



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC MISC. APPLICATION No. E013 OF 2021

LIVINGSTONE ASALA AMULAVI.....APPLICANT

VERSUS

RAPHAEL CHAZIMA CHEGENYE.....RESPONDENT

RULING

1. By Notice of Motion dated 17th May 2021, the applicant seeks the following orders:

1. *[Spent]*

2. *THAT this Honourable Court be pleased to grant leave to the Applicants to file appeal out of time in Vihiga ELC Case No. 164 of 2018.*

3. *THAT upon leave being granted, the Honourable Court be pleased to grant orders of stay of execution of judgment and decree in Vihiga ELC Case No. 164 of 2018 pending the hearing and determination of the appeal herein.*

4. *THAT costs of this application be in the cause.*

2. The application is supported by an affidavit sworn by the applicant. He deposed that judgement was delivered against him in Vihiga ELC Case No. 164 of 2018 on 26th November 2019. It is however apparent from the material before the court that he is referring to Vihiga MCELC Case No. 164 of 2018. He further deposed that when the judgment was delivered, he refunded some KShs 800,000 as well as interest which he had obtained from the second defendant in the said suit in addition to having medical bills as a result of which he was financially crippled and could not therefore foot the costs of appeal. He further deposed that the appeal has high chances of success and therefore urged the court to grant leave to file this appeal out of time as well as stay.

3. In response, the respondent filed a notice of preliminary objection dated 1st November 2021, grounds of opposition dated 1st November 2021 and a replying affidavit sworn by the respondent on 1st November 2021. The gist of the objection is that after the delivery of the Subordinate Court judgement the applicant moved the High Court seeking revocation of the subject grant and that therefore this court has no jurisdiction since the matter has since become a succession matter.

4. The respondent deposed in the replying affidavit that he sued the applicant in Vihiga MCELC Case No. 164 of 2018 culminating in a decree issued on 26th November 2019. That upon realizing that the respondent was about to execute the decree, the applicant and his sisters moved to have the grant in respect of the suit property revoked and also sought stay of proceedings in the subordinate court. That the applicant chose to revoke the grant as opposed to filing an appeal and that he has therefore come to court with unclean hands.

5. The application was canvassed through written submissions which the applicant and the respondent duly filed.

6. The applicant submitted that the question of there being in existence parallel proceedings in the succession court is not one that can be determined without looking in to facts. He relied *inter alia* on **Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd (1969) EA 696** and urged that the objection is not a competent preliminary objection. He further argued that the matter before the court is not sub judice.

7. The respondent filed his submissions on 29th November 2021 and argued that this court as an appellate court has no jurisdiction to extend time in a matter that has shifted jurisdiction to succession proceedings as it will amount to a conflict of judicial procedure over the same subject matter.

8. I have considered the application, the preliminary objection, the affidavits and the submissions. The issues that arise for determination are whether the preliminary objection has merit and whether the orders sought in the application should issue.

9. The parameters for consideration of a preliminary objection are well settled. A preliminary objection must raise a pure point of law which is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. Any objection whose determination rests on disputed facts is not a valid preliminary objection. See **Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd** (supra).

10. There is no dispute that the proposed appeal is in respect of a judgement delivered by the Subordinate Court in Vihiga ELC Case No. 164 of 2018 on 26th November 2019. Going by the case number and upon perusal of the decree annexed by the respondent, it is apparent that the appeal is to be against a judgment and decree passed by the subordinate court in exercise of its environment and land jurisdiction pursuant to **Section 9 (a) of the Magistrates' Courts Act, 2015** as read with **Section 26 of the Environment and Land Court Act, 2011**. In terms of **Section 26 (4) of the Environment and Land Court Act, 2011**, appeals from decisions of the designated magistrate's courts lie with this court. Whether or not other issues have since arisen in another court is really neither here nor there in so far as this court's jurisdiction to hear and determine an appeal against the judgment of the sort that the subordinate court rendered. Jurisdiction has been expressly granted to this court by **Section 26 (4) of the Environment and Land Court Act, 2011**. In the circumstances, I find no merit in the preliminary objection. I dismiss it.

11. I now turn to the question of whether the orders sought in the application should issue, in particular, whether to leave to file an appeal out of time should be granted.

12. The principles applicable to an application for enlargement of time were discussed by the Supreme Court in the case of in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others** [2014] eKLR as follows:

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of 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 for 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. Whether there is a 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 respondents if the extension is granted;

6. Whether the application has been brought without undue delay; ...

13. The present application was filed on 7th June 2021 while the judgement sought to be appealed against was delivered on 26th November 2019. In terms of **Section 16A of the Environment and Land Court Act, 2011**, an appeal from the subordinate court to this court is to be filed within 30 days of delivery of the judgment or ruling. There has thus been a delay of one and a half years.

14. From the material availed by the respondent, it is apparent that the applicant was aware of the judgment and even sought to stay its execution through an application filed in the subordinate court on 6th August 2020. In the affidavit which he swore in that application, he did not mention any financial hardship or ill health which he now cites. I agree with the respondent that the applicant opted to pursue other remedies instead of appealing. The explanations that he now offers do not simply add up. He has not offered any plausible and satisfactory explanation for the delay to warrant exercise of discretion in his favour. It follows therefore that stay of execution pending appeal cannot issue where there is no appeal.

15. I find no merit in Notice of Motion dated 17th May 2021. I dismiss it with costs to the respondent.

Dated, signed and delivered at Kakamega this 26th day of April 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the applicant

No appearance for the respondent

Court Assistant: E. Juma

