



Mwongela v Gilbert & 2 others (Environment & Land Miscellaneous Case E023 of 2022) [2023] KEELC 22083 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22083 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND MISCELLANEOUS CASE E023 OF 2022**

CK YANO, J

DECEMBER 7, 2023

BETWEEN

JOTHAM MWONGELA APPLICANT

AND

CILILIA KAMENWA GILBERT 1ST RESPONDENT

ABRAHAM GILBERT 2ND RESPONDENT

BARNABAS KIMATHI 3RD RESPONDENT

RULING

1. The application for determination is the Notice of Motion dated 5th July, 2022 brought under the provisions of Section 1A, 1B, 3 & 3A of the *Civil Procedure Act*, Order 42 (1) (4), 42 Rule (6), 51 Rule (6) of the *Constitution* (*sic*) and all enabling provisions of the laws of Kenya. The applicant is mainly seeking orders of stay of execution of the bill of cost, decree and subsequent orders in Tigania PMCC No 83 of 2019 pending the hearing and determination of the intended appeal and an order for leave to appeal out of time.
2. The application is premised on the grounds in the face of the motion and supported by the affidavit of Jotham Mwongela, the applicant sworn on 5th July, 2022. It is the applicant's contention that the intended appeal has great chances of success, that the learned trial magistrate erred in solely deciding that it is only the applicant to be enjoined and pay costs, that the respondents were negotiating with his family members who were not easily available before deciding to appeal and that it is in the interest of justice that the application be allowed.
3. In his affidavit in support of the application, the appellant has deponed that the trial court erred in law and facts by not calling him to testify and that he was not given ample opportunity to give his evidence. The applicant has denied encroaching on the respondent's land and that he was brought to court together with his brothers without considering settling the matter out of court. That the suit



involves neighbours and the applicant's title No Nyambene/Uringu 1/ 5795 measuring 0.31 acres and not 1.58 acres as stated by the county surveyor. The applicant further states that he is a man of low means and semi illiterate and was waiting for typed copies of proceedings to appeal, hence the delay. That the applicant took a lot of time to consult his family members after the decision and most of them were not easily available in appealing.

4. The application is opposed by the respondents through a replying affidavit sworn by Cecilia Kamenwa Gilbert, the 1st respondent on 25th September, 2022. It is the respondents' contention inter alia, that the application is full of falsehoods and were allegations intended to mislead the court. That the applicant was always present in court including on the hearing date and agreed that Peter Kithure Muriuki would testify on their behalf. That the intended appeal has no arguable grounds to warrant the grant of the orders sought herein. The respondents further aver that there is no letter exhibited by the applicant to show that he ever made an application for typed proceedings in the trial court nor a certificate of delay by the court. That the application is an afterthought and only made by the applicant after the bill of costs in the suit were taxed. That no draft memorandum of appeal has been annexed by the applicant to enable the court gauge the arguability of the intended appeal and that the application has been filed after inordinate delay. That the costs were assessed at kshs. 163, 000/= and it has not been demonstrated what substantial loss the applicant is likely to suffer.
5. The application was canvassed by way of written submissions. The firm of Mutura Mwenda & co. advocates filed submissions dated 18th March 2023 on behalf of the applicant while the respondents filed theirs dated 27th February, 2023 through the firm of Kuria Karatu & co. advocates.
6. The court has considered the application, the response and the submissions made together with the authorities relied on by the parties to buttress their rival positions. The issues for determination are whether leave should be granted to the applicant to appeal out of time and whether the court should grant orders of stay of execution of the costs, decree or orders in Tigania Pmcc No 83 of 2019 pending the hearing and determination of the intended appeal.
7. Section 78G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The said section 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

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

8. From the above provision, it is noteworthy that the phrase used in “an appeal may be admitted out of time.” This therefore means that an appeal may indeed be admitted out of time. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In *Mugo & others v Wanjiru & another* [1970] EA 482 the court stated as follows;-

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularized before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”



9. I have perused the file and note that the applicant has not filed any draft memorandum of appeal together with the present application dated 5th July, 2022. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR. They include the following-;
- i) The period of delay;
 - ii) The reason for the delay;
 - iii) The arguability of the appeal
 - iv) The degree of prejudice which could be suffered by the respondent if the extension is granted.
 - v) The importance of compliance with time limits to the particular litigation or issue and
 - vi) The effect if any on the administration of justice or public interests if any is involved.”
10. In this case, the judgment was delivered on 22nd June, 2021 while the present application was filed on 5th July, 2022. This is a period of over one year. This in my view is inordinate delay and there are no sufficient reasons given by the applicant to warrant extension of time. Section 78G permits the extension of time to file an appeal once the delay is convincingly explained. The applicant has not shown any evidence that there was delay in acquiring the copies of typed proceedings. No sufficient reason has been given for the delay.
11. In the result, this court finds that the applicant has not met the threshold for grant of leave to appeal out of time.
12. An application for stay invokes the discretionary powers of this court under Order 42 Rule 6(1) of the *Civil Procedure Rules, 2010* that empowers the court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The condition to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states as follows-;
- “No order for stay of execution shall be made under sub rule (1) unless-
- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay, and
 - b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
13. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise discretion and held that-;
- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.



3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a larger amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”.
14. Substantial loss is a factual issue which must be raised in the supporting affidavit and further supported by evidence. In this case, the applicant has not demonstrated the substantial loss he will suffer should the court disallow his prayer for stay, especially considering that the decree is on costs. In the case of *Macharia T/a Machaira & Co. Advocates v East Africa Standard* [2002] eKLR Kuloba J. held that an applicant’s ground for substantial loss must be specific and detailed as it is not enough merely stating that substantial loss will result or that if the appeal is successful it will be rendered nugatory.
 15. Further, in view of the fact that the court has declined to grant leave to appeal out of time, there would be no basis upon which the stay orders would be granted. I therefore decline to grant orders of stay of execution.
 16. In the result, this court finds that the application dated 5th July, 2022 has no merit and the same is hereby dismissed with costs to the respondents.
 17. It is so ordered.

DATED SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF DECEMBER, 2023

C.K YANO

JUDGE

In the presence of;

Court Assistant – V Kiragu/Lena M.

No appearance for Mwenda for applicant but the applicant is present in court

No appearance for respondents.

