



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC MISC. APPLICATION NO. E007 OF 2021

DAVID KIPLANGAT KOECH.....1st APPLICANT

CHERUIYOT HENRY KIPTONUI.....2nd APPLICANT

DAVID CHERUIYOT.....3rd APPLICANT

VERSUS

ELIJAH KIPKOSKE KEMEI.....DEFENDANT

RULING

1. The Application amended on the 25th October 2021 and the Application dated 8th November 2021 both brought under the provisions of Section 16A of the Environment and Land Act, to Sections 1A and 1B of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules, Article 159(1) (a) (b) and (d) of the Constitution and all enabling provisions of the law brought pursuant to the provisions of were consolidated on the 18th November 2021.
2. In the Application amended on the 25th October 2021, the Applicant therein sought for orders of stay of execution of the orders issued by the Sotik Magistrate Court in Sotik PMCC No. 215 of 2018 on the 3rd May 2021 instructing both the District Land Surveyor and the Land Registrar Bomet to visit the suit parcel of land and implement the Land surveyor's decision dated the 25th May 2017. They also sought for orders to enlarge time to Appeal the order of the trial court issued on the 8th September 2020. The Application dated the 8th November 2021 also sought for orders of stay of execution.
3. The Applications, which were supported by the grounds therein as well as the sworn affidavit by the 1st Applicant, David Kiplangat Koech were disposed of by way of written submissions to which the Applicant submitted that a party was entitled to an extension of time pursuant to the provisions of Section 95 of the Civil Procedure Act. That the delay in filing of their Appeal was not occasioned by the Applicants, but by the efficiencies at the Sotik Law Court registry wherein the staff failed to supply them with typed proceedings despite there having been a request to do so at the earliest opportunity. That coupled with this, the Covid-19 pandemic had also scaled down the operations at the Kericho Law courts and lastly that the Applicants had filed a Miscellaneous Application No E003 of 2021 earlier on which was withdrawn by consent, following the Respondent's preliminary objection. The Applicant's submission was that having given an explanation for the reasons for the delay in making the Application for extension of time, which reasons were merited, that the delay was neither inordinate nor unreasonable and therefore the orders they sought of an extension of time to file their Appeal ought to be granted in the interest of justice. The Applicant also sought for costs.
4. On the second limb of their Application, the Applicants submitted that they had met the threshold provided for under Order 42 Rule 6(2) of the Civil Procedure Rules to be granted the order for stay of execution. They submitted that should there be no stay of execution of the Land Registrar's ruling dated 25th May 2017 which award was adopted by the trial court, they would suffer substantial loss which could not be adequately compensated in damages.
5. The Applications were opposed by the Respondent's Replying Affidavits sworn on 1st November 2021 and 15th November 2021 respectively as well as the written submission dated the 15th December 2021 in which the Respondent submitted that the matter stems from a boundary disputes between the Respondent who is the proprietor of land parcel number Kericho/Kaptein/52 on one hand, and the Applicants who occupy land parcels number Kericho/Kaptein/50 and Kericho/Kaptein/79 on the other hand and who had encroached on his portion of land. That the dispute had escalated to attention of the Land Registrar who visited the suit lands and prepared a report dated the 25th May 2017 opining that parties maintain the original boundaries. The report was subsequently adopted as an order of the court on 8th September 2020.
6. That there had been a stay of 45 days to allow the parties to lodge an Appeal if any. There was no such Application filed but the Applicants instead filed a Misc Application No E003 of 2020 seeking an extension of time to lodge the said Appeal . Subsequently, by

consent they withdrew the said Application and the matter was marked as settled on 3rd March 2021 by the court.

7. It was the Respondent's submission that leave to file an Appeal out of time cannot be granted because the Applicants had not presented any plausible explanation for the delay and neither had the Applicants demonstrated that the Application had been made timeously. That the decision, which is the subject of the intended Appeal had been issued by the court way back on the 8th September 2020. The Application seeking to extend time was filed on the 7th June 2021 a period of 272 days. No explanation had been given for the delay even after the trial court having given the Applicants a stay of 45 days.

8. That although the Applicants have tried to blame the court registry and the Covid-19 pandemic for the delay, yet no evidence had been offered to support the said assertions. There was further no evidence tendered showing that Counsel for the Applicants had applied for certified copies of the proceedings or even paid for the same, and no certified copies have been presented to court to suggest that the Applicants were even ready to file an Appeal. That this Application must fail.

9. On the second limb of the Application, the Respondent submitted that the Applicant had not satisfied any of the conditions required under Order 42 Rule 6 of the Civil Procedure Rules. That the Notice of Motion dated the 8th November 2021 had been filed 370 days after the expiry of the stay of execution order issued by the subordinate court. The delay of 6 months was inordinate and unreasonable. That secondly, the Applicants had not offered any security for costs and lastly that they had not demonstrated the kind of substantial loss they would suffer if the order of stay was not granted. That indeed it would be the Respondent who would suffer the loss if the order was granted because it would affect his propriety rights. The Respondent sought for the dismissal of the Applications with costs.

Determination.

10. I have considered the Applicants' Applications, on the first limb where they seek leave to Appeal out of time. The provisions of Section 79G of the Civil Procedure Act which give an appellate court discretion to extend time for filing an Appeal from the subordinate Court to the High Court (read Land and Environment Court) stipulates 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 Appeal ed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellants 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.

11. In the case of **Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** the court held that:

"... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the Applicant to explain the reasons for delay in making the Application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the Applicant.

"... we derive the following as the underlying principles that a Court should consider in exercising 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;*
- 5. whether there will be any prejudice suffered by the Respondent, if extension is granted;*
- 6. whether the Application has been brought without undue delay; and*
- 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time" [emphasis supplied].*

12. Having this in mind the question to ask is whether the Applicants had fulfilled the above requirements so as to be granted leave to file their Appeal out of time.

13. The gist of the matter in question is that vide a Notice of Motion dated the 15th June 2020, the Trial Magistrate court sitting in Sotik in Sotik PMCC No. 215 of 2018 vide his ruling of 8th September 2020 adopted as an order of the court, the decision of the District Land Registrar Bomet made in his report dated the 27th May 2017. There was stay of execution of 45 days issued and the Applicants were granted leave to Appeal.

14. Following the said adoption, the Applicants filed a Misc Application No E003 of 2020 seeking an extension of time to lodge an Appeal. Subsequently, by consent they withdrew the said Application but filed the present Applications seeking orders as herein above captioned. They blamed the Sotik Court registry staff for laxity in not processing certified copies of the proceedings on time and further the Court Registry in Kericho for having scaled down its activities due to the covid-19 pandemic.

15. I note that after the delivery of the ruling of 8th September 2020, the Applicants instructed Counsel to file an Appeal vide their letter dated the 4th May 2021 which was 7 months down the line and unlike what the Applicant's counsel would wish the court to take into consideration was that there was laxity of the staff in the Registry at Sotik to provide them with certified copies of the proceedings, no evidence was tendered showing that counsel or his clients had applied for the said proceedings. The Applicant has now filed the present Applications seeking to file the Appeal out of time and to stay of execution of the decree dated the 8th September 2020 arising out of the Bomet District Land Registrar's finding of his report dated the 27th May 2017.

16. Having considered the Application, the supporting affidavit and the submissions hereto, I find that the Application amended on the 25th October 2021 herein was not brought without unreasonable/excusable delay. The 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, I find that the Applicants have not come to court with clean hands in the circumstance and have also not laid the basis for the extension of time to the courts satisfaction. In the upshot, the Application for enlargement of time to enable the Applicant file their Appeal after the expiry of the statutory period is herein denied.

17. I have also considered the Applicants' Application for stay of execution of the decree in Sotik PMCC No. 215 of 2018 pending the hearing and determination of their intended Appeal. I have also considered the reasons given for and against the said Application.

18. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appeal ed from except in so far as the Court Appealed from may order 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 1st 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 1st Applicant.

19. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which :

- 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.

20. I find issues for determination arising therein namely:

- i. Whether the Applicants have satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal .
- ii. What orders this Court should make

21. The purpose of stay of execution is to preserve the substratum of the case. 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”.

22. What is the status quo on the suit land? The Applicants contends that they would suffer substantial loss if stay is not 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.”

23. It was not enough for the Applicants to state that they would suffer substantial loss. It was obligated of them to go further and show the substantial loss that they stood to suffer if the Respondent executed the decree keeping in mind that they had not proved ownership of the suit land.

24. The Court has to balance the interest of the Applicants and the interest of the Respondents who are seeking to enjoy the fruits of their judgment. In other words the Court should not only consider the interest of the Applicants but has also to consider, in all fairness, the interest of the Respondents who has been denied the fruits of their Judgment.

25. It was stated by Kuloba, J in **Machira T/A Machira & Co Advocates vs East African Standard [2002] eKLR**

“to be obsessed with the protection of an Appellant or intending Appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way Applications for stay of further proceedings or execution, pending Appeal are handled. In the Application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court”.

26. On the second condition, I find that it was not in dispute that the impugned Ruling was delivered on the 8th September 2020 wherein the present Applications were filed on the 25th October 2021 and 8th November 2021 respectively. I find that the said Applications were not brought without undue delay.

27. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Applicants have not pledged any security for costs.

28. 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 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.”

29. The grant of stay remains a discretionary order that must also take into account the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their judgment. The court herein has entertained considerable doubt as to whether the intended Appeal is arguable bearing in mind that an arguable Appeal does not mean one that must succeed, rather, it is one that raises grounds that can sustain a legal argument. See **Kenya Tea Growers Association & Another v. Kenya Planters Agricultural Workers Union, Civil Application No. NAI. 72 of 2001.**

30. As to whether the intended Appeal shall be rendered nugatory if the orders sought are not granted, the answer is in the negative. In the event that the Applicants succeeds in their intended Appeal, then they shall be allowed occupation on the disputed land. All the conditions necessary for grant of Orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules having not been met by the Applicants and further in regard to the provisions of the law as stipulated under Section 3A of the Civil Procedure Act, this Court is not inclined to grant the Order of stay of execution so sought. In totality therefore both the Application amended on the 25th October 2021 and the Application dated 8th November 2021 lack merit and are hereby dismissed with costs

Dated and delivered via Microsoft Teams at Kericho this 28th day of April 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE