



**Okazetta Limited v Odero (Environment and Land Appeal
E009 of 2022) [2022] KEELC 2893 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2893 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E009 OF 2022**

AY KOROSS, J

JULY 14, 2022

BETWEEN

OKAZETTA LIMITED APPELLANT

AND

HARUN OJWANG ODERO RESPONDENT

RULING

Introduction

1. A brief background of the substratum of the intended appeal is as follows; by a motion dated 09/09/2021, the respondent who is the registered proprietor of land parcel number Siaya/ Nyangoma/1453 [“the suit property”] sought several orders in the lower court which included inter alia : (i) a temporary injunction restraining the appellant from removing from the jurisdiction of court, selling or disposing off its movable assets pending the hearing and determination of the suit and, (ii) an order for attachment before judgment of the appellant’s movable assets as security for costs pending hearing and determination of the suit.
2. The Honourable Court dismissed the respondent’s motion but stated that in the interest of justice, the appellant do deposit a banker’s guarantee of Ksh 1,000,000/-. In default, the respondent was granted leave to attach the appellants goods to the tune of Ksh 1,000,000/- and on such attachment, the goods be kept in storage pending hearing and determination of the suit.
3. Aggrieved and dissatisfied with the ruling of the lower court, the appellant filed the instant motion dated 24/03/2022 that is the subject of this ruling.



The appellant's case

4. The motion has been filed pursuant to the provisions of Section 1A, 1B, 3, 3A, 6, 63 (e), 75G and 95 of the *Civil Procedure Act* and Order 42 Rule 6 (6) and Order 51 Rule 1 of the *Civil Procedure Rules*. Some of the prayers are spent and the reliefs pending determination are as follows;
 - a. The appellant be granted leave to file an appeal out of time against the orders made on 02/12/2021 in Bondo PM ELC Case E004 of 2021 and the draft memorandum of appeal be deemed as duly filed upon payment of court fees;
 - b. There be an order for stay of proceedings in Bondo PM ELC Case Number E044 of 2021; and
 - c. There be an order for the immediate release of the appellant's excavator serial number 322S 7W-00212 or in the alternative, the excavator be kept at Bondo Police Station pending the hearing and determination of the appeal.
5. The Motion is based on the grounds set out on the face of the motion and on the supporting affidavit of the appellant's director Muchizuki Yoichiro dated 24/03/2022. The salient grounds are that via an order dated 02/12/2021, the trial court directed the appellant to deposit a banker's guarantee of Ksh 1,000,000/- and in default, the respondent do attach its movable assets and store them pending the hearing and determination of the suit. It was the appellant's position that their former advocates had made them believe that an appeal had been lodged: Siaya ELC Appeal Number E039 of 2021; which was not the case. The appellant contended that it was ready to issue the bank guarantee in favour of the respondent subject to the release of the excavator.

The respondent's case

6. The motion was opposed by a replying affidavit sworn by the respondent Harun Ojwang Odero dated 19/04/2022. In it, he contended he had leased out the suit property to the appellant. However, the appellant breached the terms thereof thus necessitating the lower court suit and the debris that was left behind by the appellant had never been removed. He asserted that the excavator had been attached in accordance with the orders of the court. The respondent submitted that he was apprehensive that the appellant may remove the movable assets from the jurisdiction of the court thereby rendering the respondent's suit nugatory.

The appellant's submissions

7. The appellant filed its written submissions dated 30/03/2022. In it, it identified 3 issues for determination; (i) whether the intended appeal had chances of success and whether the appeal could be filed out of time, (ii) whether a stay of execution could be issued pending appeal and (iii) whether an order of stay of proceedings in the subordinate court could issue pending hearing and determination of the appeal.
8. On the first issue, it submitted that its appeal had high chances of success and within the provisions of Section 75 of the *Civil Procedure Act*, a litigant could subject to good and sufficient cause, be granted leave by an appellate court to file an appeal out of time.
9. On the second issue, it was its position that despite the trial court dismissing the application for security for costs, it proceeded to issue orders for such security. He relied on the case of *Freight Forwarders Kenya Limited v Aya Investment Uganda Limited* [2013] eKLR which stated that strict criteria had to be met before a court grants such orders. It contended that within the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules, an order for stay of execution could be granted where substantial



loss would be suffered and if the application was made without undue delay. It placed reliance on the case of *Butt v Rent Restriction Tribunal* [1982] KLR.

10. On the third issue, the appellant submitted that in an application for stay of proceedings, the underlying interest was that the appeal should not be rendered nugatory. It relied on the case of *Lucy Waithera Kimanga & 2 Others v John Waiganjo Gichuru*. None of the authorities cited by the appellant were availed to this court.

The respondent's submissions

11. The respondent filed his written submissions dated 27/04/2022. Though he laid down 6 grounds for determination. He only submitted on stay of execution pending appeal. He contended that the purpose of such stay was to preserve the subject matter in dispute. He submitted that the appellant needed to demonstrate that the appeal was arguable. He cited the case of *Stanley Kiplagat Rono v William Kiprotich Cherus* [2021] eKLR which cited with approval the case of *RWW v EKW* [2019] eKLR where the court stated that three conditions have to be met before a court grants a stay of execution; the applicant [in this case appellant] had to demonstrate sufficient cause, substantial loss, furnish security and that the appeal would be rendered nugatory.
12. It was the respondent's contention that the motion was inordinately filed and the appellant had not furnished security and he would suffer loss if stay was granted.

Analysis and determination

13. I have carefully considered the appellant's motion, grounds in support, its supporting affidavit, the respondent's replying affidavit and parties rival submissions and authorities cited and the issues falling for determination are: (i) whether this court should grant the appellant leave to file an appeal out of time (ii) whether the court should grant an order for stay of proceedings in Bondo PM ELC Case Number E044 of 2021 and, (iii) whether the court should grant an order for the immediate release of the appellant's excavator or that in the alternative, the excavator be kept at Bondo Police Station pending the hearing and determination of the appeal. I will sequentially proceed to analyse the legal and jurisprudential framework on these issues.

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

14. 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.”

15. A grant or refusal of such a prayer 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. Section 3A of the *Civil Procedure Act* gives this court inherent powers to issue orders to ensure the ends of justice are met.
16. In the instant case, the length of delay was approximately 4 months. Orders were issued on 02/12/2021 and this motion was filed on 25/03/2022. The reason for the delay is that the appellant's former advocates had misled it to believe that an appeal had been lodged; Siaya ELC Appeal Number E039 of 2021; when the same had not. I do not find this delay to be inordinate. In addition, I find that the reason for the delay is reasonable, plausible and sufficient. I have had a chance to peruse the memorandum of



appeal and it raises arguable grounds. The respondent did not demonstrate the degree of prejudice that will befall him if the court grants leave to the appellant to file an appeal out of time and this court has to balance the interests of the respondent who has a ruling in his favour against the interest of the appellant who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes. It would be in the interest of justice if the appellant was given an opportunity to ventilate its case on appeal. I find that the appellant has met the criteria to warrant an order for extension of time to file an appeal.

II. Whether the court should grant an order for stay of proceedings in Bondo PM ELC Case Number E044 of 2021

17. Stay of proceedings as opposed to stay of execution is a serious juridical measure which impedes the respondent's right to prosecute his case in the trial court thus denying him access to justice, a right to be heard without delay and overall, right to fair trial. The test for stay of proceeding is therefore very strict.
18. Article 159 (2) (a) and (b) of *the Constitution* and Sections 1A and 1B of the *Civil Procedure Act* necessitates the just, expeditious, proportionate and affordable resolution of civil disputes. A court needs to take cognisance of these statutory underpinnings before staying any court proceedings.
19. The legal framework for stay of proceedings is governed by Order 42 Rule 6 of the Civil Procedure Rules and the criteria for exercising such discretionary powers is "sufficient cause". The decision of Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 was cited with approval by the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR which set out the criteria as follows;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” [Emphasis added].

20. In applying these principles, I am not satisfied that the appellant has met the criteria for stay of proceedings in the lower court. It is the humble view of this court that it is in the interests of both parties if the suit in the lower court is expedited for hearing. Further, the continuation of proceedings in the lower court will not impede the appeal as the appeal is premised on security for costs whereas the lower court suit is on permanent injunction, general damages, mesne profits, costs to remove the debris and attachment and sale of the appellant's movable goods.

II. Whether the court should grant an order for the immediate release of the appellant's excavator or that in the alternative, the excavator be kept at Bondo Police Station pending the hearing and determination of the appeal

21. The respondent executed a valid court order in attaching the appellant's excavator. The order and attachment are the substratum of the appeal that is before this court and I find that the orders sought on the release of the attached excavator cannot be canvassed at this stage but must await determination of the appeal.



22. Ultimately, I find that the motion is partially merited. It is trite law that costs follow the event and the costs of this motion shall abide the outcome of the appeal. This court makes the following disposal orders:
- a. The appellant is hereby granted leave to appeal out of time against the decision of Hon. J.P. Nandi in Bondo PM ELC E44 of 2021.
 - b. Appellant to file a memorandum of appeal within 3 days from today.
 - c. Appellant to file a record of appeal within 30 days from today.
 - d. Case to be mentioned for directions on 26/09/2022.
 - e. Costs shall abide the outcome of the appeal.

DELIVERED AND DATED AT SIAYA THIS 14TH DAY OF JULY 2022.

HON. A. Y. KOROSS

JUDGE

14/7/2022

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

Mr. Koskei for the appellant

Mr. Jaoko for the respondent

Court assistant: Ishmael Orwa

