



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 504 OF 2017

OTIENO JAMES AYUKO..... PLAINTIFF/APPLICANT

VERSUS

PAUL OSOO WAREGA.....1ST DEFENDANT/RESPONDENT

JAMES OLOO WAMOLA.....2ND DEFENDANT/RESPONDENT

LEONADUS ONYANGO NYARANGA.....3RD DEFENDANT/RESPONDENT

JAMES DICKSON W. METHO.....4TH DEFENDANT/RESPONDENT

JUDITH AJWANG WAREGA.....5TH DEFENDANT/RESPONDENT

RULING

A. INTRODUCTION

1. By Notice of Motion dated 15th September, 2021, the Applicant sought for the following orders: -

a) Spent.

b) Pending the hearing and determination of this Application, the Honourable Court be pleased to grant an Interim Order of Stay of Execution and/or Implementation of the consequential orders and in particular, the limb thereof directing the Plaintiff/ Applicant to execute a valid transfer forthwith in respect of LR NO. KANYAMKAGO/KAWERE I/3894 (hereinafter referred to as the suit property) in favor of the Defendants/ Respondents failing which the Deputy Registrar of the Honourable Court shall execute the transfer instruments.

c) The Honourable Court be pleased to extend and/or enlarge time within which the Plaintiff/ Applicant herein can proceed to file and/or lodge a Notice of Appeal against the Judgment and Decree of the Honourable Court rendered on the 9th day of June, 2021.

d) Consequent to prayer no.1 hereinabove being granted, the Plaintiff/ Applicant be granted liberty to file the Intended Notice of Appeal within 7days of the granting of leave or such shorter time as the Honourable Court, may deem fit, just and expedient.

e) The Honourable Court be pleased to grant an Order of Stay of Execution of the Judgment and Decree of the Honourable Court rendered on the 9th June, 2021 together with all consequential orders, pending the hearing and determination of the Intended Appeal to the Honourable Court of Appeal.

f) The Honourable Court be pleased to grant and/or issue such further and/or other directions as may be necessary, just and/or otherwise expedient to facilitate the realization of the Intended Appeal to the Honourable Court of Appeal.

g) Cost of this Application do abide the Appeal.

2. The application is premised on the 29 grounds thereof and on the Supporting Affidavit sworn by OTIENO JAMES AYUKO on 15.09.2021. The applicant avers that he instituted the present suit seeking Declaratory Orders relating the suit property L.R. NO. KANYAMKAGO/ KAWERE I/ 3894 against the Defendants/ Respondents. The suit proceeded for full trial and after the close of each party's case; judgment was delivered on 09.06.2021, whose effect was that the Defendants/Respondents had acquired the suit property by way of Adverse Possession and thereby dismissing his claim.

3. Consequently, he was ordered to transfer the suit property to the Defendants/ Respondents and in default, the Deputy Registrar would proceed to execute the transfer instruments.
4. The Applicant further contended that at the time of delivery of the judgment; he had already relocated to his ancestral home in Seme Sub-County within Kisumu County, and due to Covid-19 Pandemic and the curfew restrictions, he only became aware of the judgment in September 2021. He further attributed the delay to the fact that he ceased using the postal address which he had supplied to his advocate on record at the time of filing the suit and on network challenges in Seme sub county where he was staying, which made it impossible to communicate with his advocate.
5. He therefore maintained that the failure to lodge the Notice of Appeal within the prescribed 14days was occasioned by Communication breakdown between him and his advocates hence the instant Application seeking extension of time to lodge the said Notice.
6. He further stated that he is dissatisfied with the judgment delivered on 09.06.2021 and the subsequent decree and he is desirous in lodging an Appeal to the Court of Appeal.
7. It is his fear that the Defendants/Respondents having been declared as having acquired proprietary rights over the suit property; if registered as the owners of the said property will be at liberty to alienate, subdivide, sell, charge and deal with the property as they deem fit to defeat the Intended Appeal.
8. He is therefore apprehensive that should the execution of the judgment and decree take place before the hearing and determination of the Intended Appeal, his rights and interests will be defeated and further that the suit property may be wasted and interfered with and thus the Appeal will be rendered nugatory.
9. As a consequent, he maintained that he stands to suffer substantial loss if the Defendants/ Respondents are allowed to execute the judgment and decree pending the hearing and determination of the Intended Appeal. It was his position that the Respondents would not suffer any prejudice if the orders sought are granted as they would be compensated by way of costs and interest should the intended appeal be dismissed.
10. He did also contend that the Intended Appeal raises trial and pertinent issues of law, which require to be investigated and addressed by the honourable Court of Appeal and urged the court to allow the Application in order to safeguard the crux/substratum of the intended Appeal.
11. He further stated that he is ready and willing to offer such security as the honourable court may deem just, reasonable and expedient in the circumstances.
12. The application was opposed. However, on a perusal of the court record, I have only seen the written submissions by the Respondents; there is no copy of either a Replying Affidavit or a Grounds of Opposition.
13. The Application was disposed of by way of written submissions pursuant to the court's directions issued on the 17.09.2021. The Applicant, through the firm of M/s Oguttu Mboya, Ochwal & Partners Advocates filed their submissions dated 15.10.2021 while the Respondents, through the firm of M/s Omonde Kisera & Co. Advocates filed their submissions dated 08.11.2021. I have read and considered the Application, various responses thereto and the rival submissions by both parties and the various authorities cited in support of their respective claims and I have taken the same into account in arriving at my decision.

B. ANALYSIS AND DETERMINATION

14. It is my considered opinion that the issues for determination arising therefrom include;

- i. Whether this court can enlarge/extend time to lodge the Notice of Intention to Appeal.
- ii. Whether an Order for Stay of Execution can issue against the decree and the judgment dated 9/06/2021.

I. Whether this court can enlarge time to file the Notice of Intention to Appeal

15. Section 7 of the Appellate Jurisdiction Act Cap 9 vests this court with the requisite jurisdiction to enlarge/ extend time within which to lodge the Notice of Intention to Appeal, it provides as follows;

“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:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

16. The principles to be considered in exercising the court's discretion on whether or not to enlarge time to file appeal were set out in the case of **Leo Sila Mutiso vs Rose Hellen Wangeri Mwangi Civil Appeal 255/ 1997**, the court, in considering the exercise of discretion to extend time, held as follows: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

(See also MWANGI V KENYA AIRWAYS LTD, {2003} KLR 486)

17. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See Ratman vs. Cumarasamy [1964] 3 All ER 933.

18. I will therefore proceed to address each of the limbs outlined in the above mentioned cases and establish whether the Applicant has satisfactorily met each of the said principles. **The length of the delay and the reason for the delay if any.** The present Application was filed on the 16th September, 2021 after the delivery of judgment the 9th June, 2021. Even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. See ANDREW KIPLAGAT CHEMARINGO vs PAUL KIPKORIR KIBET [2018] eKLR.

19. The Applicant in giving an explanation for the 3months and 7days delay has stated that the same was occasioned by a communication breakdown between himself and his advocates. That since he had moved to Seme sub county within Kisumu county, and being a person living with disability, he was unable to travel to Kisii where his advocate’s offices are located due to the Covid-19 pandemic and the curfew restricting movement in place at that time. Further, he stated that due to network challenges he was unable to communicate in time with his advocates hence the delay in lodging the Notice of Appeal within the stipulated timelines. It was also his contention that since he had moved back to his ancestral home in Seme Kisumu County, he had been unable to access his postal box which is in Awendo Migori County thus, if a copy of the judgment had been posted to his address he would not be able to access it on time and give further instructions to his advocates regarding the appeal.

20. This court takes judicial notice of the fact that the judgment herein was delivered during the Covid- 19 pandemic period and resultant measures that were put in place by the government at the time included curfew restricting movements between certain timelines experience countrywide at the time. I have also considered that the Applicant is a person living with disability hence his movement was further constrained and in the circumstances, I find that the explanation given by the Applicant for the 3mnths delay is satisfactory and sufficient.

21. On **Chances of success of the intended Appeal.** I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the intended appeal at this stage. The Applicant need not persuade the court on the probability of success of his intended appeal but rather should demonstrate the arguability of the appeal, that the intended appeal raises triable issues that may overturn the judgment rendered.

See Kenya Commercial Bank Limited vs. Nicholas Ombija [2009] eKLR and Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR

22. It is the Respondents’ submission that the failure by the Applicant to annex a Draft Memorandum of Appeal is fatal as the court would not be able to ascertain whether the intended appeal indeed raises any triable or arguable issues as alleged and therefore urged the court to dismiss the application on that account.

23. The requirement for the consideration of whether an intended or proposed appeal has any chances of success appears to have its origins in the case of *Bhaichand Bhagwanji Shah v D Jamnadas & Co Ltd* [1959] EA 838 where Sir Owen Corrie, Ag JA is recorded as saying at pg. 840 Letter I to pg. 841 at Letter A:

“..... It is thus essential in my view, that an applicant for an extension of time under r 9 should support his application by a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it to enable the Court to determine whether or not a refusal of the application would appear to cause an injustice.....”

24. Thus, on whether the failure by the Applicant to attach a Draft Memorandum of Appeal, I find that failure to attach a draft memorandum of appeal is not fatal to an application seeking the extension of time to file the Notice of Intension to Appeal, provided that there is a demonstration through other processes relied upon by such an applicant that the intended appeal is arguable. The Applicant herein has in his Supporting Affidavit and his submissions demonstrated the effect of the Judgement dated 09.06.2021 and how the same will affect him in the event that the suit property which is registered in his name is transferred to the Respondents and registered in their names as the proprietors of the said suit parcel.

25. The final element to be proved is the degree of prejudice to the Respondents if the Application is allowed. The degree of prejudice to the respondents entails balancing the competing interests of the parties that is, the injustice to the applicant in denying him an extension, against the prejudice to the respondent in granting an extension of the time to lodge his notice of appeal, the need to balance the interests of a party who has a decision in his favour against the interest of a party who has constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes on the other hand.

26. As explained in the foregoing paragraphs; the Applicant has demonstrated the effect of the judgment delivered herein. Execution of the said decree would have the title of the suit property transferred in the names of the Respondents together with all the proprietary rights and interests’ attendant thereto pending the hearing and determination of the intended appeal. It is therefore my considered view that enlarging time for the filing of the notice of appeal will not be prejudicial to the Respondent as the intended appeal will only seek to answer the real and triable issues arising from the judgment and settle the matter with finality. Further, in the event of any prejudice, the same can be

compensated by way of costs. I therefore hold in favor of the Applicant.

27. The Applicant's right of appeal must be balanced equally against an equal right of the Respondents herein, who are the decree holders, to enjoy the fruits of the judgment delivered in their favour. It is on this strength that this court is called to exercise its discretion judicially and not based on whims.

28. In view of the above, I am inclined to exercise the discretion vested in this court in favour of the Applicant as no substantial prejudice will be occasioned on the Respondents. I accordingly find that Prayer 2 on enlarging time to lodge the Notice of Appeal is merited.

II. Whether an Order for Stay of Execution can issue against the decree and the judgment dated 9/06/2021

29. The purpose and objective of the order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not defeated. In the case of **Consolidated Marine. vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, the Court held that: -

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.

30. Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 empowers the court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. Order 42 Rule 6(2) sets out the grounds to be considered and provides as follows: -

(2) 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.

31. The import of the provisions in Order 42 Rule (2) above is to clearly outline the three prerequisite conditions for the granting of an Order for Stay pending Appeal as follows:

i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;

ii. The application is brought without undue delay and

iii. 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.

32. The first ground to be established is whether substantial loss may result to the Applicant unless stay of execution is granted. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma vs Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

33. It is upon the Applicant to demonstrate the loss he is likely to suffer if the order for stay of execution sought is not granted. This is for the reason that; by granting such stay, it would mean that the status quo should remain as it were before the judgment and that would amount to denying a successful litigant the fruits of his judgment. The onus is on the Applicant to give sufficient cause to the court to enable it to exercise its discretion in granting the orders as sought. Besides, it not merely sufficient to state that substantial loss may occasion on the applicant. (See **New Stanley Hotel Ltd –vs- Arcade Tobacconist (1980) KLR 757**).

34. It is the Applicant's contention that while he is the registered owner of the suit property, having purchased the same from a beneficiary of the deceased, the effect of the judgment delivered on 09.06.2021 declaring the Respondents as the owners of the suit parcel vide Adverse Possession, is to transfer the title, proprietary rights and interests over the said suit parcel to the Respondents who will then be at liberty to deal with the property howsoever they deem fit.

35. The Respondents on the other hand maintains that the Application is devoid of merit since the Applicant has not demonstrated the substantial loss he is likely to suffer and they should therefore be given the chance to enjoy the fruits of the judgment.

36. I have considered the rival positions taken by both parties in respect to the issue of substantial loss. I am guided by the above case laws on what amounts to substantial loss. In this case; in an attempt to demonstrate the substantial loss that he is likely to suffer should execution of the decree proceed, the Applicant stated that the effect of the judgment was to have the suit property transferred into the names of the Respondents as the legal proprietors, the likelihood of the Respondents further transferring/alienating the suit property to third parties which may render the Appeal nugatory. He has further demonstrated the hardship he is likely to endure in recovering the suit property in the event that the appeal succeeds as he would be forced to institute legal proceedings for purposes of recovering the suit property.

37. In view of the foregoing, I find and hold that the Applicant has satisfactorily proved and/or demonstrated the substantial loss that he is

likely to suffer, unless an order for stay of execution is granted. Further, the Respondent has not demonstrated his capacity to compensate the Applicants in the event that the suit property is alienated and/or disposed of and the Appeal succeeds.

38. On whether the Application has been filed without undue delay; the judgment in question was delivered on the 9th June, 2021 while the present Application was filed on the 16th September, 2020, 3 months 7 days. The Applicant has further explained the reason for the 3 months delay as outlined above, which explanation I find to be sufficient in the circumstances. It is therefore my considered view that the Application was filed without undue delay and hold that the Applicants have satisfied the 2nd limb of the conditions set out in Order 42 Rule 6(2).

39. The final element to be proved is on the deposit of security for costs as the court may direct. At Paragraph z of the Notice of Motion and paragraph 32 of his Supporting Affidavit; the Applicant has shown his willingness to furnish any just and reasonable security as the court may direct in the circumstance for the due performance of any such orders as the court may grant.

40. In the case of **Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates** the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

41. The amount of security to be deposited ought to be balanced against the interests of both the Applicant and the Respondents, the amount of security should be adequate and not be disadvantageous to the party depositing the same. this was the holding in **ROSENGERENS LTD -VS- SAFE DEPOSIT CENTRE LTD 919840M 3ALLER** 198.

42. In view of the foregoing, I find that the Applicant has satisfied the 3 limb test provided under the Civil Procedure Rules to the required threshold; the Application was brought without delay, he has demonstrated the substantial loss he is likely to suffer should the stay of execution orders not be granted and lastly, he is ready and willing to deposit security for costs for the due performance of such decree as may be directed by the court.

43. In the upshot, I accordingly find that the Application dated 15th September, 2021 is merited and I proceed to allow the same on the following terms: -

- a) Leave be and is hereby granted to the Applicant to lodge the Notice of Appeal within 7 days from the date of this Ruling.
- b) An Order for Stay of Execution of the Judgment and decree issued on 9th June, 2021 be and is hereby issued pending the hearing and determination of the Intended Appeal.
- c) The Applicant shall deposit a sum of Kshs. 100,000/= in the court's account being Security for Costs for the due performance of the decree within 30 days from the date of this Ruling.
- d) Failure to comply with orders (a) and (c) hereinabove, Order (b) hereinabove shall automatically lapse.
- e) Costs of the Application to abide the Intended Appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON 16TH DAY OF FEBRUARY, 2022.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Mr. Mwitwa holding brief for Ms. Ochwal for the Applicant

Mr. Oywel for the Respondents

Court Assistant- Tom Maurice