



**Ojwang v Mudianga & another (Environment and Land Appeal
E006 of 2022) [2022] KEELC 3310 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3310 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E006 OF 2022**

**AY KOROSS, J
JULY 28, 2022**

BETWEEN

ALEX OGUTU OJWANG APPLICANT

AND

SABAN MUDIANGA 1ST RESPONDENT

PATRICIA ONYANGO 2ND RESPONDENT

RULING

The applicant's case

1. The motion dated 3/03/2022 that is the subject of this ruling has been filed pursuant to the provisions of Section 1A, 1B and 75(G) of the *Civil Procedure Act* and Order 42 Rules (1) and (2) and Order 22 Rule 22 of the *Civil Procedure Rules*. Some of the prayers are spent and the reliefs pending determination are as follows;
 - a. The applicant be granted leave to file an appeal out of time;
 - b. The memorandum of appeal be certified upon payment of court fees;
 - c. An order of stay of execution of the judgment issued on 9/09/2021 be issued pending the hearing and determination of the appeal; and
 - d. Costs to abide the outcome of the appeal.
2. The Motion is based on the grounds set out therein and on the supporting affidavit of Charles Odhiambo Odera the applicant's Counsel dated 3/03/2022. The salient grounds were that the respondents had commenced execution of the judgment and that the applicant and his family would be rendered destitute and there was high likelihood of bloodshed during the eviction process. Further, the intended appeal had overwhelming chances of success, the lower court had failed to furnish him



with certified copies of proceedings in time and that he had been financially constrained. He never annexed any documents to his affidavit.

The respondents' case

3. The motion was opposed by a replying affidavit jointly sworn by the respondents who act in person dated 28/3/2022. In it, they contended the motion was malicious, vexatious and an abuse of the court process and waste of judicial time. They submitted that the applicant neither proffered any evidence that he sought for proceedings from the lower court nor filed a notice of appeal. They submitted that the applicant had intimated to them that he was willing to vacate the suit property within 4 months; they indulged him. They contended that they had been prejudiced by his reluctance to vacate.

The applicant's submissions

4. The applicant's Counsel filed written submissions dated 14/3/2022 in which he identified 2 issues for determination; whether the applicant should be granted leave to appeal out of time and whether stay of execution pending appeal is merited.
5. On the 1st issue, he reiterated the averments in his submissions and contended that the legal framework for extension of time to appeal was Sections 79(G) and 95 of the *Civil Procedure Act*. He relied on the Supreme Court of Kenya decision of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the court outlined the guiding principles on applications for leave to appeal out of time.
6. On the 2nd issue, Counsel contended that within the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules, an order of stay of execution pending appeal could be granted so as to protect a suit property on condition that the applicant approached the court with clean hands and to this end, he cited the case of *Jajbbay v Cassim* 1939 AD 537-551. He also placed reliance on the case of *Butt v Rent Restriction Tribunal* Civil App No. Nai 6 of 1979 where the court stated that a stay of execution was not to prevent an appeal. None of the authorities cited were proffered.

The respondents' submissions

7. The respondents filed joint written submissions dated 28/03/2022. They reiterated the averments in their replying affidavit. They contended that the intended appeal emanated from Magistrates Court ELC No.45 of 2020 and that it was close to 6 months from when the decision was rendered. In their view, the motion was inordinately filed. They urged the court to dismiss the motion with costs and allow them to proceed with eviction.

Analysis and determination

8. I have carefully considered the applicant's motion, grounds in support, counsel's supporting affidavit, respondents' replying affidavit and parties' rival submissions. The issues falling for determination are: (i) whether this court should grant the applicant leave to file an appeal out of time and if (i) is in the affirmative, (ii) whether the court should grant an order for stay execution pending appeal. I will proceed to analyse the legal and jurisprudential framework on these issues.
9. Before I proceed with the substratum of the issues for determination. I wish to bring certain observations to the fore. Contrary to the respondent's assertion that the applicant failed to file and serve a notice of appeal, appeals to a superior from the lower court do not require a notice of appeal. Sections 78 and 79 of the *Civil Procedure Act* and Order 42 of the Civil Procedure Rules have an elaborate framework on how such appeals are to be lodged which are distinct from the procedures envisaged



under the Court of Appeal Rules. Further, the applicant did not proffer his cited authorities to this court and as it were, this court is constrained.

I. Whether this court should grant the applicant leave to file an appeal out of time

10. Enlargement of time to appeal is premised on Section 79G of the Civil Procedure Act and more or less replicated in Section 16A of the Environment and Land Court Act which states that:

“ All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of decree or order appealed against.”

11. Grant or refusal of this motion is at the discretion of the court as espoused by Section 95 of the Civil Procedure Act and Order 50 Rule 5 of the Civil Procedure Rules. The discretion must be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim and or sentiment and the applicant must demonstrate good and sufficient cause. Section 3A of the Civil Procedure Act gives this court inherent powers to issue orders to ensure the ends of justice are met.

12. In the instant case, it is common ground between the parties that the delay against the alleged impugned judgment prior to the motion being filed was 6 months. This court does not consider this to be inordinate. But there is more, the substance of the decision the applicant intends to appeal against is not disclosed on the face of the motion or supporting affidavit and as earlier observed the affidavit does not have any annexures.

13. The 1st glimpse that one comes across the alleged impugned judgment is in the respondents’ submissions however, even so, it does not disclose which subordinate court the decision emanated from. Submissions are parties “marketing tools” to sway a court to determine a matter either way and they cannot take the place evidence. It is trite law that courts are bound by the pleadings of the parties. This position of the courts was well encapsulated in the Court of Appeal decision of David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR as follows;

“ It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded.... parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way”

14. Even if this court were to grant the applicant the orders sought on the face of the motion, it would be an exercise in futility because the court and decision the applicant is aggrieved against are not disclosed.

15. In his motion, the applicant failed to attach a draft copy of his memorandum of appeal which is a mandatory requirement. The Supreme Court of Kenya in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR held as follows;

Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time”

I need not say more on the 2nd issue.

Ultimately, it is my finding that the motion is incompetent, fatally defective and a nullity and I will not hesitate but strike it out. I award the costs of this motion to the respondents and ultimately issue the following disposal orders:

a. The Notice of Motion dated 5/03/2021 is struck out with costs to the respondents.



DELIVERED AND DATED AT SIAYA THIS 28TH DAY OF JULY 2022.

HON. A. Y. KOROSS

JUDGE

28/7/2022

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Odera for the applicant

1st & 2nd respondents ; acting in person present in court

Court assistant: Ishmael Orwa

