



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC MISC CASE NO. 21 OF 2021

ISAAC KIBIEGO1ST APPLICANT

COLLINS CHOGE.....2ND APPLICANT

=VERSUS=

KIMOI TAMINING KIPYUKRESPONDENT

RULING:

1. This is a ruling in respect of a notice of motion dated 24th May, 2021 in which the Applicants seek the following orders:-

1. That this application be certified as urgent and be heard ex-parte in the first instance.
2. That the honorable court be pleased to allow the applicants to lodge, file and serve the appeal out of time against the judgment rendered on the 27th January, 2021 at the Senior Resident Magistrate's court at Iten in E&L No. 29 of 2018 Kimoi Tamining Kipyuk v Isaac Kipyego & another.
3. That an order do issue that the attached Memorandum of Appeal be filed and served upon payment of requisite court fees.
4. That in the meantime there be stay of execution of the judgment and decree by the Honourable Charles Kutwa SPM rendered on the 27th January, 2021 at the E&L case No. 29 of 2018 in the Senior Principal Magistrates court at Iten and all the consequential orders pending the hearing and determination of this application and/or until further orders of the honourable court.
5. That in the meantime there be stay of execution of the judgement and decree by the Honourable Charles Kutwa SPM rendered on the 27th January, 2021 at the E&L case No. 29 of 2018 in the Senior Principal Magistrates court at Iten and all the consequential orders pending the hearing and determination of this appeal and/or the intended appeal.
6. That the Honourable court be pleased to order that pending the hearing and determination of the application herein and of the hearing and determination of the appeal or the intended appeal that all the subsequent proceedings before the Senior Resident Magistrates court, Iten in E&L case No. 29 of 2018 including an application for eviction be stayed and/or suspended forthwith and this order be served upon Senior Resident Magistrate's Court Iten.
7. That the costs of this application be in the cause.

2. The Respondent had filed a suit against the Applicants at Iten Senior Resident Magistrate's Court. The suit was fully heard and a judgment was delivered on 27th January, 2021. The Applicants were ordered to move out of the suit property. The Applicants had purchased the suit property from the sons of the Respondent. They have set up their homes where they have been residing since the year 2010.

3. The Applicants contend that the Respondent moved to the Iten Senior Resident Magistrate's court where they sought eviction orders against them. The Applicants filed this application under certificate of urgency. They obtained stay of proceedings from this court on 3rd June 2021.

4. The Applicants now state that they intend to file an appeal against the judgment and are seeking extension of time to do so. They state that failure to file appeal in time was due to covid 19 pandemic which led to downscaling of court activities and that there was lockdown which

prevented them from instructing their former advocates to file an appeal in time.

5. The Applicants contend that if the orders being sought are not granted, they will be evicted and their intended appeal will be rendered nugatory. They argue that their intended appeal raises arguable grounds of appeal as they are innocent purchasers for value.

6. The Respondent opposed the Applicants' application based on two replying affidavits. The first one is sworn on 17th October, 2021 and the second one is sworn on 3rd January, 2022. The Respondent contends that the Applicants' application is an afterthought which has been filed too late and that the Applicants' have no developments on the suit property.

7. The Respondent argues that the Applicants were given time to urge their case in the lower court and that there is therefore no basis for seeking to re-open the case. The Respondent argues that she should be allowed to enjoy the fruits of her judgment. The Respondent argues that the Applicants have not given sufficient reasons why they did not file the appeal in time and that in any case, the Applicants have not offered security.

8. The parties were directed to file written submissions. The Applicants filed their submissions dated 24th January, 2022. The Respondent filed her submissions dated 3rd January, 2020. I have considered the Applicants' application as well as the opposition to the same by the Respondent. I have also considered submissions by the parties. There are two issues which emerge for determination. The first is whether time to appeal should be extended and the second one is whether stay of execution should be granted.

9. In the case of Paul Musili Wambua -Vs-Attorney General & 2 others (2015) eKLR the Court of Appeal quoted with approval the case of Kinyunjuri Muguta -Vs- Wotuku Muguta (2018) eKLR where the Court states as follows:-

“...it is now settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted.”

10. In the instant case, the judgment was delivered on 27th January 2021. This application was filed on 25th May, 2021. There was a delay of almost four months. This delay has been explained by the Applicants. There was covid 19 pandemic which led the court business to be downscaled. There was also lockdown in some counties. The Applicants were therefore unable to instruct their former Advocates to file an appeal.

11. It is common knowledge that covid 19 led to downscaling of court business. There was also lockdown which restricted movement of people. I therefore find that the delay of about 4 months has been satisfactorily explained. The Applicants have also demonstrated that they have an arguable appeal. An arguable appeal is not one which will necessarily succeed. The Applicants have been on the suit property since 2010. They have put up their homes and business premises. There will therefore be no prejudice suffered by the Respondent if time to appeal is extended.

12. On the second issue, it is clear that before stay of proceedings was granted, the Respondent had moved to the lower Court seeking to evict the Applicants. The Applicants have put up their homes and businesses on the suit property. If they are evicted, their houses and business premises will be demolished. This will result in substantial loss and will render the intended appeal nugatory.

13. In the case of RWW -Vs- EKW (2019) eKLR the court held as follows:-

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguard and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award costs....”

“.....indeed to grant or refuse an application for stay or execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the Appellant with those of the Respondent...”

14. As I have said hereinabove, the Applicants purchased their plots in 2010. They have been staying on the land since then. The lower court suit was filed in 2018. There will therefore be no prejudice suffered by the Respondent if there is stay of execution pending appeal. I therefore find that the Applicants' application is merited. I allow the same in the following terms: -

1. Time to appeal against the judgment of Senior Resident Magistrate's Court in E&L case No. 29 of 2018 delivered on 27th January, 2021 is extended for 14 days from today's date.

2. The said appeal shall be filed before Iten ELC Court.

3. A stay of execution pending the hearing and determination of the intended appeal is hereby granted.

4. The Applicants shall jointly deposit a sum of Kshs two hundred thousand as security for costs before Iten Court within 90 days failing which the stay shall automatically lapse.

5. The costs of this application shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 20TH DAY OF APRIL, 2022.

E. OBAGA

JUDGE

In the virtual presence of;

Respondent in person.

E. OBAGA

JUDGE

20TH APRIL, 2022