



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC NO. 131 OF 2016**

**PHILIP TAPAKWANG.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JACKSON KARIWO.....1ST DEFENDANT/APPLICANT**

**ESTHER KARIWO.....2ND DEFENDANT/APPLICANT**

**AMBROSE KERISO.....3RD DEFENDANT/APPLICANT**

**RULING**

**(On Enlargement of Time for Lodging Notice of an Intended Appeal)**

**INTRODUCTION**

1. The Defendants/Applicants brought a Notice of Motion dated 3/11/2021. It was filed on the same date. It generally sought orders stay of execution of an order of eviction and extension of time to file an intended Appeal. It was brought under **Section 7** of the **Appellate Jurisdiction Act**, Chapter 9 of the Laws of Kenya, **Sections 1A, 1B, 3, 3A** and **63E** (sic) of the **Civil Procedure Act**, Chapter 21 of the Laws of Kenya, **Order 42 (6)** (sic) and **Order 51 Rules 1** and **4** of the **Civil Procedure Rules 2010** and “all enabling provisions of law”. The specific prayers in the Application were:

**(1) ....spent**

**(2) ....spent**

**(3) That this Honourable Court be pleased to extend the time for filing a notice of intention to lodge an appeal to the Court of Appeal against the judgment of this court delivered on 4th May, 2021.**

**(4) That the costs of this Application to abide the outcome of the appeal to be in the course.**

**THE APPLICATION**

2. The Application was supported by two Affidavits, one sworn on 3/11/2021 by Jackson Kariwo, the 1st Defendant, and another sworn on the same date by his learned counsel, Geoffrey K. Lowasikou. The grounds of the Application were, one, that on 4/5/2021 and 19/5/2021, this Court delivered judgment in this suit and issued a decree on the respective dates. Two, that learned counsel lost contact with the defendants hence could not get further instructions to file an appeal. Three, on 1/11/2021 the first defendant, upon visiting his counsel’s chambers, learnt that there was a notice of eviction and warrant of arrest already issued against him. Four, that the judgment was delivered *ex parte* contrary to **Order 21 Rule 8** of the **Civil Procedure Rules**. Five, the delay in moving to the Court of Appeal was due to the **Covid-19** Pandemic and that should not deny the Applicants opportunity to argue their appeal. Six, no prejudice would be occasioned to the Respondent if the Application was allowed, and the court had wide discretion to grant it. Seven, the application was brought without undue delay and justice fairness demanded that it be granted.

3. The Affidavit by the Applicant largely repeated the grounds save that to it were annexures of the decree, eviction order and warrants of arrest. The Further Affidavit filed by learned counsel, reiterated the contents of both the grounds of the application and the affidavit of First Defendant. It went on to add that the judgment was delivered contrary to **Order 21 Rule 8** of the **Civil Procedure Rules** and that if the Application was not granted the Applicants would be condemned unheard. It then summed it up that the Application was made in good faith.

## THE RESPONSE

4. The Plaintiff/Respondent opposed the Application vide an Affidavit he swore on **8/11/2021**. In it he deponed that the Motion lacked merit and was a design by the Defendants to buy time and deny him the fruits of his judgment. He stated further on oath that counsel for the Applicants was aware of all the stages of the matter and even participated in the taxation of the Plaintiff's party and party bill of costs. Further, he stated that judgment was delivered through electronic mail and sent to counsel and he should not use the **Covid-19** Pandemic as an excuse for not acting in time. He swore that the Application was brought with undue delay and on **3/11/2021**, only after the **2nd** and **3rd** Defendants had been arrested and committed to civil jail. His further deposition was that there was no appeal preferred and that even if there was any it was not an automatic stay of execution of the Court's decree. He reiterated that there was no Memorandum of Appeal annexed to the Application and that the Applicants had not fulfilled the conditions under **Order 42 Rule 1(6)** of the **Civil Procedure Rules**. He deemed the application an abuse of the Court process and prayed for its dismissal.

5. In response to the Replying Affidavit, the **1st** Applicant reiterated the fact of loss of contacts with counsel and blamed it on the frustration by **Covid-19** pandemic. But, other than stating that, he never at all explained in what manner the Pandemic frustrated his efforts to meet counsel or led to loss of contacts. He did not state if he was in a lock-down area or anything relating to inability to move or communicate with or call or receive calls from counsel. But he admitted in **paragraph 5** of his Further Affidavit that counsel participated in part in the proceedings of the Court after judgment. He deponed that he only learnt of the judgment after the arrest of the other two Defendants. He then stated that he had fulfilled the requirements of **Order 42 Rule 1(6)** of the Civil Procedure Rules. He also stated that he was willing to fulfill any condition imposed by the Court and if, as he stated, "my intended appeal would NOT be successful", the Respondents would be free to execute the decree. He then repeated his advocates' deposition about justice and fairness needing to be served and being condemned unheard in case the prayers are not granted.

6. It is worth noting that the other two judgment debtors herein did not file any documents in support of the Application. A perusal of the Court record shows that indeed they were arrested, brought to Court on **2/11/2021** and committed to civil jail for **30 days** from then. On **30/11/2021** their jail term was extended for another **30 days**. On both occasions they never said they intended to appeal against this Court's judgment or wished to seek leave to appeal against the judgment and decree. What that implied, and it appeared to me, was that the Applicant herein was a lone ranger in the instant application. He only dragged the other judgment debtors into the Application by mentioning that they too were part of it. Perhaps that is why in **paragraph 13** of his further Affidavit sworn on **15/11/2021**, he stated that "...in any event, if my intended appeal would NOT be successful..." He made the phrase both in bold and underline as indicated. Lastly, by the time of writing this ruling, the other two Defendants were serving their jail term without any complaint, for two months now.

## SUBMISSIONS

7. When this Application came up before me under certificate of urgency on **04/11/2021**, I directed service of the same, the filing of responses and written submissions. I also directed that as a sign of commitment to the fulfillment of the condition of stay of execution each of the Applicants deposit in Court a sum of **Kshs. 81,886/=** being only **ten percent (10%)** of the taxed costs. That was to be done within **ten (10)** days of the directions. None of the three judgment debtors complied with the condition hence the orders of stay of execution lapsed.

8. The Applicant filed written submissions dated **15/11/2021** on **19/11/2021**. Clearly the submissions showed that they were for only one Applicant, the **1st** Defendant. This was because they were titled "Defendant/Applicant Submissions" and they referred to the "1st Applicant" or "1st Defendant/Applicant" throughout their body.

9. The first two pages of the submissions summarized the contents of the grounds of the Application and the depositions in the Supporting Affidavits. The next phase detailed four issues the Applicant wished the Court to determine. They were whether or not loss may occur, if delay in bringing the Application had been explained, whether the Plaintiff would be prejudiced and whether leave would be granted.

10. On substantial loss the Applicant's submission was that if execution proceeded the intended appeal will be rendered nugatory. On delay, the applicant repeated the fact that it was "due to corona pandemic" (*sic*). Regarding prejudice, he was willing to offer any security imposed on him. Lastly, on leave being granted, he relied on **Section 7** of the **Appellate Jurisdiction Act** and the case of **Clemensia Nyanchoka Kinaro v. Joyce Nyansiaboka [2021] eKLR**.

## DETERMINATION

11. This Court carefully considered the Application, the grounds and affidavits both in support and opposition to it, the Defendant's submissions as well as the law. It found three issues for determination. These were:

(a) *Whether the failure to appeal in time had been sufficiently explained.*

(b) *Whether the appeal can be granted in the circumstances.*

(c) *Who to bear the costs of this Application?*

12. I start by analyzing the first issue, that is to say, Whether the failure to appeal in time had been sufficiently explained. The Applicant based his Application on many provisions and "all enabling provisions of law." It is my view that the phrase "all enabling provisions of law" is a meaningless one in this and indeed any other application where it is used. If there are enabling provisions of law to be relied on, nothing would be easier than to cite them for analysis and comparison, using the **Issue, Rule, Application and Conclusion (IRAC)** model. What Rule can the Court term as "all enabling provisions of law" as it frames and analyses issues? At best citing the phrase depicts a culture of laziness where parties throw everything, including dirt, at the doorstep of the Court and go for a walk, leaving the Court to sort out their mess. It would be advisable for a party to state clearly and precisely the provisions of law under which they invoke the power of the Court.

13. That said, besides **Section 7** of the **Appellate Jurisdiction Act** and **Order 51 Rules 1** and **4** of the **Civil Procedure Rules** which form the first set of provisions that I single out, learned counsel cited **Sections 1A, 1B, 3, 3A** and **63E** (sic) of the Civil Procedure Act and **Order 42 Rule 6** of the **Civil Procedure Rules**. I have analyzed each one of the provisions cited that form the latter set and come to the conclusion that they are not applicable in this Application. At the same time, I point out from the outset that there is no Section 63E in the Civil Procedure Act. The only **sub-section** that exists in the **Act** is **63(e)**. It provides for the Court to make such interlocutory orders as may be just and convenient to prevent the defeat of the ends of justice. Each of the provisions in the second set has its place in the legal procedures followed in civil suits and should be accorded that always. To take time discussing how irrelevant their application is in this case would be a waste of the Court's time. Needless to say, that the parties herein are advised to read the case of *Hellen N Mbesi v Wycliffe Mathias Muniafu & 2 Others [2016] eKLR* where the late Justice Mukunya explained that those sections of the **Act** do not come to the aid of a party who has ignored the provisions of the civil procedure. What I understood that the judge meant was that each provision of the law has its place it serves in the legal system. Legal provisions are not enacted to be misused in all and sundry situations. They are like the cities of refuge which were used in olden Biblical times (*for those who believe in the Bible*). One would only run into them if he killed another unintentionally and he would then be spared. Not every error of commission or omission entitled an individual to refuge in such a place. In a similar manner, not every circumstance entitles a party to rely on every other provision of law. Each fact has to be clearly applicable to the specific provision. Again, learned counsel cited submitted on **Order 42 Rule 1(6)** of the **Civil Procedure Rules**. No such provision exists in law.

14. In regard to **Order 42 Rule 6** of the **Civil Procedure Rules**, I cannot overemphasize its irrelevancy apart from stating that it relates to stay pending appeal. In the instant application there was no prayer for stay of execution pending appeal.

15. Thus, the law on whether or not to grant leave to appeal from a decree or judgment of this Court is governed by **Section 7** of the **Appellate Jurisdiction Act**, Chapter 9 of the Laws of Kenya. It provides that "*The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.*" Under **Article 162(2)** of the **2010 Constitution** and **Section 4(2)** of the **Environment and Land Court Act**, this Court exercises the same power as the High Court but in its specialized realm of land and environment. I do not need to belabor the point.

16. The power to extend time to issue a Notice of Appeal is discretionary and that discretion is wide. However, it must be exercised judiciously. That means it ought to be exercised on a case by case basis and in consideration of the circumstances that the party seeking its exercise places before the Court. The specific provision of law does not give a raft of factors a Court is to consider in exercising the discretion. But in the *Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 others [2016] eKLR* my learned sister Aburili J. gave a summary of such factors. They may not have been an exhaustive laundry list but they at least give a framework to guide as a start. She stated that they "*include:*

- i. *Whether there has been indolence or unexplained delay on the part of the applicant.*
- ii. *Whether the applicant is guilty of abuse of the court process.*
- iii. *Whether the enlargement will prejudice the defendant.*
- iv. *Whether the denial of enlargement period will occasion prejudice to the applicant given the circumstances of the case.*
- v. *Whether the enlargement is necessary for the effectual complete adjudication of the issues in controversy.*
- vi. *Whether it is just and fair to enlarge time in the circumstances of the case."*

17. That compares well with the view by the learned judge in *Barclays Bank of Kenya Limited v Patrick Njuguna Kubai [2014] eKLR* where she stated as follows:

***"Courts have wide and unfettered discretion to enlarge time to allow parties to do certain acts where time limitations have been given and to proceed to determine matters without undue regard to technicalities as provided for in Article 159 (2) (d) of the Constitution of Kenya, 2010. However, courts have to be careful when balancing this discretion by considering the consequences of certain acts which are not done within the stipulated period in particular where there are express and clear provisions of the law regarding those time lines."***

18. I have no doubt in my mind that this Court is clothed with a wide robe of discretion to enlarge time as sought in this matter, and in the interest of justice it has to do so. I therefore use it now to consider the facts and apply them to the law in order to determine whether or not the Application has merits. I will not follow each of the factors stated above. Moreover, a party does not have to satisfy each one of them in order to avail himself of the prayer of enlargement of time. But it is important to note that **Section 59** of the **Interpretation and General Provisions Act**, Cap 2 Laws of Kenya, provides as follows:-

***"Where in a written law time is prescribed for doing an act or taking proceedings, and power is given to a court or other authority to extend that time, then unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed."***

19. The provision is to the effect that a party is at liberty to move the Court for enlargement or extension of time to do an act where time is prescribed by statute or Court, even if the time has or has not elapsed. For instance, in the instant application the time for lodging a Notice of Appeal had since elapsed by the time the Applicant made it. All that the Court needs to do is to consider the circumstances of the Application vis-à-vis the requirements to be fulfilled.

20. In the instant Application, first, the Applicant argued that unless the court granted the prayers, he would suffer substantial loss. With due respect, this submission relates to applications where a stay of execution of a decree or order of the Court is sought. This goes also with submissions on whether or not an intended appeal may or may not be rendered nugatory. The instant application seeks no such prayer.

21. Second and of relevance to his application was, the Applicant explained the delay bringing this Application on two limbs. First, that the judgment of the Court was delivered contrary to **Order 21 Rule 8** of the **Civil Procedure Rules**. The said provision is on the process of preparing and dating of decrees and orders of a Court. This is usually done after delivery of either a judgment or ruling. It has nothing to do with the delivery itself. Thus, by the Applicant submitting about delivery of the judgment contrary to the said provision, he misapprehended the law. In any event, if the Applicant complain about delivery of the Judgment contrary to **Order 21 Rule 1** of the **Civil Procedure Rules**, that is a reed he was hanging onto: he still had to sink. The record clearly shows that the judgment was delivered by way of electronic means, as per **Direction 14** of the Directions by the Chief Justice, namely, **Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic, Gazette Notice No. 3137 of 2020**. The judgment was delivered to the Applicant's Advocates' email address on **04/05/2021**. Thereafter, the Applicant's advocates even participated in the post-judgment procedures such as taxation of the party and party costs on **13/07/2021** whose ruling was delivered on **27/07/2021**. It is clear from the record that the Applicant's counsel and by extension the Applicant was aware of the delivery of the judgment. How the Applicant then faults the delivery of the judgment in terms of the Civil Procedure Rules defeats logic and reason. At no point in time did counsel inform the Court that he had lost contacts with the clients. If he had, at that point he should have applied to cease acting for the Defendants. In any event the other two defendants did not state so anywhere in the proceedings of this application. This could not suffice as proper explanation for the delay.

22. Moreover, the second limb the Applicant relied on was the existence of Covid-19 Pandemic to argue that his efforts to give instructions were frustrated by ravaging nature. Again, it was not shown whatsoever, how the contact between counsel and the Applicant was lost. By this, the Court was not informed whether it was the postal address, the email address or the telephone line which was inaccessible and from which date to which other. All the Court was given was a mere unsubstantiated blanket statement that contact was lost. That is all that the Applicant stated. It is not shown how the Pandemic frustrated communication between the Applicant and counsel. There was no allegation of a lockdown being in existence as to prevent movement between the Applicant's residence and the counsel's offices. No other explanation of how the Pandemic interfered with communication whether by physical or electronic means between the Advocate and client.

23. I am not convinced that the Covid-19 Pandemic brought the entire life of everyone in the world, and more so in Kenya, to a complete standstill. Even where there were lockdowns, essential services existed. One such a service was that of lawyers. Theirs was not curtailed by the lockdowns imposed in the country. In my view the delay was not sufficiently explained, even though the period of less than six (6) months may appear to be short. Even when there is a delay of a day which is not sufficiently explained, the Court may not exercise discretion to extend time just because the duration is short. There has to be a reasonable explanation given to the Court's satisfaction after which it will consider whether the period of delay is short or unreasonably long.

24. In regard to the prejudice to be occasioned by failure to enlarge time, the case of **Board of Trustees of African Independent Pentecostal Church of Africa Church**(cited above) gave two contending factors to be considered, namely, Whether the enlargement will prejudice the defendant, and, Whether the denial of enlargement period will occasion prejudice to the applicant given the circumstances of the case. This requires a delicate balancing of the entire case. In the instant case, the Applicant through counsel participated in the proceedings towards taxation of party and party costs. This was even before the time of lodging notice of appeal expired.

25. Also, as at the time the instant Application was being determined, execution of the decree had already progressed far in relation to the Applicant's co-defendants. While it is not this Court's view that all the defendants were to either appeal or fulfil their obligations under the judgment jointly, and that the point of execution having gone far down the road should prejudice the Applicant's right to appeal, this Court is of the view that the Applicant has not come to Court with clean hands hence does not merit the exercise of the discretion of the Court. He misled the Court about the fact that all the defendants intended to appeal, only for him to submit about his case only. This issue, together with the one of the Applicant relying on the existence of the Covid-19 Pandemic and only bringing the Application because of the issuance of warrants of arrest against him, made the Court to consider that the Respondent would be more prejudiced than the Applicant if the enlargement of time was given in order for the judgment to be disturbed by stopping its further execution.

26. Lastly, despite the fact that the Respondent raised the fact that no draft memorandum of appeal was annexed to the Application to demonstrate that the intended appeal would be raising arguable grounds of appeal, the Applicant did not bother to bring it to the attention of the Court even after. This Court will not form an opinion about non-existent points to be argued on appeal so as to grant the extension sought. In the circumstances, I find that the Applicant has failed to satisfy the Court on the requirements for the grant of the prayers sought.

**(c) Who to bear the costs of this Application?**

27. The upshot is that this court cannot issue the orders prayed for by the Applicant. Consequently, the applicant's application dated 3/11/2021 lacks merit and is hereby dismissed with costs to the Respondent.

28. To clear any doubt, this Court directs that the interim orders of stay issued earlier in favour of the Applicant should be and are hereby vacated.

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 19<sup>th</sup> day of January, 2022.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE**