



REPUBLIC OF KENYA



**Hemed v Asena (Environment and Land Miscellaneous Application
E049 of 2021) [2022] KEELC 3634 (KLR) (18 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3634 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E049 OF 2021
LL NAIKUNI, J
JULY 18, 2022**

BETWEEN

FAIZ RAMADHAN HEMED INTENDED APPLICANT

AND

PERIS IRUNGU ASENSA RESPONDENT

RULING

I. Introduction

1. The application before the court for its determination is the one dated November 15, 2021 filed by the Intended Appellant/Applicant. It is brought under the provision of Order 50 Rule 5 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*.

II. The Intended Appellant/applicant's Case

2. The Intended Appellant/Applicant seek for the following orders:-
 - a) Spent;
 - b) That the Intended Appellant/Applicant be granted leave to appeal out of time;
 - c) Spent;
 - d) That there be an Order for stay of execution of the orders issued on the September 29, 2021 pending the hearing and determination of the Appeal;
 - e) That there be an Order for stay of proceedings in Chief Magistrate (Mombasa) Court pending the hearing and determination of the Appeal;
 - f) That costs be provided for.



3. The application is premised on the grounds, facts, testimony and the averments set out in the 17 Paragraphed Supporting Affidavit sworn by Faiz Ramadhan Hemed, the Applicant herein and five (5) annexures marked as “FRH 1 to 5” annexed hereto. The Applicant avers that he was previously represented by the firm of Messers Omar Said & Co Advocates and due to communication breakdown, he was not informed of the ruling and the orders issued on the September 29, 2021. He states that he only came to learn of the orders on November 9, 2021 when he was physically served by the process server.
4. The Applicant further contended that he was aggrieved by the injunctive orders issued by the lower Court and he intends to prefer an appeal against the said ruling. He averred that he stood to suffer irreparable damage if the orders were not set aside since he had been in occupation and possession of the suit property for more than forty (40) years. The Applicant averred that he ran a poultry business on the suit property and he had invested heavily on the said business by constructing a perimeter wall and other permanent and temporary structures. He further contended that the Respondent had never had possession of the suit property since her alleged purchase in the year 1994 and she only visited the suit property in the year 2019 when she found the Applicant in possession.
5. The Applicant stated that he had been a tenant on the suit property since the years 1980s having leased the same from the Estate of one Swaleh Nguru, and he had been regularly paying rent to date. Lastly, he asserted that he had brought this application without any undue delay and in pursuit of justice. In his affidavit in support of the application, the applicant deposed that the time for lodging an appeal against the said ruling had lapsed and this was a mistake occasioned by the laxity and oversight by his former advocates and he had been informed which information he verily believed to be true that that mistakes of an advocate should not be visited upon their client.

III. The Respondent’s Case

6. The application is opposed by the Respondent vide her sworn 20 Paragraphed Replying Affidavit sworn by Peris Irungu Asena, the Defendant/Respondent herein. She deposed that as per her husband Wilson Asena’s affidavit, the Applicant was fully aware that the ruling to the application for injunction was coming up for delivery of its ruling on September 29, 2021. Therefore, he should not use his former advocates as a scapegoat or an excuse for failing to seek appeal against it on time. She added that prior to November 9, 2021, her advocate on record took all necessary steps to serve the ruling and order to the Applicant former advocates. Further to this, the Defendant/Respondent deposed that after the Applicant failed to comply with the orders of September 29, 2021, her advocate wrote a letter dated October 21, 2021 requiring the Applicant to comply with the injunction orders. The Respondent contended that thereafter, her advocate communicated to Mr Khamisi who was in conduct of the Applicant who requested for the order and ruling for onward transmission to the applicant. She deposed that the documents were emailed to Mr Khamisi on November 5, 2021 and by an email dated November 7, 2021, Mr Khamisi acknowledged receipt.
7. The Respondent claimed that this instant application was only filed as a reaction to avert the application for contempt of court filed in the trial court against the Applicant herein for being in breach and disobedience of Court Order. The Defendant/Respondent deposed that she was the owner of the suit property while the Applicant had just continued to infringe her proprietary right. She deposed that even though the Applicant had a right to appeal, this application had been brought eighteen (18) days after the statutory thirty (30) days. She held that the reason for the inordinate delay did not hold any waters. She deposed that the Applicant had not demonstrated any facts to warrant stay of execution orders or stay of proceedings as was required by law. Hence, the said orders sought by her ought to be disregarded.



8. In addition to this, there was also filed an affidavit by Wilson Asena Adirathe husband to the Defendant/Respondent. He deposed that he had met with the Applicant before the ruling was delivered. He added that they met at the offices of Swaleh Nguru to try and settle the matter out of court. He deposed that the Applicant was fully aware that the ruling was coming up on September 29, 2021. Mr Asena further deposed that on November 5, 2021 he met with the Applicant to try and settle the matter. He added that after the meeting he informed him of his intentions to file an appeal.

IV. Submissions

9. On December 16, 2021 while all parties were present in Court, they were directed to canvass the matter by way of written submissions. Pursuant to that they all complied and the Honorable Court reserved a date for delivering of the ruling accordingly.

A. The Applicant's Written Submissions

10. On January 21, 2021 the Learned Counsel for the Applicant the Law firm of Messrs. Gitahi Gathu & Company Advocates filed their written Submissions dated January 20, 2022. Mr. Gitahi the Learned Counsel for the Applicant submitted on two broad arguments. Firstly, was on the first order of leave to file an appeal out of time. The Counsel reiterated the averments in the Supporting affidavit by the Applicant. He put emphasis on his claim for enlargement of time. To buttress on this point, the Learned Counsel cited the two cases of '[Tana & Athi River Development – Versus - Jeremiah Kimigbo Mwakio & 3 others](#) (2015) eKLR and that of '[Lucy Bosire – Versus - Kebancha Div. Land Dispute Tribunal & 2 Others](#) (2013) eKLR. He submitted that the Applicant had demonstrated that he stood to suffer great prejudice if denied leave to appeal out of time and that he was only in this predicament simply because of the glaring mistakes of his former advocate.
11. Secondly, was whether the Applicant was entitled to orders of stay of execution of the orders issued on October 18, 2021. The Learned Counsel submitted that the Applicant had been in actual possession and occupation of the suit property since the year 1980's as a lessee. That he had been paying land rent and even had developed the suit property. He submitted that the trial magistrate granted the order for injunction solely of the Respondent's Certificate of Title which was acquired in the year 2019. He argued that it would be in the interest of justice that the manner in which the title was acquired was interrogated. The Counsel referred the court to the conditions for grant of stay as enumerated in the provisions of Order 42 Rule 6 of the '[Civil Procedure Rules, 2010](#). He further cited the famous case of '[Butt – Versus - Rent Restriction Tribunal](#) (1979) eKLR'. He further submitted that the Applicant stood to suffer substantial loss if he was locked out of the suit property. He argued that the Respondent would not be prejudiced if the orders sought are granted.

B. The Respondent's Written Submissions

12. On February 1, 2022, the Learned Counsels for the Respondents herein, the Law firm of Messrs. Lawrence Obonyo Legal Advocates filed their written submissions dated February 2, 2022. Mrs. Wambani, the Learned Counsel for the Defendant/Respondent submitted on three (3) issues raised by the Applicant. These were firstly, whether the Applicant should be granted leave to appeal out of time. The Counsel submitted that as per the averments of Mr. Asena, there were several meetings held between him and the Applicant. Hence, for the Applicant to be stating that there had been a communication breakdown between him and his advocate was a wanton misrepresentation of facts. The Counsel added that proper service was effected on the Applicant's former advocates in four different ways, including by serving a copy of the ruling unto the Applicant's former advocate on



- October 18, 2021, a letter being received by the Applicant's former advocate on October 21, 2021, an email sent to them on November 5, 2021, and a personal service to the applicant on November 9, 2021.
13. In order to support their point, the Counsel referred Court to the cases of “*Chandaria Industries Limited – Versus - Sonal Holdings (K) Limited & another* (2014) eKLR” and “*Bank of Africa Kenya Limited – Versus - Put Sarajevo General engineering Co. Limited and 2 others*. He contended that at all times, all clients including the Applicant had a duty to pursue their advocates on record to find out the position on the litigation and that mere citing of inadvertence or mistake was not a sufficient excuse for failure.
 14. The Learned Counsel further submitted that the ruling was delivered on September 29, 2021 while this application was filed on November 15, 2021, making it eighteen (18) days outside the statutory window as required by law. The Counsel added that the Applicant took close to seven (7) days to file this application after he was personally served. The Counsel opined that the Defendant/Respondent would be highly prejudiced with the continued stay. The Counsel further argued that the allegation by the Applicant of being a tenant on the suit property since the year 1980s was false and misplaced. He added that the Defendant/Respondent purchased the suit property from its former owners and the Defendant/Respondent held the title deed to it.
 15. The Counsel further referred this Honorable Court to the Supreme Court case of “*Nicholas Kiptoo Arap Korir Salat- Versus - Independent Electoral and Boundaries Commission & 7 others*” which was cited with approval in the cases of “*Vishva Stone Suppliers Company Limited – Versus - RSR Stone (2006) Limited* (2020) and the case of *Damji Pragji Mandavia – Versus - Sara Lee Household & Body care (K) Limited*” which were also cited with approval in the case of “*Mbarak Said Ali & another – Versus - Sultan Palace Development Limited* (2021) eKLR’. The Counsel contended that an extension of time was not a right of a party but an equitable remedy. She also argued that the Draft Memorandum of Appeal did not raise any triable issues with any likelihood of succeeding during the appeal.
 16. On the issue of whether the Applicant had met the condition for grant of the orders of stay pending appeal, the Counsel relied on several cases to include “the *Butt – Versus - Rent Restriction Tribunal* (1979), the case of *James Wangalwa & another vs. Agnes Naliaka Chesoto* (2012) eKLR and *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000*’. The Counsel submitted that the court in exercising its discretion to grant or refuse an application of stay should consider the special circumstances of the case and its unique requirements. She also argued that the fact that the process of execution had been put in motion, or was likely to be put in motion, by itself does not amount to substantial loss. She argued that the court should also balance the right of the applicant to appeal and that of the successful litigant to enjoy the fruits of his/her judgment. The Counsel further submitted that the Applicants had not demonstrated any substantial loss that would be occasioned by him.

V. Analysis and Determination

17. I have considered all the filed pleadings, the affidavits in Support and replies, the written submissions and the cited authorities, the provisions of the *Constitution* and statutory provisions herein. In order to arrive at an informed, reasonable and just decision, the Honorable Court has framed the following three (3) issues for its determination. These are:-
 - a. Whether the Notice of Motion application dated November 15, 2021 filed by the Applicant herein meets the laid - down threshold for the enlargement of time to file an appeal out of time.
 - b. Whether the parties are entitled to the relief sought



- c. Who will bear the costs of the application.

Issue No. a). Whether the Notice of Motion application dated 15th November, 2021 filed by the Applicant herein meets the laid - down threshold for the enlargement of time to file an appeal out of time.

Brief Facts

18. Before embarking on the framed issues, there is need to contextualize the instant application by giving a brief background of the matter. From the filed pleadings, on June, 2021 the Defendant/Respondent herein filed a suit before the Chief Magistrate's Court pleading that she was the registered and legal owner of all that parcel of land known as Land Reference Numbers. 7954/1/MN (CR No 23257) (hereinafter, 'the Suit Property'). She further claimed that prior to the purchase of the suit property, she conducted due diligence and found that it was vacant and without any encumbrances thereof. However, it was realized that the Applicant herein had encroached on the suit property, erected a perimeter wall and constructed a chicken coop.
19. She contended that she had made several attempts to have the Defendant vacate the suit property, but her efforts had not been successful. It was for this reason that she filed an application seeking for orders of temporary injunction against the Applicant herein restraining him from trespassing into or having any dealings with the suit land. On September 29, 2021, the said court delivered a ruling granting the orders of temporary injunction against the Applicant. Being aggrieved by the said ruling by the lower Court that the Applicant was in the process of preferring the appeal out of time vide the instant application. That is adequate on facts.
20. Now turning to the framed issue under analysis. The law and status regarding the enlargement of time to file appeal out of time is now well established. The provision of Sections 79G and 95 of the *Civil Procedure Act*, 2010 provide for the filing of appeals from the subordinate courts and for enlargement of time respectively. Section 79G provides as follows:-
- “Every appeal from a subordinate court to the High Court shall be filed within a period of thirty (30) days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.”
21. Nonetheless, the proviso to this provision holds that an appeal may be admitted out of time if the Appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. Section 95 thus provides that:
- “Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
22. This Honorable Court wishes to in the case of “*Paul Musili Wambua – Versus - Attorney General & 2 others* [2015] eKLR, the Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated the following:-
- “...it is now well settled by a long line of authorities by this Court that the decision of whether to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general, the matters which a court takes into account in deciding whether to grant



an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted.”

23. From this famous decision, what the Courts need to consider in addition to the sufficient cause and reason while granting the orders for the enlargement of time are four ingredients as follows:-

- (a) The length of the delay;
- (b) The reason for the delay;
- (c) The chances of the appeal succeeding if the application is granted and
- (d) The degree of prejudice to the Respondent if the application is granted.

Therefore, this Court be dealing with each of these ingredients block by block. As for the length of the delay, the Honorable Court has taken cognizance that the impugned ruling by the lower Court was delivered on September 29, 2021 whilst this instant application was filed on November 15, 2021. On quick arithmetic, it is approximately forty seven (47) days later on. The reason adduced by the Applicant and from the filed pleadings for this was that there was a communication breakdown between the applicant and his counsel, hence, he only found out about the ruling on November 9, 2021. On the other hand, the Defendant/Respondent, relying on the affidavit filed by Mr Asena vehemently refuted this position and argued that the Applicant was well aware of the application and the ruling date. Mr Asena had deposed that he had met with the Applicant on several occasions to discuss the possibility of settling the matter out of court. There was no mention that in those meetings, the Applicant was represented by a Counsel. It was deposed that the meeting was held at the offices of Mr Swaleh Nguru between Mr. Asena and the Applicant. Thus, it cannot be disputed that the Applicant was aware of the suit, the filed application for injunction and the date for the delivering of the ruling. In an ideal circumstances, it follows that the Applicant as prudent person had the opportunity to have filed a rebuttal to this affidavit, but he elected not to do so. In effect, this affidavit stands uncontested.

24. Indeed, from the pleadings, there was no possibility that there was a communication breakdown between the Applicant and his advocate. The Applicant’s former advocate was served with the ruling, order, letter and email from the Defendant/Respondent’s advocate, but he did not respond or even attempt to salvage the issue. The ruling had adverse effects on his client and still, he did not respond in any way. The Applicant has now sought for fresh representation by engaging a different Counsel. Despite of this being a good reason and empathizing with the Applicant for being that unfortunate predicament, this Court, I must fully concur with the Advocate for the Respondent to the effect that all clients including the Applicant herein have a duty obligation to pursue their Advocate to find out the position on the litigation and their filed cases. They should never just take a back seat and be in their comfort zones while their matters were filed in Court. I am conscious to the old arguments that the mistake of an advocate should not be visited upon his client and which now needs to be distinguished and adjusted accordingly. This can apply in other situations but not the case at hand. Diplock LJ in the case of “*Allen – Versus - Sir Alfred McAlpine & Sons Limited* (1968) All ER 543 which stated that an ordinary litigant, once he has consulted his solicitor, is helpless before the mysterious arcana of the law. In this instant case, the Applicant cannot be termed as an ‘ordinary litigant’. I have taken note that the Applicant without the presence of his Counsel would on several occasion attend and manage out of Court negotiation meetings with the aim of attaining a settlement. The Applicant had made efforts on even coming up with an amicable solution between both him and Mr. Asena, the Respondent’s husband. The Applicant was well conversant with his case, and he had the ability to follow it up with his advocate. These are facts that were never challenged in terms of rebuttal or being controverted. For



these reasons, certainly, the Applicant was not a 'helpless litigant'. Due to the alleged communication breakdown between the Applicant and his advocate, the Applicant was able to seek replacement of the previous Advocate with the current new one. If the Applicant was vigilant to prefer an appeal and prosecute it, he would have sought new counsel immediately after the ruling.

Issue b). Whether the parties are entitled the relief sought

25. Now turning to the issue of whether the parties are entitled to the relief sought. From the impugned ruling delivered by the lower Court, it is stated that the Defendant/Respondent holds title to the disputed property. The Applicant claims to have been a tenant in the property since the years 1980s. The Magistrate stated that as per Swaleh Hussein's (manager of Swaleh Nguru's Estate) deposition the disputed land was leased from Swaleh Nguru (deceased) to one Ramadhan Hemed (now deceased), the Applicant's father sometime in the year 1980s, By that time, it is noted that the disputed property never had a formal title of its own but was part of plot no. 624/I/MN which was the mother title for 29 subdivided plots. From the Magistrate's ruling, it seems like the tenancy agreement was between Swaleh Nguru (deceased) and the Applicant's father, Ramadhan Hemed (deceased). Therefore if this Court was to evaluate the chances of this appeal being a success, as advised by the Court of Appeal in "Paul Musili Wambua – Versus - Attorney General (*supra*) while taking into consideration that the respondent has shown that she holds title to the disputed plot, I would emphatically say, and without holding a mini trial, that the chances of the appeal succeeding are slim.
26. It is the view of this Court that the Defendant/Respondent who holds title to the disputed property would be prejudiced if the orders sought are granted. As per the provision of Section 26 of the [Land Registration Act](#), No. 3 of 2012, its trite law that a Certificate of title is to be held as conclusive evidence of proprietorship unless it is proven that the title was acquired by fraud, omission, mistake, illegally or un procedurally. The Applicant has not demonstrated any of these wrongs or challenges against the said Certificate of Title Deed held by the Defendant /Respondent from the filed pleadings. Additionally, this Court holds that as a legal and absolute proprietor of the disputed property with all the indefeasible title, interest and rights over the suit property, unless otherwise stated, the Defendant/Respondent should be allowed to fully enjoy the rights and privilege over the said property as provided under the provisions Sections 25 and 26 of the [Land Registration Act](#), No. 3 of 2012.

Issue No. c). Who will bear the Costs of the application

27. It is now settled law that Costs are at the discretion of the Honorable Court. Costs mean what is awarded after every legal action, act or proceedings in a litigation. The proviso of Section 27 (1) of the [Civil Procedure Act](#), Cap. 21 provides that Costs follow the events. The events here means the result of the said legal action, act or proceedings in the litigation.
28. In the instant case, the results from the filed Notice of Motion application dated November 15, 2021 is that the same has been dismissed for being unmeritorious. For that reason, the Costs for the application should be borne by the Applicant and awarded to the Defendant/ Respondent. That is all.

VI. Conclusion & Disposition

29. In view of the foregoing, and based on the intensive analysis to all the framed issues herein, the Applicant herein has not satisfied the legal requirements to warrant this court to exercise its discretion in his favor and grant leave to appeal out of time. As such, there is no reason to determine prayers 4 and 5 of the application on stay of proceedings and execution. For avoidance of doubt this Court makes the following orders:-



- a) That the Notice of Motion application dated November 15, 2021 filed by the Applicant herein be and is hereby dismissed for lack of merit.
- b) That for expediency sake, the matter – Chief Magistrate Court ELC No. 095 of 2021 to be heard and disposed off within the next one hundred and eighty (180) days from today. There be a mention before the Chief Magistrate’s Court on August , 2022 for Pre – Trial Conference under Order 11 of the *Civil Procedure Rules, 2010* and fixing a hearing date and other directions thereof.
- c) That the Costs to be borne by the Applicant be awarded to the Respondent.

30. It is ordered accordingly.

RULING DELIVERED, SIGNED AND DATED ON THIS 18TH JULY DAY OF 2022.

HON JUSTICE L L NAIKUNI, (JUDGE),

ENVIRONMENT & LAND COURT AT

MOMBASA

In the presence of:-

- a. M/s Yumna Hassan, Court Assistant.**
- b. No appearance Advocate for the Applicant.**
- c. No appearance Advocate for the Respondent.**

