



**Gathogo & another v Kamiri (Environment and Land Appeal
E021 of 2021) [2022] KEELC 3216 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3216 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E021 OF 2021**

YM ANGIMA, J

MAY 19, 2022

BETWEEN

MARY MUTHONI GATHOGO 1ST APPELLANT

STEPHEN WATUTI GATHOGO 2ND APPELLANT

AND

JAMES WAINAINA KAMIRI RESPONDENT

RULING

A. The Appellant's Application

1. By a notice of motion November 5, 2021 brought under sections 1A, 1B & 63(e) of the *Civil Procedure Act* (Cap.21), Order 42 rule 6(1) of the *Civil Procedure Rules*, 2010 (the Rules), and all other enabling provisions of the law, the Appellants sought a stay of execution of the judgment and decree of the trial court (Hon. J. Wanjala CM) dated September 29, 2021 in Nyahururu CM ELC No.128 of 2018 - James Wainaina Kamiri -vs- Mary Muthoni and Another, pending the hearing and determination of the appeal.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1st Appellant, Mary Muthoni Gathogo, on November 5, 2021 and the exhibits thereto. The Appellants contended that they were dissatisfied with the judgment of the trial court in consequence whereof they filed the instant appeal. The Appellants further contended that they were in imminent danger of being evicted from LR.No.Nyandarua/Ol Kalou Township Block 2/164 which was their home. The Appellants contended that they shall suffer substantial loss if they were to be evicted and their residential house demolished during the pendency of the appeal. The court was consequently urged to allow the application.



B. The Respondent's Response

3. The Respondent filed a notice of preliminary objection dated January 14, 2022 in response to the application. The gist of the preliminary objection was that the appeal was incompetent since it was filed out of the time stipulated under Section 79 G of the *Civil Procedure Act* (Cap.21). It was further contended that the application for stay was equally incompetent since it was predicated upon an incompetent appeal. Consequently, the court was urged to strike out both the application and the appeal.
4. The Respondent also filed a replying affidavit sworn on January 14, 2022 in opposition to the application. It was reiterated that the appeal was incompetent for having been filed out of time. It was further contended that the application was not to be filed without unreasonable delay. The Respondent contended that there was no evidence to demonstrate that he intended to sell or dispose of the suit property nor any evidence of substantial loss as required by law. The Respondent was of the view that the Appellants were in occupation of the suit property illegally and that they should not perpetuate the same using a stay order. The court was consequently urged to dismiss the application with costs.

C. The Appellants' Rejoinder

5. The Appellants filed a supplementary affidavit sworn on January 17, 2022 in response to the Respondent's replying affidavit. They disputed that the appeal was filed out of time and contended that the last day for lodging the appeal was October 30, 2021, which fell on a Saturday hence they were entitled under Order 50 rule 3 of the Rules to lodge the instant appeal on the next working day which was November 1, 2021.
6. The Appellants denied that the instant application was filed after undue delay since they had obtained a temporary stay for 30 days upon delivery of judgment. They contended that the suit property was their only home and if they were evicted during the pendency of the appeal they shall suffer substantial loss and great prejudice.

D. Directions on Submissions

7. When the application was listed for inter partes hearing it was directed that it shall be canvassed through written submissions. The parties were granted timelines for filing and exchanging their respective submissions. The record shows that Appellants' submissions were filed on March 7, 2022 whereas the Respondent's submissions were filed on April 4, 2022.

E. The Issues for Determination

8. The court has considered the Appellants' application for stay, the notice of preliminary objection, the replying affidavit, the Appellants' supplementary affidavit as well as the material on record. The court is of the opinion that the following key issues arose for determination:
 - a. Whether the instant appeal is incompetent.
 - b. Whether the Appellants have satisfied the requirements for stay pending appeal.
 - c. Who shall bear costs of the preliminary objection and the application.



F. Analysis and Determination

a. Whether the instant appeal is incompetent

9. The court has considered the material and submissions on record on this issue. Whereas the Respondent submitted that the appeal was incompetent for having been filed outside the 30 days stipulated under Section 79 G of the *Civil Procedure Act*, the Appellants contended otherwise. There is no dispute that the impugned decree was passed on September 29, 2021. There is also no contest that the memorandum of appeal was filed on November 1, 2021. The only contest among the parties is on computation of time.
10. Under the provisions of Order 50 rule 8 of the Rules time prescribed under the Rules is to be computed by excluding the first day and including the last day. The court is thus of the view that the 30 days for filing appeal were to run with effect from September 30, 2021 and lapse on October 29, 2021. The court takes judicial notice of the fact that the last day was a Friday hence a working day in the Judiciary. Accordingly, by filing the instant appeal on November 1, 2021 the Appellants were out of time by at least 2 days. The court does not agree with the Appellants' contention that Order 50 rule 2 of the Rules was applicable to them since the prescribed time for lodging the appeal was not less than 6 days.
11. What, then, is the consequence of filing an appeal out of time? The Respondent submitted that the consequence is that the appeal is rendered incompetent hence a perfect candidate for striking out. Although under Section 79G of the *Civil Procedure Act* (Cap.21) the period required for preparation of a copy of the decree or order the subject of appeal is to be excluded from the period of 30 days, the Appellants did not provide a certificate of delay on the excluded period. The court has further noted that the Appellants did not apply for extension of time or for admission of the appeal out of time. The court has also taken note of the fact that the period of delay is only 2 days both of which fell on a weekend.
12. The court is of the opinion that in spite of the Appellants' failure to seek extension of time, the court has inherent jurisdiction under Section 3A of the *Civil Procedure Act* and also under Sections 1A and 1B of the *Civil Procedure Act* to make such orders as it may deem fit for the ends of justice and to further the overriding objective of the *Civil Procedure Act* and Rules to resolve disputes in a just, proportionate, expeditious and cost-effective manner. It would be contrary to the overriding objective to strike out the appeal so that the Appellants may begin afresh by filing an application for extension of time and another application for stay of execution. The court is thus of the opinion that this is a fit case for the invocation of its inherent jurisdiction. Accordingly, the court hereby makes an order admitting the appeal out of time. The Appellants shall, however, bear costs of the preliminary objection regardless of the outcome of the appeal.

b. Whether the Appellants have satisfied the requirements for stay pending appeal

13. The court has considered the material and submissions on record on this issue. The court has considered the case of *Butt -vs- Rent Restriction Tribunal* [1979] eKLR on the general principles for granting stay pending appeal. The court is aware that the power to grant a stay is discretionary and that it should be exercised in a judicious manner so as not prevent an appeal. The court is further aware that the Appellants should satisfy the requirements set out under Order 42 rule 6(2) of the Rules including the element of substantial loss.
14. It is evident from the impugned judgment that the trial court made an order declaring the Appellants to be trespassers on the suit property and ordered their eviction from the suit property. The trial court also ordered the demolition and removal of the Appellants' buildings and structures from the suit



property. The court is satisfied that if the Appellants were to be evicted and their buildings destroyed during the pendency of the appeal then they shall suffer substantial loss within the meaning of Order 42 rule 6(2) of the Rules. Accordingly, the court finds and holds that the Appellants have satisfied the first limb of the legal requirements for granting a stay.

15. The court has considered the material on record on whether the application was filed without unreasonable delay. It is evident that whereas the impugned decree was passed on September 29, 2021 the instant application was not filed until November 5, 2021. The court is of the opinion that the delay of about one month was not inordinate or unreasonable bearing in mind that the Appellants were acting through a law firm. In the premises, the court is satisfied that the application was filed without unreasonable delay.
16. The court has considered the material on record on the provision of security for due performance of the decree should the appeal ultimately fail. In the instant application, the person who has offered security is the 1st Appellant's husband who has offered to provide his Title No. Nyandarua/Ndemi/6643 as security. The Appellants have not provided any valuation report thereof but the proposed surety has estimated its value at Kshs.800,000/=.
17. Bearing the proposed surety's relationship to the Appellants the court is inclined to accept the Title for parcel 6643 as security for due performance of the decree should the appeal be unsuccessful. The court shall make orders for a valuation of the said parcel and for the original title deed to be deposited in court.

c. Who shall bear costs of the preliminary objection and the application

18. As indicated earlier, the Appellants shall bear the costs of the preliminary objection in any event for having failed to file their appeal within the prescribed period. The Respondent was accordingly justified in raising the preliminary objection in the circumstances. The costs of the application shall, however, be costs in the appeal.

G. Conclusion and Disposal

19. The upshot of the foregoing is that even though the Respondent's preliminary objection was well taken, the same is hereby overruled. The court is satisfied that the Appellants' application for stay is merited. Accordingly, the court makes the following orders for disposal of the preliminary objection and application:
 - a. Respondent's notice of preliminary objection dated January 14, 2022 is hereby overruled.
 - b. The Appellants' memorandum of appeal dated October 27, 2021 is hereby admitted out of time.
 - c. There shall be a stay of execution of the decree of the trial court dated September 29, 2021 in Nyahururu CM ELC No.128 of 2018 for a period of 2 years or until the hearing and determination of the appeal, whichever comes first.
 - d. The Appellants shall provide security for due performance of the decree by filing a current valuation and certificate of official search for Title No. Nyandarua/Ndemi/6643 and depositing the original of the Title in court within 14 days from the date hereof.
 - e. In default of the Appellants' compliance with order (d) above, the stay granted herein shall lapse.

Orders accordingly.



RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 19TH DAY OF MAY, 2022.

In the presence of:

Ms. Ndegwa or the Appellant

Mr. Kinyua Njogu for the Respondent

C/A - Carol

Y. M. ANGIMA

JUDGE

