



**Chacha v Nyangoko & another (Environment & Land Case
65 of 2021) [2022] KEELC 3655 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3655 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 65 OF 2021
GMA ONGONDO, J
JULY 27, 2022**

BETWEEN

PETER SABAI CHACHA PLAINTIFF

AND

NYAICHOA MWITA NYANGOKO 1ST DEFENDANT

**CHAIRMAN, BOARD OF MANAGEMENT NYAMAHARAGA MIXED
SECONDARY SCHOOL 2ND DEFENDANT**

RULING

1. This ruling is in respect of an application by way of a Notice of Motion dated 23rd May 2022 through the firm of Omonde Kisera and Company Advocates brought under, inter alia, Order 51 Rules 3, 4 and 5 of the *Civil Procedure Rules*, 2010 and Order 42 Rule 6 of the same Rules (The Rules herein). The applicants are seeking the following orders;
 - a. Spent
 - b. Spent
 - c. The Honourable Court be pleased to grant temporary stay of execution of the decree and all the consequential orders arising therefrom herein pending hearing and determination of the intended appeal.
 - d. The Honourable Court be pleased to extend and /or enlarge time within which the defendants/ applicants herein can file and/ or lodge a Notice of Appeal against the judgment and decree of this honourable court rendered on 19th January, 2022.
 - e. Consequent to prayer 1 hereinabove being granted, the defendants/applicants be granted liberty to file the intended notice of appeal within 7 days of the granting of leave or such time as this honourable court may deem fit, just and expedient.



- f. The Honourable Court be pleased to grant and/or issue such further directions, as may be necessary, just and/or otherwise expedient to facilitate the realization of the intended appeal to the Court of Appeal.
- g. Costs of this application be provided.
2. The application is anchored on grounds (a) to (m) set out on the face of the same alongside the supporting affidavit sworn on even date by Hellen Omwai, the Principal of Nyamaharaga Mixed Secondary School, the 2nd respondent. In summary, the applicants' lamentation is that 2nd defendant is a public school providing education to thousands of pupils. That the school has been in existence for many years and is built on the suit land reference number Bukira/Buhirimono/448 which is its only land. That Government of the Republic of Kenya and the parents have made massive infrastructure and other development for the school over the years on the suit land. That the applicants were not notified of the judgment date and that the respondent has directly embarked on execution of the decree herein hence, precipitating the application.
3. By a replying affidavit of fourteen paragraphs sworn on 7th June 2022 through the firm of Quinter Adoyo and Company Advocates, the respondent, Peter Sabai Chacha deposed, inter alia, that the suit was instituted in the year 2017 at Migori Environment and Land Court and later transferred to this court for final hearing and determination. That the counsel for the respective parties were duly notified via email that judgment would be delivered in this suit on 19th January 2022 as shown in the email extract (PSC-01). That the decree (PSC-02) has been extracted, signed and sealed accordingly.
4. The respondent further deposed that he is in occupation of a portion measuring approximately zero decimal three hectares (0.3 Ha) of the suit land and left the other parts thereof to the school and others as gleaned from the sketch map accompanying the application. That the applicants out rightly delayed in filing the application. That the delay is a ploy to deny the respondent the fruit of a conscientious, judicious, fair and just judgment.
5. This application was heard by way of written submissions further to this court's orders of 26th May 2022 and pursuant to Order 51 Rule 16 of the Rules.
6. By the defendants'/applicants' submissions dated 10th June 2022 and filed on 20th June 2022, it was asserted that the applicants are entitled to the appeal and the orders sought in the application since substantial loss may occasion on the applicants as the suit land shall be terminated. That there is no inordinate delay in mounting the application.
7. To reinforce the submissions, counsel for the applicants made reference to Order 42 Rule 6 (supra) and the decision in the case of *Edith Gichunge Koine-vs-Stephen Njagi Thoitbi* (2014) eKLR on factors to be considered in an application such as the instant one. Counsel further relied on the case of *Kamlesh Patni-vs-DPP and 3 others* (2015) eKLR where the court held, inter alia, that the courts exist for purpose of dispensing justice.
8. In the Plaintiff/respondent's submissions dated 17th June 2022 and duly filed on 20th June 2022, his counsel reference was made to the orders sought in the application and contended that the applicants do not deserve the orders. That therefore, the application be dismissed with costs.
9. To fortify the submissions, counsel cited the case of *Imperial Bank Limited and another-vs-Alnasir Popat and 18 others* (2018) eKLR regarding inordinate, unreasonable and unexplained delay in mounting the application. Counsel also cited the decision in *Samvir Trustee Limited-vs-Guardian Bank Limited* (1997) eKLR that a successful party is prima facie entitled to the fruits of his judgment, among other things.



10. I have duly considered the application, the replying affidavit and the rival submissions in their entirety. So, is the application meritorious?
11. Order 42 Rule 6 (supra) sets out the triple conditions for stay of execution namely;
 - a. Substantial loss on the part of the applicant
 - b. Delay in mounting the application for stay of execution.
 - c. Security for the due performance of the decree in the matter.
12. The respondent has embarked on execution of the decree herein by way of the notice to show cause dated 24th April 2022 issued against the applicants as disclosed in paragraph 10 of the affidavit in support of the application and annexed thereto. In those circumstances, substantial loss is likely to occasion on the applicants.
13. Notably, judgment herein was rendered on 19th January 2022 and the application was lodged in court on 23rd May 2022. The delay over four months to generate the application is explained by the applicants and reasonable in the circumstances.
14. In an application such as the present one, an applicant has to demonstrate due diligence in observation of the prescribed timelines of filing an appeal as held in Imperial Bank case (supra) and guided by Order 51 Rules 2, 6, 7 and 8 of the Rules. Taking into account Sections 75 and 79G of the Civil Procedure Act Chapter 21 Laws of Kenya on orders from which appeal lies and time for filing from subordinate courts respectively, this court is satisfied that the applicants have established good and sufficient cause for not filing the appeal in time.
15. It must be noted that a successful party is prima facie entitled to the fruits of judgment; See *Shahmad-us-Shamji Bros and another* 1957 EA 438 and Samvir case (supra).
16. Besides, the period of delay and the reasons thereof as advanced in this application can hardly prompt this court to shut out the applicants from the door to the corridor of justice. Indeed, the court has to accord them an opportunity to be heard in the intended appeal; see Koine and Patni cases (supra)
17. As regards security, no person is exempt from providing the same in such an application; see *Doshi Iron Mongers Ltd-vs-Kenya Revenue Authority and another* (2020) eKLR. However, it is within the court's discretion.
18. Additionally, Articles 48 and 50 (1) of the Constitution of Kenya, 2010 provide for access to justice and fair hearing respectively. The right to fair trial of any matter including the prospective appeal herein, is unlimited as provided for under Article 25 (c) of the same Constitution.
19. Further, I subscribe to the Court of Appeal decision in the case of *Butt-vs-Rent Restriction Tribunal* (1979) eKLR where it was observed;

“.....The appellant has an undoubted right of appeal.....”
20. It noteworthy that this court has the mandate to grant interim preservation orders as provided for under Section 13 (7) (a) *Environment and Land Court Act*, 2015 (2011). The stay of execution sought in the application is envisaged thereunder.
21. Moreover, the court has authority to issue orders for preservation, in the interim, of a subject matter of appeal; see *Board of Governors, Moi High School Kabarak and another-vs-Malcolm Bell* (2013) eKLR.
22. In the premises, I find the application meritorious.



23. The applicants shall deposit in this court a sum of Kshs.10,000 (Ten thousand) being security for the due performance of the decree herein within the next fourteen (14) days from this date failure to which the stay order granted shall lapse automatically.
24. Wherefore, the application by way of notice of motion dated and lodged in court on is allowed in terms of orders 3, 4, 5 and 6 sought therein and as stated at paragraph 1(c), (d), (e) and (f) hereinabove.
25. Costs of the application to abide the intended appeal.

DELIVERED, SIGNED AND DATED AT HOMA BAY THIS 27TH DAY OF JULY 2022.

G MA ONGONDO

JUDGE

PRESENT

Mr Odhiambo Kanyangi holding brief for Mr Omonde Kisera, learned counsel for the applicants/defendants
Angela and Fiona, Court Assistants

