



Njogu & 2 others v Munene (Suing as an administrator of the Estate of Gilbert Munene Kathenge alias Munene Gathenge) & 3 others (Miscellaneous Application E005 of 2022) [2022] KEELC 3877 (KLR) (22 April 2022) (Ruling)

Neutral citation: [2022] KEELC 3877 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
MISCELLANEOUS APPLICATION E005 OF 2022**

**EC CHERONO, J
APRIL 22, 2022**

BETWEEN

**MICHAEL MUNENE NJOGU 1ST APPLICANT
DAVID MURAGE NJOGU 2ND APPLICANT
JOHN KARAGU NJOGU 3RD APPLICANT**

AND

**JULIA MUTHONI MUNENE (SUING AS AN ADMINISTRATOR OF THE ESTATE OF GILBERT MUNENE KATHENGE ALIAS MUNENE GATHENGE) 1ST RESPONDENT
POLINE WANGARI GAKUYA (SUING AS AN ADMINISTRATOR OF THE ESTATE OF THE LATE NJERU GATHENGE ALIAS NJERU KATHENGE) 2ND RESPONDENT
JOHN NJOKA GITHINJI (SUING AS AN ADMINISTRATOR OF THE ESTATE OF GITHINJI MUTWANJAU ALIAS BERNARD GITHINJI) 3RD RESPONDENT
PETER NJOGU ZAKAYO (SUING AS AN ADMINISTRATOR OF THE ESTATE OF ZAKAYO NJOGU) 4TH RESPONDENT**

RULING

1. The applicants filed a notice of motion dated February 4, 2022 on February 8, 2022 in which they seek the following orders: -
 - a. Spent.



- b. That this honourable court be pleased to extend time for filing the memorandum of appeal against the judgment dated December 2, 2021, of the Chief Magistrates Court sitting at Kerugoya, MELC 86 of 2019.
 - c. Spent.
 - d. That the honourable court be pleased to grant an order for stay and/or stay of any other proceedings and/or process being taken out as a consequence or incidental to the judgment dated December 2, 2021, of the Chief Magistrates Court sitting at Kerugoya, MELC Number 86 of 2019 pending the filing, hearing and determination of the intended appeal, or further orders of this honourable court.
 - e. Spent.
 - f. That the costs of this application be provided for.
2. The application is premised on the grounds set out on the face of the application supported by the affidavit of Michael Munene Njogu, the 1st applicant herein, sworn on February 4, 2022.
 3. The respondents opposed the application by way of a replying affidavit sworn on February 14, 2022. However, the respondents withdrew it *vide* a notice of withdrawal dated February 28, 2022 and filed another replying affidavit sworn on February 28, 2022.
 4. When the said application came up for hearing on March 17, 2022, the parties agreed to have the same canvassed by way of written submissions.
 5. The applicants filed their submissions on April 11, 2022 while the respondents filed theirs on March 30, 2022.

Applicants' Case and Submissions: -

6. The applicants' case is that they were aggrieved by the judgment delivered in favour of the respondents herein by Honourable AK Ithuku on December 2, 2021 in Kerugoya MELC Suit Number 86 of 2019.
7. The applicant further stated that they were unable to retain their former advocates M/S Munene Wambugu & Kiplagat Advocates for purposes of appeal due to insufficient funds.
8. However, their former Advocates advised them that they are suppose to file their memorandum of appeal within 30 days but he has been unable to do so due to sickness related to Covid 19 pandemic which disabled his movement and was therefore unable to meet the other applicants to discuss the appeal until end of January when he fully recovered.
9. He stated that the intended appeal has overwhelming prospects of success as evidenced in the memorandum of appeal.
10. He further stated that the respondents' counsel had applied for execution of the impugned decree and unless the orders sought are granted, the suit property Land Parcel Number Inoi/Kerugoya/250/16 is likely to be subdivided and disposed to third parties.
11. He also stated that the respondents will suffer no prejudice if the orders sought are granted and in the contrary, they themselves will stand to suffer prejudice and injustice as they will be condemned unheard and may suffer substantial irreparable and irredeemable loss that cannot be compensable by an award of damages.



12. He stated that it is in the interest of justice and fairness that the honourable court grants the orders sought.
13. In their submissions, the applicants submitted that they have satisfied the provisions of order 42 rule 6 (2) of the *Civil Procedure Rules*.
14. They submitted that they had proffered satisfactory reasons and therefore the delay of 1 month is not inordinate.
15. They submitted that the appeal has merit and therefore prayed that the application be allowed with costs. They relied on the case of *MFI Document Solutions v Paretto Printing Works Limited* [2021] eKLR.

Respondents' Case and Submissions: -

16. The respondent's case on the other hand is that on December 10, 2021, their advocate on record moved the court vide a notice of motion dated December 8, 2021 seeking orders for execution of the decree issued by the trial court.
17. He stated that upon being served with the said notice of motion, the applicant filed a relying affidavit sworn on January 29, 2022 and there were no indication by the applicants to file an appeal.
18. He stated that that the ground for the delay due to sickness on the part of the 1st applicant does not explain why his co-applicants never moved to have the appeal filed on time.
19. He stated that the applicants have not explained the reasons they never visited their then advocate on record between December 2, 2021 to January 3, 2022 when the appeal was to have been filed and therefore, they have come to court with unclean hands and are guilty of non-disclosure of material information.
20. He stated that the applicants have not demonstrated to the satisfaction of the court that they stand to suffer any loss or prejudice if the decree is executed as it is clear from their own averment that they had no issue with the decree being executed had the documents been forwarded to them.
21. The respondents further submitted that the applicants had not provided good and sufficient cause for not filing their appeal on time and that it is clear that the applicants were indolent in filing the appeal. They relied on the case of *Pius Kawinzi Kitboka v Jacinta Kavindu Makau* [2012] eKLR.
22. The respondents also submitted that the applicants had not demonstrated that they have an arguable appeal with a high chance of success and that it is clear that the intention to file an appeal is a delaying tactic to further delay the execution process of the impugned judgment.
23. They submitted they have not demonstrated what substantial harm they are likely to suffer if the stay is not granted as the suit land is owned through tenancy in common and therefore no substantial loss shall be suffered by the applicant if the orders of stay are disallowed.
24. They prayed that the application be dismissed with costs to the respondents.

Analysis: -

25. I have considered the application, the replying affidavit, the rival submissions of the parties and the relevant law.



26. The applicant has brought this application under section 79G of the *Civil Procedure Act* which 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 a good and sufficient cause for not filing the appeal in time.”

27. The applicant is blaming her failure to file the appeal on time due to insufficient funds and her sickness due to Covid 19 pandemic where she was placed under isolation as a result of which she was unable to meet the other applicants to discuss the appeal until end of January, 2022 when he had fully recovered.

28. I have looked at the medical record marked as exhibit 2 and indeed confirm that the 1st applicant was diagnosed with Covid.

29. I also take judicial notice that a patient with Covid virus was required to either isolate himself/herself or be placed in isolation in order to prevent the spread of the virus to other people and in this case the co-applicants.

30. The applicant also contends that the appeal is arguable and has high chances of success. At this stage I am not required to delve into the merits of the appeal. I have also looked at the draft memorandum of appeal annexed as exhibit 3, and form the opinion that the same is arguable and is not idle.

31. I am also of the considered view that the applicant’s sickness and arguability of the appeal is a good and sufficient ground to warrant the grant of the orders sought.

32. On the issue of stay of execution pending appeal, I am guided by the provisions of order 42 rule 6 of the *Civil Procedure Rules 2010* which provide thus: -

No order for stay of execution shall be made under subrule (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.

33. The applicant is first supposed to satisfy to the court that they will suffer substantial loss unless the orders sought are granted. I have looked at exhibit 4 in the supporting affidavit and it is evident that the respondents have already commenced execution of the decree.

34. The subject matter of this appeal is land and I am convinced that substantial loss may occur in the event the decree is executed as the suit land is likely to change hands rendering the appeal nugatory in the event of success.

35. On the issue of delay, the application was filed approximately 2 months after delivery of the impugned judgment. I have considered that the delay in filing the appeal for a period of two months has been explained to the satisfaction of this court. I am therefore of the view that the application has been brought timeously without unreasonable delay.



36. On the issue of security, the applicant have not given any under taking to furnish the same. However, this court can order security especially owing to the fact that the applicant has met the other prerequisites.

Conclusion: -

37. In view of the foregoing, I am satisfied that the applicants' notice of motion dated February 4, 2022 is merited and the same is allowed as follows: -
- a. The applicants are hereby granted leave to file their appeal against the decree of the lower court within 21 days from today.
 - b. The applicants are hereby granted stay of the execution of the judgment and decree of the impugned judgment before the lower court pending hearing and determination of the applicants' intended appeal.
 - c. The applicant shall deposit security of Kshs 100,000/= (one hundred thousand shillings) in court within 30 (thirty) days from the date of delivery of this ruling failing which the stay orders shall automatically lapse.
 - d. Costs shall be borne by the applicants.

READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 22ND APRIL, 2022.

HON EC CHERONO

ELC JUDGE

In the presence of:-

Mr Asimwe holding brief for Mrs Makworo for the respondent.

1st appellant/applicant – present.

2nd appellant/applicant – present.

3rd appellant/applicant – absent.

Kabuta, court clerk – present.

