



Kitiri Farmers Co-operative Society Ltd v Chief Land Registrar & 3 others (Environment & Land Case 236 of 2017) [2022] KEELC 2651 (KLR) (21 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2651 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 236 OF 2017**

**YM ANGIMA, J
JULY 21, 2022**

BETWEEN

KITIRI FARMERS CO-OPERATIVE SOCIETY LTD PLAINTIFF

AND

CHIEF LAND REGISTRAR 1ST DEFENDANT

SETTLEMENT FUND TRUSTEES 2ND DEFENDANT

WILSON MAINA MUTAHI 3RD DEFENDANT

JOSEPH MBURU MIHANGO 4TH DEFENDANT

RULING

1. By a notice of motion dated 18.02.2022 based upon Article 159(2) of *the Constitution* of Kenya 2010, Sections 1A, 1B, 3 & 3A of the *Civil Procedure Act* (Cap.21), Order 9 rule 9, Order 22 rule 22, Order 21 rule 20, Order 42 rule 6(1) and Order 51 of the *Civil Procedure Rules* 2010 the Plaintiff sought the following orders:
 - (a) Spent
 - (b) That the firm of M/S Ndegwa Wahome & Co. Advocates be granted leave to come on record on behalf of the Plaintiff after entry of judgment.
 - (c) That this Honorable Court be pleased to stay execution of the judgment and decree dated and delivered on 6th May, 2020 by Justice C.M. Oundo pending the hearing and determination of this application and the intended appeal.
 - (d) That this Honorable Court be pleased to grant leave to the Applicant to file a notice of appeal out of time and be allowed to appeal out of time.



- (e) That this Honorable Court be pleased to order that the Applicant be supplied with certified copies of typed Proceedings and certified copies of Decree and Judgment dated and delivered on 6th May, 2020 in ELC Nyahururu 236 of 2017.
- (f) That the costs of this application be provided for.
2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Edward Mbugua Karoga on 18.02.2022 and the exhibits thereto. The Plaintiff contended that it was not aware of the delivery of the judgment dated 06.05.2020 until recently hence it could not file the instant application earlier. It was further contended that the Plaintiff was desirous of pursuing an appeal against the said judgment and that the delay in filing the instant application was not inordinate bearing in mind the challenges brought about by the Covid-19 pandemic which disrupted service delivery in the Judiciary. The court was consequently urged to allow the application.
3. The 3rd and 4th respondents filed a replying affidavit sworn by Wilson Maina Mutahi on 09.03.2022 in opposition to the said application. It was contended that the application was an afterthought and an abuse of the court process; that there was undue delay in filing the application; that there was no satisfactory explanation for the delay; and that the Plaintiff was not diligent in prosecuting or following up on the matter with its advocates. The 3rd and 4th Defendants further contended that they were entitled to the fruits of their judgment and that the Plaintiff had failed to satisfy the legal requirements for granting the orders sought. The court was consequently urged to dismiss the application with costs.
4. The Plaintiff filed a supplementary affidavit sworn by Edward Mbugua Karoga on 13.04.2022 in response to the 3rd and 4th Defendant's replying affidavit. It was denied that the instant application was an abuse of the court process or that the Plaintiff was an indolent litigant. It was contended that the Plaintiff's previous advocates were unaware of the judgment date hence they were not present on the online platform when judgment was delivered virtually on 06.05.2020. The Plaintiff reiterated that it was unable to follow up on the status of the matter with the court registry due to the outbreak of Covid-19 and its attendant restrictions.
5. There is no evidence on record to demonstrate that the 1st and 2nd respondents filed any response to the application despite being represented by the Hon. Attorney General.
6. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff filed its submissions on 21.04.2022 whereas the 3rd and 4th Defendants filed theirs on 25.04.2022. The Attorney General did not file any submissions on behalf of the 1st and 2nd Defendants.
7. The court has considered the Plaintiff's notice of motion dated 18.02.2022, the 3rd and 4th Defendants' replying affidavit in opposition thereto, as well as the Plaintiff's supplementary affidavit. The court is of the opinion that the following issues arise for determination herein:
- (a) Whether the Plaintiff is entitled to leave to change advocates.
- (b) Whether the Plaintiff has made out a case for stay of execution pending appeal.
- (c) Whether the Plaintiff should be granted leave to file a notice of appeal out of time.
- (d) Whether the Plaintiff requires a court order to be supplied with copies of the proceedings, judgment and decree.



(a) Whether the Plaintiff is entitled to leave to change advocates

8. The Plaintiff has sought leave of court to change advocates after judgment. It is obvious that this order was sought on the basis Order 9 rule 12 of the Civil Procedure Rules which requires such leave or in the alternative a consent order by the outgoing and incoming advocates. The 3rd and 4th Defendants did not express any opposition to the prayer. The court is of the opinion that a party has a constitutional right to be represented by an advocate of his choice at any stage of the proceedings. In the premises, the court is inclined to grant the leave sought to effect the change of advocates.

(b) Whether the Plaintiff has made out a case for stay of execution pending appeal

9. The court has considered the material and submissions on record on this issue. Whereas the Plaintiff submitted that it was entitled to exercise its right of appeal against the judgment dated 6.05.2020, the 3rd and 4th Defendants contended that the Plaintiff had failed to meet the requirements for the grant of a stay pending appeal. The 3rd and 4th Defendants further submitted that the impugned decree simply dismissed the Plaintiff's suit hence there was nothing to be stayed.
10. The court has perused the judgment dated 06.05.2020. It is evident that upon a full hearing of the suit the trial court found that the Plaintiff had failed to prove its case against the Defendants. Consequently, the Plaintiff's suit was dismissed with costs to the 3rd and 4th Defendants. The court is persuaded that save for costs, the dismissal order is a negative order incapable of being stayed. The Plaintiff has not specifically sought a stay of execution for costs of the dismissed suit. Moreover, there is no material on record to demonstrate that the Plaintiff may suffer substantial loss by payment of costs of the suit. There is also no evidence to demonstrate that such costs shall be irrecoverable once paid to the 3rd and 4th Defendants.
11. In the case of *Western College of Arts & Applied Sciences –vs- Oranga & Others* [1976 – 80] KLR 78 the Court of Appeal held, inter alia, that:

“But what is there to be executed under the judgement the subject of the intended appeal?
The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs.

In *Wilson Vs Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgement for this court, in an application of a stay. It is so ordered.”

12. That holding was followed in other subsequent cases such as *Kilindini Warehouses (K) Ltd & Another –vs- Omar Saleh Said & Another* [2014] eKLR and *Sonalux Limited & Another –vs- Barclays Bank of Kenya Ltd* Nairobi Civil Application No. Nairobi 219 of 2007. The court is thus satisfied that the Appellant is not entitled to any orders of stay under Order 42 Rule 6 of the Rules since there is really no positive order to be stayed in the decree sought to be appealed from.

(c) Whether the Plaintiff should be granted leave to file a notice of appeal out of time

13. The court has considered the material and submissions on record on this issue. The Plaintiff submitted that the delay of about 2 years in filing the instant application was excusable for several reasons: First, it was contended that it's former advocates were not aware of the judgment date of 06.05.2020. Second, that it was unable to follow up on the matter due to Covid-19 restrictions. Third, that the Judiciary



had scaled down its operations during the period in question. Fourth, that in any event, the mistakes of its former advocates should not be visited upon it.

14. The court has noted that the Plaintiff was aware of the original judgment date of 21.4.2020 when the trial court directed that it shall be delivered upon notice. The court is not persuaded that a diligent litigant would take almost 2 years to follow up on the outcome of his case whose hearing was apparently concluded on 20.06.2019. There is also nothing on record to demonstrate that the Plaintiff's previous advocates were unaware of the judgment date of 06.05.2020 or that they were unaware of the delivery of the judgment at all. No letter or affidavit from the former advocates has been exhibited in that regard.
15. The court is also unable to accept the Plaintiff's explanation that it was unable to take action due to Covid-19 pandemic. Although it is true that the Judiciary scaled down its operations in early 2020, the operations were up-scaled later in the same year. Near normal operations continued throughout 2021 and many litigants transacted their businesses in the Judiciary. The court is thus far from satisfied that the Plaintiff has rendered a credible and reasonable explanation for the lengthy delay in filing the instant application. It is evident from the material on record that the Plaintiff has not been a diligent litigant and it only filed the instant application as an afterthought. Accordingly, the court is not inclined to grant an extension of time to file a notice of appeal out of time.

(d) Whether the Plaintiff requires a court order to be supplied with copies of the proceedings, judgment and decree

16. Although the Plaintiff has prayed for an order to be supplied with certified copies of the proceedings, judgment and decree, no basis for such a prayer has been laid in the application. There is no evidence or allegation that the Plaintiff has ever sought to be supplied with such certified copies. There is no evidence to demonstrate that such request was denied without lawful excuse. The court is of the opinion that the Plaintiff has a legal right to be furnished with copies of the said documents upon request and payment of the applicable fee. The court is further of the opinion that the Plaintiff does not require a court order to facilitate the provision of such documents. That is a matter which ought to be resolved administratively through the Deputy Registrar of the court or the Head of Station.
17. The upshot of the foregoing is that save for the prayer for leave to change advocates the court finds no merit in the Plaintiff's application. Accordingly, the court makes the following disposal of the notice of motion dated 18.02.2022:
 - a. Leave be and is hereby granted for the Plaintiff to change advocates from the firm of M/S Kibera & Co. Advocates to M/S Wahome Ndegwa & Co. Advocates.
 - b. The rest of the prayers in the said application are hereby declined.
 - c. The 3rd and 4th Defendants are hereby awarded costs of the application to be borne by the Plaintiff.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 21ST DAY OF JULY, 2022.

In the presence of:

Mr. Ojare for the Plaintiff

N/A for the 1st and 2nd Defendants

Mr. Kibet for the 3rd and 4th Defendants

C/A - Carol



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Y. M. ANGIMA
JUDGE

