



**Kamau v Nyokabi & another (Environment and Land Case Civil Suit  
132 of 2013) [2022] KEELC 3033 (KLR) (15 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3033 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 132 OF 2013**

**MAO ODENY, J**

**JUNE 15, 2022**

**BETWEEN**

**CATHERINE NJERI KAMAU ..... PLAINTIFF**

**AND**

**LAND REGISTRAR MPEKETONI ..... 1<sup>ST</sup> DEFENDANT**

**GRACE WAITHERA NYOKABI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of an application dated 14<sup>th</sup> October, 2021 by the Plaintiff/Applicant seeking the following orders: -
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. That pending the hearing and determination of the Applicant's application for leave to appeal out of time in Mombasa Court of Appeal Civil Application No. E040 of 2021 and the intended appeal arising therefrom, the Honourable Court be pleased to stay the execution of the final judgment, decree and/or any consequential orders/ processes thereto in the suit herein by the 1<sup>st</sup> Defendant by herself, her servants, agents, employees and/or any other person authorized by her.
  - e. That pending the hearing and determination of this application and the Applicant's application for leave to appeal out of time in Mombasa Court of Appeal Civil Application No. E040 of 2021, the Honourable Court be pleased to stay the proceedings in Criminal Case No. 270 of 2020 in the Principal Magistrate's Court at Mpeketoni.



- f. That the costs of this application be provided for.

### **Plaintiff/Applicant's Case**

2. The Plaintiff/Applicant relied on the grounds on the face of the application together with her supporting affidavit where she deponed that by a Judgment dated 2<sup>nd</sup> May 2017 delivered by Justice Angote, the Honourable Court issued an eviction order against the Plaintiff in respect of the land known as Lamu/ Lake Kenyatta 11/474.
3. That she was dissatisfied by the Judgment and instructed the firm of Tonia Mwanja & Associates Advocates who filed a Notice of Appeal on 24<sup>th</sup> May, 2017 whom she accused of neglecting to file an appeal within the prescribed time. She also stated that she withdrew the instructions and instructed another advocate to seek leave to file the appeal out of time as a matter of urgency.
4. It was the Plaintiff's case that instead of executing the Judgment entered by the court, the 1<sup>st</sup> Respondent moved to institute criminal proceedings against herself at Principal Magistrate's court at Mpeketoni in Criminal Case No. 270 of 2020 where she is charged with three counts including the offence of forcible detainer contrary to Section 91 of the *Penal Code*, malicious damage to property contrary to Section 399 (1) as read together with Section 339 (4) of the Penal Code and illegal grazing contrary to Section 3(1) of the *Trespass Act*.
5. She therefore urged the court to grant stay of execution orders of the Judgment and the said criminal proceedings in Mpeketoni court as the intended appeal will be rendered nugatory

### **Defendant/Respondent's Case**

6. The 1<sup>st</sup> Respondent Grace Waithera Nyokabi filed a Replying Affidavit where she deponed that she has never been served with the Notice of Appeal and the same has not been annexed to this application
7. She also deposed that upon delivery of the Judgment, the Plaintiff vacated the suit property and the same remained vacant and she took possession hence there is nothing left to stay. Similarly, the Respondent stated that the inordinate delay in bringing the current application has not been explained since the Judgment was delivered on 12<sup>th</sup> May, 2017 and that the Plaintiff/Applicant does not live on the suit property.
8. It was the Respondent's case that the Applicant has not provided any evidence to show whether she took any steps to appeal and no reason for delay in filing the appeal after 5 years has been given.
9. Further Tonia Mwanja Advocate filed a Replying Affidavit whereby she deponed that the Plaintiff sought legal representation from her and paid a deposit retainer of Kshs. 20,000/= but did not give any instructions and that devoid of instructions from the Plaintiff, she was unable to act for her and therefore decided to refund the amount that was paid to her office which she exhibited the Mpesa message for refund of the money.

### **Plaintiff's Submissions.**

10. Counsel for Plaintiff submitted on the principles for grant of stay of execution and relied on Order 42 Rule 6 of the Civil Procedure Rules together the case of RWW vs EKW (2019) eKLR where the court held that the purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted rights of appeal are safeguarded and the appeal if successful, is not rendered nugatory.



11. Counsel similarly relied on the case of *Masisi Mwita vs Damaris* Wanjiku Njeri Civil Appeal No. 107 of 2015 and submitted that the Applicant will suffer extreme prejudice and loss if stay of execution is not granted and that what is at stake is a huge parcel of land which the Applicant cultivated since the year 2010. Further that the application has been brought without unreasonable delay and that the Applicant has demonstrated that indeed she had paid counsel to lodge an appeal which was never done and that is the reason why the current counsel on record has moved the Court of Appeal in Mombasa.
12. Mr. Oduol submitted that a litigant ought not to be punished for the sins of his advocate and relied on the case of *Kasturi Limited v Nyeri Wholesalers Limited* (2014) eKLR Civil Appeal (Application) No. 248 of 2012 and urged the court to allow the application as prayed.
13. The 1<sup>st</sup> Respondent's submission has already been captured in her case and her main contention is that there is nothing to stay as the decree had already been satisfied by the Applicant moving out of the suit land and further that there was inordinate delay in filing this application. She cited the case of *Michael Ngondi Karani v James Muchiri Nyaga* (2015) eKLR and urged the court to dismiss the application with costs.

### **Analysis and Determination.**

14. This is an application for stay of execution of a Judgment that was delivered on 12<sup>th</sup> May 2017, application for stay of proceedings in Criminal Case No 270 of 2020 at Mpeketoni Magistrate's Court and leave to appeal out of time.
15. The application for stay of execution in both cases is dependent on the court granting leave to appeal out of time. The Judgment that the Applicant wishes to appeal against was delivered 12<sup>th</sup> May 2017 which is more than 5 years. The Judgment gave an order that the Plaintiff be evicted which the Defendant has confirmed to the court that it has been overtaken by events as the Plaintiff vacated the suit property hence there is nothing to stay.
16. In the case of *Teresiab Wairimu v Wanjiku Mwangi* [2018] eKLR the court held as follows:

“The Applicant must satisfy the Court that the application was made without unreasonable delay. The Court noted that the Memorandum of Appeal was filed on 27<sup>th</sup> August 2015, and an application for stay was filed on 3<sup>rd</sup> September 2015. However, the said application was withdrawn and the instant application was filed on 4<sup>th</sup> October 2016. By then, the Respondent had already applied for execution of the same. The execution sought to be stayed was initiated by the Respondent before the instant application was filed. Therefore, the Court finds that there was unreasonable delay in filing this application and the stay of execution has been overtaken by events. See the case of Jane Jeptoo Sawe...Vs...Estate of Sylvester Kimagut Sang Represented by Jennifer Chebet Sang, Civil App No.49 of 2015, where the Court of Appeal held that: -

“The order of stay of execution that the Applicant seeks has been overtaken by events and cannot in the present circumstances be granted as it would serve no useful purpose”.

Equally, the Court herein finds that the sought Order of stay of execution would not serve any purpose herein.”
17. The reasons given by the Applicant do not explain why she did not take charge of her case and file an appeal within the stipulated time. Blaming an advocate for her indolence cannot help in salvaging her case. She did not follow up her case with instructions to the advocate who subsequently refunded the



money which she had paid as deposit. After the refund the Applicant did not move swiftly to file an application for leave to file an appeal out of time.

18. The application for stay cannot issue if there is nothing pending to be done in this case pending an appeal which in this case is non-existent. It is not clear from the application or the affidavit by the Applicant when she found out that the appeal had not been lodged. The Judgment in this matter was delivered on 12<sup>th</sup> May, 2017 and therefore the delay in filing the intended appeal has not been sufficiently explained.
19. In the case of *Grace Wanja Njuguna v Andrew Kingori* [2021] eKLR in dismissing an application for extension of time held as follows: -

“I agree with the submissions of the Defendant that the Plaintiff’s application is too little too late. It has been overtaken by events. This court refuses to exercise its discretion in vain. whatever the Plaintiff was attempting to prevent has already happened. The conduct of the Plaintiff in this matter is not consistent with that of a diligent litigant keen on enforcing her rights under the law. Her notice of appeal was filed out of time without leave of the Court. The law provides that appeal must be filed within 30 days (not 14 days as the Defendant avers). The Judgment that she seeks to stay was delivered four (4) years ago. In her application she through an affidavit sworn by her advocates shifts the blame to her former advocates. I cannot put it better that the learned Judge of Appeal did in *Bi-Mach Engineers Ltd Vs James Kahoro Mwangi* (2011) e KLR. In dismissing an application seeking extension of time to appeal, Judge Philip Waki JA (as he then was) stated that; -

“The Applicant had a duty to find out the position on the litigation but there is no disclosure that the Applicant bothered to follow up the matter with his erstwhile Advocates. It is not enough to simply accuse the Advocate for failure to inform as if there is no duty on the client to pursue his matter”.

20. Having found that the application was filed after a lapse of more than 5 years hence inordinate delay. I find that the application lacks merit and is therefore dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 15<sup>TH</sup> DAY OF JUNE, 2022.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

