grant the application for enlargement of time, there would be no need to consider the prayer for stay pending appeal. Consequently, the application dated 31.5.2023 is dismissed with costs to the 1st defendant.



26. I will now proceed to determine the application dated 12th April, 2023 which seeks to implement the judgment dated 20th December 2022.
27. As correctly submitted by counsel for the Judgment Debtor, the application is premature. The procedure for execution of a decree is provided under Order 21 of the Civil Procedure Rules. In particular with regard to the decree, Order 21 Rule 8 provides as follows:
- Rule 8 Preparation and dating of decrees and Orders
- “Any party in a suit in the High Court may prepare a Draft Decree and submit it for the approval of the other parties to the suit who shall approve it with or without amendment or reject it, without delay; and if the draft is approved by the parties, it shall be submitted to the Registrar, who if satisfied that it was drawn up in accordance with the judgment , shall sign and seal the Decree accordingly”.
28. I have perused the court file and I have not come across any Decree signed and sealed by the Deputy Registrar in this matter.
29. In the circumstances, I am constrained to agree with counsel for the Plaintiff that the application for eviction was filed prematurely.
30. Accordingly, the application dated 12th April, 2023 is struck out with costs to the plaintiff/ Respondent. The 1st Defendant is at liberty to apply for eviction after complying with Order 21 Rule 8 of the Civil Procedure Rules.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 11TH DAY OF DECEMBER, 2023.

J.M ONYANGO

JUDGE

In the presence of;

1. Mr. Esikuri for the Applicant
2. Mr. Kwame for Mr. Odongo for the 2nd -4th Defendants
3. Mr. Kibii for the 1st Defendant

Court Assistant: Oniala

