



**Kodhiambo v Nyagaya & another (Miscellaneous Application  
E006 of 2022) [2022] KEELC 3929 (KLR) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3929 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
MISCELLANEOUS APPLICATION E006 OF 2022  
GMA ONGONDO, J  
JULY 26, 2022**

**BETWEEN**

**ATIENO KILI KODHIAMBO ..... APPLICANT**

**AND**

**MARTIN OKOMBO NYAGAYA ..... 1<sup>ST</sup> RESPONDENT**

**PHILISTA OLUOCH NYAGAYA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Application for stay of execution and leave of court to file the appeal out of time from the judgment and orders of the trial court, Hon Onzere E. M. (Principal Magistrate) in Ndhiwa Principal Magistrate's Court Environment and Land Case No. 44 of 2018 dated 22nd April 2020)*

**RULING**

1. On March 31, 2022, the applicant through Kanyangi & Company Advocates mounted an application by way of a Notice of Motion dated March 28, 2022 pursuant to, inter alia, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, Order 9 Rule 9, Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*. He is seeking the orders infra;
  - a) Spent
  - b) Spent
  - c) That stay of execution be granted restraining the respondents by themselves, their agents/servants and all those claiming under them from interfering, disposing of and/or transferring to whoever, the parcel of land number Kanyamwa/Kayambo- Kwamu/324 pending the hearing and determination of the prospective appeal.
  - d) That the honourable court be pleased to give the applicant leave to file the appeal out of time.



- e) That costs of the application be provided for.
2. The application is anchored on the applicant's supporting affidavit, filed on even date, and annexed documents including a copy of an application dated December 7, 2021, a copy of ruling rendered on March 1, 2022 in respect to the said application and a draft memorandum of appeal dated March 28, 2022 and lodged herein on March 31, 2022.
  3. The applicant's counsel stated, inter alia, that when he received instructions to take up the instant appeal, there was already filed an application in Ndhiwa Principal Magistrate's Court Environment and Land Case No. 44 of 2018, which was pending for hearing and determination. That if the said application had succeeded, it would have rendered the instant appeal nugatory. The application dated December 7, 2021 was heard and determined and a ruling delivered by the trial court on March 1, 2022. Thus, delay was occasioned and time for filing an appeal lapsed.
  4. Counsel also stated that in the impugned judgment, the court reasoned, inter alia, a declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants held parcel numbers Kanyamwa/Kayambo-Kwamu/1277, 324 and 1316 all measuring 5.06 Hectares in trust for the Estate of Nyagaya Obel Thomas (deceased). That the court further ordered that the parcels of land be merged with land parcel number Kanyamwa/Kayambo-Kwamu /325 measuring 4.68 hectares and that the land now measuring in total 9.7 hectares be registered in the name of Nyagaya Obel Thomas (deceased) and be part of Kanyamwa/Kayambo-Kwamu/325.
  5. The applicant's counsel further stated that should the orders so issued be carried out, then the applicant shall suffer irreparable loss and damage as her parcel of land shall have been consolidated with that of the estate of Nyagaya Obel Thomas. That reversing that position shall be difficult if the appeal succeeds.
  6. In a replying affidavit sworn on May 30, 2022, the respondents' counsel, H. Obach & Partners Advocates, opposed the application and sought that it be dismissed with costs.
  7. The respondent's counsel deposed, inter alia, that the applicant has failed to show how she is likely to suffer irreparable damage as the judgment was entered against her more than 2 years ago. That the appellant has not proposed to deposit any security pending the hearing and determination of the instant appeal as required by law.
  8. On April 7, 2022, this court ordered and directed that the application be argued by way of written submissions pursuant to Order 51 Rule 16 of the *Civil Procedure Rules, 2010* and Practice Direction No. 33 of the Environment and Land Court (ELC) Practice Directions, 2014.
  9. Accordingly, learned counsel for the applicant filed submissions dated April 25, 2022 on even date giving the background of the matter. Counsel submitted that the appellant has made a sufficient case to warrant grant of the orders sought in the application.
  10. Learned counsel for the respondents filed their submissions dated May 27, 2022 on May 30, 2022. Counsel submitted that since the conditions for grant of order of stay under Order 42 Rule 6 of the *Civil Procedure Rules 2010* have not been met, the application ought to be disallowed with costs. Counsel relied on several authorities including the case of *Shell Limited v Kibiru & another* Civil Application No. 97 of 1986, Nairobi, [1986] KLR 410, [1986] eKLR, [1986] KECA 94 (KLR) to buttress the submissions.
  11. In the foregone, the following issues fall for determination:
    - a. Whether the applicant has proved the conditions set for grant of leave to file an appeal out of time;



- b. Whether the applicant has proved the conditions set for grant of orders of stay of execution; and
  - c. Who should bear the costs of the instant application
12. Section 75 of the *Civil Procedure Act* Chapter 21 Laws of Kenya sets out the orders from which appeal lies. Section 79 G of the same Act stipulates the time for filing of appeals from subordinate courts.
  13. Order 50 Rules 4, 6, 7 and 8 of the *Civil Procedure Rules, 2010* provides for when time does not run, power to enlarge time, enlargement of time and computation of days respectively. Bearing in mind the date of judgment and date of mounting the instant application, the applicant has given satisfactory explanation as regards the time of commencement of the application in the circumstances.
  14. This court is pretty aware of the conditions concerning an order for stay of execution under Order 42 Rule 6 (supra) which provides in part thus:
    2. No order for stay of execution shall be made under subrule (1) unless:
      - a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
      - b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. (Emphasis supplied)
  15. This court is also conscious of the rights of the applicant under Articles 48, 50 (1) as read with Article 25 (c) of *the Constitution* of Kenya, 2010. So, it is not the intention of this court to deprive the appellant her right of appeal as enshrined in the said Constitutional provisions, the view held in *Palata Investment Limited v Butt & Sinfield Ltd* [1985] 2 ALL ER 517 (CA) as well as the decision in *Butt v Rent Restriction Tribunal* [1979] eKLR, where the Court of Appeal held that;
 

“.....The appellant has an undoubted right of appeal.”
  16. In the instant case, there is an impending consolidation of the applicant’s parcel of land with land belonging to the estate of Nyagaya Obel Thomas as disclosed in the Application. Those are special circumstances in this application and the applicant has an undoubted right of this appeal.
  17. Plainly, the draft memorandum of appeal contains triable issues, inter alia, trust, fraud and misrepresentation, to be heard and determined on merits; see *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR.
  18. In view of the nature of the matter including Sections 1A, 1B and 6 of the *Civil Procedure Act* Chapter 21 Laws of Kenya and other provisions stated on the face of the application and the circumstances herein, the applicant has advanced sufficient and good reason for the grant of the orders sought in the application as noted in the case of *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR.
  19. It is the considered view of this court that the application is meritorious. The applicant is entitled to the orders sought in the application.
  20. The upshot is that prayers 3 and 4 sought in the application dated March 28, 2022 and filed on May 31, 2022 as set out in paragraph 1 (c) and (d) herein above respectively, are hereby granted accordingly.
  21. The applicant shall deposit in court within thirty (30) days from this date, a modest sum of Kshs.10,000 (Ten thousand only) as security for the due performance of such decree or order as may ultimately be



binding upon her, failing which the stay so granted shall automatically lapse without further order(s) herein.

22. The draft memorandum of appeal dated March 28, 2022 and filed on March 31, 2022 is hereby deemed duly filed.
23. The applicant's counsel shall file and serve the record of appeal together with the memorandum of appeal on record within thirty (30) days from this date.
24. Costs of the application to abide the appeal.
25. It is so ordered.

**DELIVERED, SIGNED AND DATED AT HOMA BAY THIS 26<sup>TH</sup> DAY OF JULY 2022.**

**G M A ONGONDO**

**JUDGE**

**Present**

Mr. Kiseru holding brief for H.Obach, learned counsel for the respondent

Mr. C. O. Kanyangi, learned counsel for the applicant

Angela and Fiona, Court Assistants

