



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC MISC. APPLICATION No. E020 OF 2021

HENRY KASONI LUSIGI.....APPLICANT

VERSUS

WYCLIFFE LIMONYO MILIZA.....RESPONDENT

RULING

1. By Notice of Motion dated 28th September 2021, the applicant herein seeks the following orders:

1. [Spent]

2. That leave be granted to the firm of Adongo & Co Advocates to come on record for the Applicant.

3. The Honorable court be pleased to stay execution of the judgment of 5th May, 2021 and decree and all consequential orders in Kakamega CMCC E& L NO 159 OF 2019 pending the hearing and determination of this Application and consequently the appeal.

4. The Honorable court do grant leave to the applicant to file the memorandum of appeal out of time.

5. Costs of this application to be in the cause.

2. The application is supported by an affidavit sworn by the applicant. He deposed that he acted in person in Kakamega CM E & L No. 159 of 2019 and that judgment was delivered in the said matter on 5th May 2021. That he has now instructed an advocate to represent him and that the subordinate court gave directions on 15th September 2021 that the police could go ahead and enforce the decree.

3. The applicant further deposed that he has developed and lives on the suit property with his family hence an eviction would render him homeless. That he applied for certified proceedings on 17th May 2021 and received them after numerous follow-ups on 23rd August 2021.

4. The respondent answered the application through grounds of opposition and a replying affidavit in which he deposed that the judgment was delivered in the presence of the applicant and that the decree was extracted on 10th May 2021 and served upon the applicant. That due to non-compliance by the applicant, a further order was issued on 15th September 2021 directing police to ensure compliance. That the applicant is yet to comply with the judgment hence the present application as well as the intended appeals are afterthoughts only meant to keep him from enjoying the fruits of his judgment.

5. The application was canvassed through written submissions which both sides duly filed. I have considered the application, the affidavits and submissions.

6. Pursuant to prayer 2 of the application, the applicant seeks leave for the firm of Adongo & Co Advocates to come on record for him. The applicant contends that he was self-represented in the proceedings before the subordinate court. The respondent has not expressly opposed this aspect of the application.

7. **Order 9 Rule 9** of the **Civil Procedure Rules** provides:

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

8. The foregoing rule only applies to situations where there is a change of advocate or where a party decides to act in person having previously engaged an advocate after judgment has been passed. None of those situations apply to the applicant herein since he acted in person prior to engaging the present advocates. It follows therefore that no leave is needed and that the applicant's present advocates only needs to comply with **Order 9 Rule 7** of the **Civil Procedure Rules** by filing notice of appointment of an advocate.

9. The applicant also seeks stay of execution of decree of the subordinate court pending hearing and determination of an appeal that he intends to file to this court. The court's power to grant stay pending appeal is founded on **Order 42 rule 6 (6)** of the **Civil Procedure Rules, 2010** which provides as follows:

Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

10. Thus, the court can only grant stay pending appeal if the procedure for instituting an appeal has been complied with. The applicant herein does not, as at now, have any pending appeal against the decree sought to be stayed. He seeks, under prayer 4 of his application, to be granted leave to file an appeal out of time. It follows therefore that the court has no jurisdiction to grant the applicant stay pending appeal in the absence of an appeal.

11. Should the applicant be granted leave to file a memorandum of appeal out of time? The Supreme Court of Kenya stated in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** as follows regarding principles applicable to an application for extension of time:

This being the first case in which this Court is called upon to consider the principles for extension of time, 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; ...***

12. The judgment and decree that is sought to be appealed from was passed by the subordinate court on 5th May 2021 in exercise of its environment and land jurisdiction pursuant to **Section 9 (a)** of the **Magistrates' Courts Act, 2015** as read with **Section 26** of the **Environment and Land Court Act, 2011**. In terms of **Section 16A** of the **Environment and Land Court Act, 2011**, the applicant was required to file any appeal against the decree to this court within 30 days of delivery of the judgment. In other words, the appeal ought to have been filed not later than 5th June 2021. The present application was filed on 4th October 2021. There was thus a delay of four months.

13. The applicant has sought to explain the delay by stating that he applied for certified proceedings on 17th May 2021 and received them on 23rd August 2021. I do not think that one must obtain certified proceedings to enable them to draft and file a memorandum of appeal. In any case, despite receiving the proceedings, the applicant did not file the present application until almost one and a half months later on 4th October 2021. I am not persuaded by the reasons offered for the delay.

14. The foregoing notwithstanding, I am alive to the fact that the right of appeal is an essential component of the right to a fair hearing. As far as it is possible, the court should not shut off a litigant from accessing justice. In the context of the present application, there will be no prejudice suffered by the respondent beyond that which can be compensated by costs if the extension of time is granted.

15. In the result, I make the following orders:

a) Leave is hereby granted to the applicant to file an appeal against the judgment in Kakamega CM E & L No. 159 of 2019 out of time.

b) The memorandum of appeal to be filed and served within 14 (fourteen) days from the date of delivery of this ruling. In default, Notice of Motion dated 28th September 2021 shall stand dismissed with costs to the respondent.

c) Costs of Notice of Motion dated 28th September 2021 are awarded to the respondent.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF JANUARY 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Adongo for the applicant

No Appearance for the respondent

Court Assistant: E. Juma