



Saleri v Redeemed Gospel Church (Environment and Land Miscellaneous Application 4 of 2023) [2023] KEELC 22048 (KLR) (5 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22048 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 4 OF 2023
FM NJOROGE, J
DECEMBER 5, 2023**

BETWEEN

JACOB MUNENE SALERI PLAINTIFF

AND

REDEEMED GOSPEL CHURCH DEFENDANT

RULING

1. The Defendant brought this Application vide a Notice of Motion dated 21st September 2023 brought under Sections 3A, 75G and 95 of the Civil Procedure Act, Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules (2010) seeking the following orders;
 1. Spent
 2. That this honourable court be pleased to grant to the Defendant/Applicant leave to appeal out of time against the judgment of Hon. J.M Kituku (SPM) in Kilifi ELC No. E034 of 2020 delivered on 20th June 2023.
 3. That this honourable court be pleased to issue an order for stay of execution of the judgment and decree issued in Kilifi ELC No. E034 of 2020 pending the hearing and determination of this application.
 4. That this honourable court be pleased to issue an order for stay of execution of the judgment and decree issued in Kilifi ELC No. E034 of 2020 pending the hearing and determination of the intended appeal.
 5. That costs of this application be in the cause.
2. The application is founded on the grounds set out on its face and the supporting affidavit of Mary Muronji an advocate of the High Court of Kenya having conduct of this matter on the applicant's behalf who deponed that stay of execution has since lapsed. She stated that she made an oral application



for stay of execution and a request for a copy of the judgment and despite several correspondences and follow ups, the same was not supplied in time. It was averred that they were served with a copy of Judgment Notice dated 23rd June 2023 yet they had still not received a copy of the judgment and typed proceedings. Further, the delay was occasioned by not obtaining a copy of the judgment and there is an impending threat of execution against the Applicant who stands to suffer irreparable loss. In addition, unless an order for stay of execution is granted the intended appeal shall be rendered nugatory.

3. The Respondent herein filed a replying affidavit sworn on its behalf by Samuel Odhiambo Eliakim, an advocate of the High Court of Kenya, who stated that filing of a memorandum of appeal does not require furnishing a copy of judgment and proceedings; that there is no evidence that the applicant instructed the advocates to file an appeal; that there is no irreparable loss the applicant will incur if the orders herein are not granted but the respondent would be prejudiced by the continuous stay and occupation of his premises by the Applicant who has not paid rent which rent arrears stood Kshs. 765,000 as at July 2023 with the same continuing to accrue.

Analysis and determination

4. I have considered the application, grounds, affidavits, submissions and authorities cited by counsels. The applicant seeks leave to file appeal out of time and stay of execution of the judgment and decree pending the hearing of the intended appeal.

5. Section 79G of the *Civil Procedure Act* provides 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 good and sufficient cause for not filing the appeal in time.”

6. It is not disputed that Judgment in this matter was delivered on 20th June, 2023 in presence of the Applicant’s Counsel who sought a 45 days stay of execution and the same was granted. The applicant has not disputed having being served with the Judgment Notice by the Respondent which was received in their office on 4th August, 2023 which Notice made them aware of the said Judgment.

7. The applicants’ request to file appeal out of time may only be accepted if it satisfies the court that it had good and sufficient cause for not filing the appeal out of time. The Supreme Court of Kenya sitting at Kisumu in the case of *County Executive of Kisumu vs County Government of Kisumu & others* (2017) eKLR while relying to its decision in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others* Application No. 16 of 2014 (2014) eKLR the Hon. Judges reiterated the considerations to be made in such a case to be as follows:

- “ 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.”
8. This court has considered the amount of delay from 20th June 2023 to the filing of the application was about 12 weeks, noting that the court had granted the Defendants 45 days stay of execution. Further, from the time they were served with the judgment notice, there is no sufficient cause advanced as to why there was a delay in filing the appeal. The Applicant only alleges that there was a delay in obtaining a copy of the judgment and typed proceedings. There is no certificate of delay filed to that effect. In my opinion, the delay has not been accounted for and therefore I decline to grant leave to appeal out of time.
9. On the issue of stay of execution Order 42 Rule 6(2) of the *Civil Procedure Rules* provides:
- “(2) No order for stay of execution shall be made under subrule (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.”
10. In the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution 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 large 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.”

11. With the leave to appeal out of time having been denied as above for reasons given, the orders sought for stay of execution automatically fails. The Application dated 21st September 2023 is therefore dismissed with costs for lack of merit.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 5TH DAY OF DECEMBER 2023.

MWANGI NJOROGE

JUDGE

