



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC MISCELLANEOUS APPLICATION NO. E002 OF 2022

GEORGE MASIBAYI WAFULA.....APPLICANT

VERSUS

RICHARD WAFULA MASINDE.....RESPONDENT

R U L I N G

(Being an application for extension of time to appeal and stay

of execution of the Judgment delivered on 26th November 2021

by HON C. A. S. MUTAI (PRINCIPAL MAGISTRATE) in BUNGOMA

CHIEF MAGISTRATE'S COURT CIVIL CASE No 143 of 2018 HENRY

WAFULA MASIBAYI (deceased) substituted with GEORGE MASIBAYI WAFULA .V. RICHARD WAFULA MASINDE)

1. HENRY WAFULA MASIBAYI (the deceased and later substituted with **GEORGE MASIBAYI WAFULA** - the Applicant) filed in the **CHIEF MAGISTRATE'S COURT BUNGOMA CIVIL CASE No 143 of 2018** seeking against **RICHARD WAFULA MASINDE** (the Respondent) the following reliefs as per the supporting affidavit herein: -

(a) An order of permanent injunction restraining the Respondent, his servants and/or agents or any other person claiming through him from interfering with a portion measuring 50 x 120 feet comprised in the land parcel NO BUKUSU/SOUTH KANDUYI/2461 and/or alternatively an order for refund of the purchase price of the said portion at the current market value.

(b) Costs of the suit and interest at normal Court rates.

(c) Any other relief that the Honourable Court deemed just and fit to grant.

By a Judgment delivered on 26th November 2021, the trial Magistrate dismissed the Applicant's claim and failed to order the Respondent to refund the purchase price of Kshs. 500,000/= notwithstanding the fact that the Respondent admitted receipt thereof.

2. The Applicant has now moved to this Court vide his Notice of Motion dated 28th January 2022 and filed on 4th February 2022 seeking the following remedies: -

1. Spent

2. Spent

3. That this Honourable Court be pleased to extend time within which the Applicant should file his appeal.

4. That pending the hearing and determination of the intended appeal, there be a stay of execution of the decree and Judgment in BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 143 of 2018.

5. That costs of this application to abide by the outcome of the intended appeal.

The application is predicated under the provisions of **Sections 1, 1A, 1B, 3, 3A, 63(e), 79G and 95** of the **Civil Procedure Act** and **Orders 22 and 25** of the **Civil Procedure Rules**. It is also premised on the grounds set out therein and supported by the affidavits of the Applicant as well as his Counsel **ELIZABETH CHUNGE** both dated 28th January 2022.

3. The gravamen of the application is that the Applicant is aggrieved by the Judgment delivered on 26th November 2021 in which his claim to a portion of land measuring 50 x 120 feet out of the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/2461** was dismissed including his claim for a refund of the purchase price of Kshs. 500,000/= although the Respondent admitted receipt of the same. That when the Judgment was delivered, his Counsel **MRS ELIZABETH CHUNGE** was not present but had instructed another Counsel **MR KUNDU** to hold her brief. That **MR KUNDU** did not apply for the proceedings and due to an over – sight, the file was kept away by his Counsel’s staff without seeking further instructions from the Applicant. It was not until 22nd December 2021 that Counsel applied for the proceedings but she was unable to reach her client. Thereafter, Counsel’s offices were closed down on 22nd December 2021 upto 10th January 2022 for the Christmas and new year holidays. The Applicant was therefore unable to reach his Counsel’s office and it was not until 11th January 2022 that he was informed of the Judgment and instructed his Counsel to appeal. That the delay in filing the appeal was not intentional but was due to lack of communication and also oversight which should not be visited on the Applicant.

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

1. Complaint in BUNGOMA CHIEF MAGISTRATE’S COURT CIVIL CASE No 143 of 2018.

2. Closure Notice notifying the public that the offices of ELIZABETH CHUNGE & COMPANY ADVOCATES would be closed from 22nd December 2021 upto 10th January 2022.

3. Memorandum of Appeal.

4. Letter dated 12th January 2022 from WERE & COMPANY ADVOCATES addressed to THE PASTOR ABUNDANT GRACE CHURCH INTERNATIONAL.

5. Supporting affidavit dated 28th January 2022 by MRS ELIZABETH CHUNGE.

The application is opposed and the Respondent filed a replying affidavit dated 25th February 2022 in which he averred, inter alia, that the application is not only incompetent, misconceived, incurably defective, spurious, vexatious, frivolous and an abuse of the process of the Court but has also been filed after an unreasonable inexcusable, inexplicable and unjustified delay. That the application is a mere after thought as the Judgment was delivered in the presence of **MR KUNDU** and there is no evidence that the Applicant applied for typed copies of proceedings and Judgment on 22nd December 2021 or on any other date. That the intended appeal is frivolous since the Applicant sought the specific performance of a land sale agreement over a parcel of land whose owner was deceased and the matter is pending succession.

5. That further, the claim for a refund of the purchase price was statutorily time – barred as the land sale agreement was made in 2004. In any event, there is nothing to stay as the dismissal of the suit was a negative order which cannot be stayed. The Applicant has therefore failed to demonstrate that he is entitled to the orders sought.

6. Annexed to the replying affidavit are the following documents: -

1. The defence in BUNGOMA CHIEF MAGISTRATE’S CIVIL CASE No 143 of 2018.

2. Respondent’s submissions.

7. On 8th February 2022, I directed that the application be canvassed by way of written submissions. These have been filed both by **MRS CHUNGE** instructed by the firm of **ELIZABETH CHUNGE & COMPANY ADVOCATES** for the Applicant and by **MR WERE** instructed by the firm of **WERE & COMPANY ADVOCATES** for the Respondent.

8. I have considered the application, the rival affidavits and annexures as well as the submissions by Counsel.

9. The Applicant seeks the following two (2) substantive orders: -

(a) Extension of time within which to appeal the Judgment in BUNGOMA CHIEF MAGISTRATE CIVIL CASE No 143 OF 2018.

(b) Stay of execution of the decree and Judgment in BUNGOMA CHIEF MAGISTRATE’S COURT CIVIL CASE No 143 of 2018 pending the hearing and determination of the intended appeal.

I shall consider them in that order.

1: LEAVE TO APPEAL OUT OF TIME: -

Section 79G of the Civil Procedure Act provides that: -

“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.” Emphasis added.

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

16 A (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 satisfies the Court that he had a good and sufficient cause for not filing the appeal in time.” Emphasis added.

11. Although no copy of the Judgment and decree sought to be appealed has been annexed to either of the affidavits, it is common ground that the said Judgment was delivered on 26th November 2021. Further, it is not disputed that both the Applicant and his Counsel were not in Court on that day and Counsel’s brief was held by **MR KUNDU**.

12. The Applicant therefore had upto 26th December 2021 to file his appeal. However, for *“good and sufficient cause,”* the Applicant may have a window within which to seek and obtain an extension of time to lodge his appeal. The term *“good and sufficient cause”* has been said to mean one and the same thing – **QURESHI & ANOTHER .V. PATEL & OTHERS 1964 E.A.L.R 633**. Has the Applicant demonstrated *“good and sufficient cause”* to warrant the order of extension of time? That is what I shall now interrogate in the following paragraphs.

13. 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** described the term *“good and sufficient cause”* as follows: -

“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 & ATHERS 2014 eKLR**, the Supreme Court re – stated the following principles which should guide a Court considering an application for leave to extend time. These are: -

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 per 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 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 respondent if the extension is granted.
6. Whether the application has been brought without undue delay.
7. Whether in certain cases like election petitions, public interests should be a consideration for extending time.

See also the cases of **BAGAJO .V. CHRISTIAN’S CHILDREN FIND INC 2004 2 KLR 73** and also **FAHMI TWAHA .V. TIMAMU ABDALLA & OTHERS, SUPREME COURT CIVIL APPLICATION No 35 of 2014.**

14. Guided by the above legal provisions and precedents, it is clear that this Court has a discretion, for *“good and sufficient cause,”* to consider and grant an extension of time within which a party can file on appeal beyond the thirty (30) day period. That discretion, however, must be exercised judicially on bona fide reasons. It is not to be granted as a matter of course. Rather, it is an equitable remedy and whereas there is no mathematical formula as to what is or is not an unreasonable delay, each case must be considered on its own peculiar circumstances. However, whatever reasons are put forth as justifying good and sufficient cause, they must be rational, plausible, logical, convincing, reasonable and truthful leaving no doubt that what is being pursued is solely in the interest of justice and nothing more.

15. In the circumstances of this case, it is clear that following the delivery of the Judgment by the Subordinate Court, the office of the Applicant's Counsel "**by an oversight or error**" filed away the file without seeking the instructions of their client. That is what Counsel has deponed in paragraph 8 of her supporting affidavit and is reiterated in paragraph 12 of the Applicant's affidavit. Courts will readily excuse a mistake of Counsel if it affords a justiciable expeditious and holistic disposal of a matter although that discretion is by no means automatic – **TANA & ATHI RIVERS DEVELOPMENT AUTHORITY .V. JEREMIA K. MWAKIO & OTHERS 2015 eKLR**. See also **PHILIP CHEMWOLO & ANOTHER .V. AUGUSTINE KUBENDE 1982 0 88 KLR 103** where **APALOO J.A** (as he then was) said: -

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit."

Bearing in mind the un – contested fact that both the Applicant and his Counsel were not in Court and the file was inadvertently kept away without seeking the Applicant's further directions, it would be harsh to punish him due to the mistake of Counsel.

16. Further, it is not disputed that Counsel for the Applicant had closed her office for the Christmas and new year holidays between 22nd December 2021 and 10th January 2022. The Applicant has deponed in paragraph 13 of his affidavit as to how he tried to reach his Counsel but the office was closed as confirmed by Counsel herself. It was not until 11th January 2022 that the Applicant was able to contact his Counsel and give instructions to lodge an appeal. This application was then filed on 4th February 2022. It is clear to me that there is **good and sufficient** cause to warrant the grant of an extension of time to appeal. The explanation given by the Applicant is **plausible, rational, logical, convincing, reasonable and truthful**. It does not leave any doubt in my mind that the application is made in good faith.

17. The prayer for extension of time is well merited. I allow it.

2: STAY OF EXECUTION PENDING APPEAL: -

Although the Applicant has cited **Orders 22 and 25** of the **Civil Procedure Rules**, the correct provision that donates power to this Court to grant a stay of execution pending appeal is **Order 42 Rule 6(1) and (2)**. That provision states that: -

6 (1): "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may under but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(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. Emphasis added.

A party seeking an order for stay of execution pending appeal must satisfy the following conditions: -

1: Show sufficient cause.

2: Demonstrate that unless the order for stay is granted, substantial loss will

ensue.

3: File the application without unreasonable delay.

4: Offer security

18. The Applicant has annexed a Draft Memorandum of Appeal and that is sufficient cause. He has also satisfactorily explained the delay in approaching this Court and which is not unreasonable in the circumstances.

19. However, the Applicant was also required to satisfy **all** the conditions set out in **Order 42 Rule 6(1) and (2)** of the **Civil Procedure Rules**, not only some of them. And the cornerstone of such an application for stay of execution pending appeal is substantial loss as **PLATT Ag J.A** (as he then was) put it in **KENYA SHELL LTD .V. BENJAMIN KIBIRU & ANOTHER 1986 KLR 410** when he said: -

"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in it's various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money. Emphasis added.

20. In **VISHRAM RAVJI HALAI & ANOTHER .V. THORNTON & TURPIN (1963) LTD 1990 KLR 365**, the Court said:-

“Thus the superior Court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the applicant must furnish security. The application must of course be made without unreasonable delay.” Emphasis added.

21. On the issue of substantial loss, KULOBA J captured it well in the case of **MACHIRA ¹/_a MACHIRA & COMPANY ADVOCATES .V. EAST AFRICAN STANDARD (No 2) 2002 2 KLR** as follows: -

“If the applicant cites as a ground, substantial loss the kind of loss likely to be sustained must be specified, details or particular thereof must be given and the conscience of the Court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order before disposal of the applicant’s business (e.g. appeal or intended appeal).”

The Judge went on to add that: -

“Moreover, a Court will not order a stay upon a mere vague speculation; there must be the clearest ground of necessity disclosed on evidence Another common factor in favour of the applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the appellant or intended appellant of the means of prosecuting the appeal or intended appeal. So, really, stay is normally not granted, save in exceptional circumstances.”

GIKONYO J described it as follows in **JAMES WANGALWA & ANOTHER .V. AGNES NALIAKA CHESETO (2012 eKLR):-**

“..... the fact that the process of execution has been put in motion, by itself, does not amount to substantial loss The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. That is what substantial loss would entail “

I have perused both the Applicant’s and M/S CHUNGE’s supporting affidavits in support of this application. There is no mention of what substantial loss, if any, the Applicant will suffer if there is no order for stay of execution pending appeal. Yet that is the cornerstone of such an application. In ground No (h) of the application, it is stated thus: -

(h) “That the applicant stands to suffer irreparable loss and damage as he may be illegally evicted basing on the wrong interpretation of the decree and Judgment herein which does not have orders that the applicant be evicted.”

In paragraph 18 of his supporting affidavit, the Applicant refers to a letter (annexture **GWM 4**) dated 12th January 2022 from the Respondent’s Counsel and addressed to **M/S ABUNDANT GRACE CHURCH INTERNATIONAL** as evidence that he is likely to be evicted from the land in dispute. However, as Counsel for the Respondent has correctly submitted in his submissions: -

“The letter dated the 12th day of January 2022 on the instructions of CAPT (RETIRED) CHARLES MASINDE and addressed to the PASTOR GRACE CHURCH INTERNATIONAL is between strangers to this case and has no nexus to these proceedings. It’s an abuse of the Court process for the Applicant exhibit (sic) at as justification to obtain a stay of execution.”

To begin with, neither the decree nor the Judgment sought to be appealed was annexed to the application. Therefore, it is not clear where the Applicant and his Counsel have picked the threat of eviction from. And if it is from the letter dated 12th January 2022, that letter is addressed to **THE PASTOR ABUNDANT GRACE CHURCH INTERNATIONAL** and not to the Applicant. The Court has not been informed if the Applicant herein is **THE PASTOR** referred to in the said letter. In any event, there is an elaborate procedure for evicting persons from public or private land set out in **Section 152** of the **Land Act 2012**. No evidence has been placed before this Court suggesting that the Respondent has commenced that procedure.

22. No substantial loss has been established.

23. The Applicant was also required to offer security or at least aver that he is ready and willing to abide by any conditions which this Court may impose for the due performance of any decree or order that may ultimately be binding on him. As was held in **WYCLIFF SIKUKU WALUSAKA .V. PHILIP KAITA WEKESA 2020 eKLR: -**

“The offer for security must of course come from the Applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not merely as a decoy to obstruct and delay the Respondent’s right to enjoy the fruits of his Judgment.”

No such offer has been made by the Applicant in his twenty-three (23) paragraph supporting affidavit nor even on the face of the Notice of Motion.

24. The Applicant has therefore failed to surmount the hurdle of providing security.

25. Finally, as Counsel for the Respondent has rightly submitted, the Applicant’s suit was dismissed. That was a negative order which cannot be stayed save perhaps for costs which, according to those submissions, were not awarded. Therefore, there is really nothing to stay. The case law on stay of execution pending appeal is clear that for such an order to be granted, there must be a positive order. In the case of

WESTERN COLLEGE OF ARTS AND APPLIED SCIENCES .V. ORANGA & OTHERS 1976 – 80 1 KLR 78, the Court of Appeal for East Africa stated thus: -

“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 to refrain from doing anything or to pay any sum.”

In CO – OPERATIVE BANK OF KENYA LTD .V. BANKING INSURANCE & FINANCE UNION KENYA 2015 eKLR, the Court of Appeal held that: -

“An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of Judgment.”

As I have already stated above, no copy of any decree setting out positive obligations to be performed by either of the parties has been annexed but it is not in dispute that the Applicant’s suit was dismissed. So, there is really no positive order due to be performed as a result of the Judgment sought to be appealed.

26. And in KANWAL SARJIT SINGH DHIMAN .V. KASHEVJI JIVRAJ SHA 2008 eKLR, the Court of Appeal while considering an application for stay of execution 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 refrain from doing anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only.” Emphasis added.

27. The same case applies here. The Applicant’s case having been dismissed and in the absence of any positive orders having been made capable of execution, there is nothing to warrant the grant of orders of stay of execution pending appeal.

28. Ultimately therefore and having considered the Notice of Motion dated 28th January 2022, this Court makes the following orders: -

1. Leave is hereby granted to the Applicant to file and serve his appeal out of time.
2. The appeal be filed and served within fifteen (15) days from the delivery of this ruling.
3. The Record of Appeal be filed and served within forty-five (45) days from the date of serving the appeal.
4. The prayer for stay of execution pending appeal is declined.
5. Costs of the application shall abide the outcome of the appeal.

Boaz N. Olao.

J U D G E

24th March 2022.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 24TH DAY OF MARCH 2022 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES AS WAS ADVISED TO THE PARTIES ON 1ST MARCH 2022.

Boaz N. Olao.

J U D G E

24th March 2022.