



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC MISCELLANEOUS APPLICATION NO. E014 OF 2021

MORKO NAIBEI KISACH.....PLAINTIFF

VERSUS

GEORGE NABIFWO.....DEFENDANT

RULING

1. The parties herein litigated in **BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 29 of 2011** in which **MORKO NAIBEI KISACH** (the Applicant) sought to evict **GEORGE NABIFWO** (the Respondent) from the land parcel **NO NORTH MALAKISI/NORTH WAMONO/877**. After hearing the parties, **HON. J. KING'ORI (CHIEF MAGISTRATE)** delivered a Judgment on 5th May 2020 dismissing the Applicant's suit and ordering him to pay the costs thereof. He further directed the **DISTRICT CRIMINAL INVESTIGATIONS OFFICER (DCIO) BUNGOMA** to conduct an investigation in respect of the land parcel **NO NORTH MALAKISI/WEST WAMONO/864** (this might be a typographical error because the same land is referred to in the same Judgment as **NORTH MALAKISI/NORTH WAMONO/864** but that is not relevant for the purposes of this ruling).

2. The Applicant is aggrieved with that Judgment and intends to appeal.

3. I now have for my consideration the Applicant's Notice of Motion dated 8th November 2021 and filed on 9th November 2021 seeking the following orders: -

(a) Spent

(b) Spent

(c) That there be a stay of execution of the decree issued in **BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 29 of 2011** pending the hearing and determination of the intended appeal.

(d) That leave be granted to the Applicant to file the appeal out of time arising from the decree in **BUNGOMA CHIEF MAGISTRATE'S CIVIL CASE No 29 of 2011**.

(e) Costs

The application is premised on the grounds set out therein and is also supported by the Applicant's affidavit.

4. The gravamen of the application is that the Applicant applied for the proceedings and Judgment soon after it was delivered but it was not until October 2021 that the same were delivered long after the 30 days for lodging the appeal had lapsed. That the Applicant risks being attached for costs the same having been assessed on 3rd August 2021 which will not only render his appeal an academic exercise but will also expose him to irreparable loss and damage. That he has an arguable appeal.

5. Annexed to the application are the following documents: -

1. **Certified proceedings and Judgment.**

2. **Receipts**

3. **Letter dated 19th August 2021 from the Applicant's Counsel requesting for certified copy of proceedings and Judgment.**

4. **Reminder letter dated 20th September 2021.**

5. **Certificate of Delay dated 26th October 2021 showing proceedings were ready on 8th September 2021.**

6. **Memorandum of Appeal.**

The application is opposed and the Respondent filed a replying affidavit dated 15th November 2021 in which he deponed, inter alia, that the application is not only frivolous and vexatious but is also an abuse of the process of this Honourable Court. That following a protracted trial, the Court delivered Judgment on 5th May 2020 and the Applicant requested for certified copies of proceedings and Judgment. That there is inordinate delay on the part of the Applicant in following up on the same but from a perusal of the Certificate of Delay, the proceedings were ready on 8th September 2021 and this application was filed 2 months thereafter. That no explanation has been proffered as to why this application was not filed immediately after the proceedings were ready. That the Applicant has been indolent and has also approached this Court with unclean hands. That no stay of execution can be granted in respect of a negative order and this application should be dismissed with costs.

6. The Applicant filed a supplementary affidavit on 17th January 2022 with the consent of the parties in which he deponed, inter alia, that although the proceedings and Judgment were ready on 8th September 2021, they were only released to his Counsel on 5th November 2021 and this application was filed on 8th November 2021. That the Applicant has approached this Court with clean hands and he will suffer irreparable harm and loss if the execution process which has commenced is not stayed. Annexed to that affidavit is a proclamation notice issued by the firm of **DOMINION YARDS AUCTIONEERS** and dated 2nd December 2021 showing that his properties have been attached for a decree of Kshs. 75,375.00/=.

7. When the application was placed before me on 30th November 2021 for directions, I directed that it be canvassed by way of written submissions and that it be mentioned on 12th January 2022. However, only **MR BWONCHIRI** Counsel for the Applicant filed his submissions. None have been filed by **MR MURUNGA** Counsel for the Respondent.

8. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by **MR BWONCHIRI**. I shall start with the prayer for leave to appeal out of time because if I disallow it, then it will not be necessary to consider the prayer for stay of execution.

EXTENSION OF TIME TO APPEAL: -

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 any appeal may be admitted out of time if the appellant satisfies the Court that he had a good and sufficient cause for not filing the appeal in time.” Emphasis added.

Section 16A (1) and (2) of the **Environment and Land Court Act 2011** is couched in similar terms. It reads: -

16A(1) “All appeals from Subordinate Courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in Section 13(2) of the Environment and Land Court Act, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the Subordinate Court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.”

(2) An appeal may be admitted out of time if the appellant satisfied the Court that he had a good and sufficient cause for not filing the appeal in time.” Emphasis added.

It is clear that following the delivery of the Judgment in the Subordinate Court on 5th May 2020, the Applicant had upto 5th June 2020 to appeal. He did not do so. However, for **good and sufficient cause**, a window was available for him to seek an extension of time within which to appeal. The term good and sufficient cause mean one and the same thing – **QURESHI & ANOTHER .V. PATEL & OTHERS 1964 EALR 633.**

9. Has the Applicant demonstrated **good and sufficient cause**? In the case of **HON ATTORNEY GENERAL .V. THE LAW SOCIETY OF KENYA & ANOTHER C.A CIVIL APPEAL No 133 of 2011 [2013 eKLR]**, **MUSINGA J.A** stated the following: -

“Sufficient cause or good cause in law means: -

‘..... the burden placed on a litigant (usually by a Court rule or order) to show why a request should be granted or any action excused’

See *BLACK'S LAW DICTIONARY 9TH EDITION* page 251

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge's mind. The explanation should not leave unexplained gaps in the sequence of events."
Emphasis added.

In the case of *NICHOLAS KIPTOO arap KORIR SALAT .V. I.E.B.C & OTHERS 2014 eKLR*, the Supreme Court laid down the following principles to guide a Court while considering an application to extend time. These are: -

- (a) Extension of time is not a right. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.
- (b) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.
- (c) Whether the Court should exercise its discretion to extend time is a consideration to be made on a case to case basis.
- (d) Where there is a reason for delay, it should be explained to the satisfaction of the Court.
- (e) Whether there will be any prejudice suffered by the Respondent if extension is granted.
- (f) Whether the application has been brought without delay.
- (g) Whether in certain cases like election petitions, public interest should be a consideration.

10. It is common ground that the Judgment sought to be appealed was delivered on 5th May 2020. The appeal ought to have been filed on or before 5th June 2022. The Applicant's explanation for not filing the appeal within 30 days is that although he applied for copies of the proceedings and Judgment soon after delivery of the same, it was not until the month of October 2021 when they were supplied to him. And in support of that explanation, he has annexed a copy of the Certificate of Delay issued on 26th October 2021. That Certificate of Delay reads as follows: -

"I, CHARLES SOI MUTAI SENIOR PRINCIPAL MAGISTRATE Bungoma Law Courts do hereby certify that the plaintiff applied for certified copy of proceedings from the Court on the 7.5.2020 but the same was not supplied due to volume of work within the station and the same was not ready until 8.9.2021."

Clearly, this Certificate of Delay does not assist the Applicant because it shows that the proceedings and Judgment were ready on 8th September 2021. It was therefore the responsibility of the Applicant to collect them on that day. In his supplementary affidavit, he says in paragraph 6 that they *"were released to my advocate on 5th November 2021."* However, there is no evidence to show that they were released on 5th November 2021. In the circumstances, the Court can only rely on the Certificate of Delay itself which shows that the proceedings and Judgment were ready by 8th September 2021. In any event, in paragraph (1) of the grounds upon which the Notice of Motion is predicated, it is stated thus: -

"That despite the fact that the Applicant applied for proceedings and Judgment in BUNGOMA CMCC No 29 of 2011 on 7.5.2020, the same were supplied to him on 8.9.2021 when the time to lodge an appeal had lapsed Judgment having been delivered on 5.5.2020."

The Applicant is therefore shifting goal posts. That is evidence of dishonesty. The Applicant's hands are soiled. He approached this Court on 9th November 2021 two (2) months after he obtained the proceedings and Judgment. Not only has he been cagey but he has been rather economical with the truth and cannot be deserving of the order of extension of time. The averments in paragraph 16 of the Respondent's replying affidavit that *"the Applicant has approached the Court with unclean hands"* is justified. What was required to the Applicant was good and sufficient cause which, following *THE HON A – G .V. LAW SOCIETY OF KENYA* (supra) must be *"rational, plausible, logical, convincing, reasonable and truthful."* Further, the explanation *"should not leave unexplained gaps in the sequence of events."* In the circumstances of this case, there is no explanation whatsoever for the delay between 8th September 2021 when the proceedings and Judgment were supplied and 9th November 2021 when this application was filed. In the absence of an explanation that is acceptable to the Court, there can be no basis upon which this Court can exercise its discretion in his favour. Extension of time, as is clear from the case of *SALAT .V. IEBC* (supra), is not a right. It is an equitable remedy only available to a deserving party at the discretion of the Court. A proper basis must be shown to the satisfaction of the Court before such an order can be made. The Applicant has explained to my satisfaction, the delay between 5th May 2021 and 8th September 2021. However, there is no explanation for the delay between 8th September 2021 and 8th November 2021. The prayer for extension of time must therefore collapse.

STAY OF EXECUTION PENDING APPEAL: -

Having failed to surmount the hurdle of an order of extension of time, a consideration of the remedy for stay of execution pending appeal is rendered superfluous. I shall nonetheless consider it for purposes of completeness albeit briefly.

Order 42 Rule 6(2) of the Civil Procedure Rules provides that: -

“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.” Emphasis added.

Substantial loss is the cornerstone of such an application for stay of execution pending appeal – **KENYA SHELL LTD .V. BENJAMIN KIBIRU & ANOTHER 1986 KLR 410.**

11. As to what substantial loss he will suffer, the Applicant has deponed in paragraph 9 of his supporting affidavit as follows: -

9: “That I am also apprehensive that the Respondent is likely at any time from now to execute the decree against me costs having been assessed and the 30 days’ stay having lapsed a fact that will render my intended appeal not only academic but expose me to irreparable loss and damage considering the contents of the Judgment delivered by the Magistrate.”

And on the face of the Notice of Motion itself, he says at paragraph (ii): -

(ii) “That the Applicant risks attachment, costs having been assessed on the 3.8.2021 and stay of execution for 30 days lapsed on 3.9.2021.”

The Judgment delivered on 5th May 2021 merely dismissed, with costs, the Applicant’s claim seeking to evict the Respondent from the land parcel **NO NORTH MALAKISI/NORTH WAMONO/877**. And although the decree that followed has not been annexed, it must surely be only in respect of costs. Such an order cannot be stayed. And there is nothing to suggest that the Applicant will suffer substantial loss if the decree of costs, which as per the annexed proclamation is Kshs. 90,437.50/= including the Auctioneers fees, is executed. Even if leave to appeal out of time had been granted, this limb of the application would not have been available to the Applicant. In **WESTERN COLLEGE OF ARTS AND APPLIED SCIENCES .V. ORANGA & OTHERS 1976 – 80 1 KLR**, the Court said: -

*“But what is there to be executed under the Judgment the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In **WILSON .V. CHURCH**, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything or refrain from doing anything or to pay any sum.”*

See also **CO – OPERATIVE BANK OF KENYA LTD .V. BANKING INSURANCE & FINANCE UNION KENYA 2015 eKLR**. In **KANWAL SARJIT SINGH DHIMAN .V. KESHAVJI JIVRAJ SHAH 2008 eKLR**, the Court of Appeal while dealing with an application for stay of a negative order held:-

“The 2nd prayer in the application for stay (of execution) of the order of the Superior Court made on 18th December 2006 merely dismissed the application for setting aside the Judgment with costs. By the order, the Superior Court did not order any of the parties to do anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only.”

What comes out of the above precedents is that where the Court has simply dismissed a claim, there can be no justification for an order of stay of execution. And even if the *“irreparable loss and damage”* that the Applicant is referring to in paragraph 9 of his supporting affidavit is the execution with respect to costs, there is nothing to suggest that the Respondent is so impecunious as to be unable to refund the costs should any appeal have succeeded.

12. Even if leave to appeal had been granted, the remedy of stay of execution would not have been available to the Applicant.

13. The up – shot of the above is that the Notice of Motion dated 8th November 2021 and filed on 9th November 2021 is devoid of merit. It is accordingly dismissed with costs.

Boaz N. Olao.

J U D G E

23rd February 2022.

Ruling dated, signed and delivered at **BUNGOMA** on this 23rd day of February 2022 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

23rd February 2022.