



Masila v Mutungi & another; Mutungi (Interested Party) (Environment and Land Miscellaneous Application E101 of 2022) [2022] KEELC 12839 (KLR) (30 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12839 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E101 OF 2022
LN MBUGUA, J
SEPTEMBER 30, 2022**

BETWEEN

ELIZABETH KANINI MASILA APPLICANT

AND

LYDIAH KALONDU MUTUNGI 1ST RESPONDENT

LILIAN MUMBUA KALONDU 2ND RESPONDENT

AND

PAUL NYAMAI MUTUNGI INTERESTED PARTY

(Being an intended Appeal from the Judgement of the Chief Magistrate Court at Nairobi delivered on 30/07/2021 by Hon. L.L. Gicheha (Mrs.) in Milimani Commercial Court Civil Case No. 5447 of 2017)

JUDGMENT

1. This miscellaneous suit was filed by way of a notice of motion application dated June 20, 2022 in which the applicant seeks the following orders;
 - “ 1. That this matter be certified as urgent and that in the first instance service of the same upon the respondents be dispensed with and that it be heard ex parte.
 2. That the honourable court be pleased to extend time within which to lodge and serve the memorandum of appeal.
 3. That the honourable court be pleased to extend time within which to lodge and serve a record of appeal.



4. That pending the hearing of this application inter parties, the honourable court be pleased to grant a stay of execution of the judgement of the lower court delivered on the July 30, 2021.
5. That the costs of this application be in the cause.”

2. The application is premised on the grounds that;

- “ a) That the applicant herein being dissatisfied with the judgment of the lower court of July 30, 2021 directed that an appropriate appeal process be initiated which was promptly done when: the memorandum of appeal was filed; request for certified copies of proceedings and judgement was lodged and paid for and served. Thus the appeal being HCCA No E518/2021 was filed on time.
- b. The application for stay was filed and certified urgent; interim orders of stay made.
- c. The respondents filed their response together with a P O when the court ordered the substitution of the third party before the hearing of the application for stay and directed that the P O be dispensed with: the application for substitution was filed and opposed while the P O was attended to as directed by the court.
- d. That the preliminary objection dated September 22, 2021 was filed by the counsel for the respondents.
- e. That the honourable court on the June 7, 2022 struck out the appeal indicating that the court lacked the jurisdiction to hear the appellant’s appeal dated August 6, 2021 and specifically ordered that the appeal be filed in this court.
- f. That the appeal stands overwhelming chances of success.
- g. That the applicant stands to suffer substantial and/or irreparable loss.
- h. That the life of the children involved shall be abruptly disrupted to the detriment of their well-being: they stay within the suit property and go to a school in the neighborhood and the current term session is ongoing.
- i. That the education of the children in issue shall be suddenly cut short as it is difficult and unaffordable to change school mid-term hence their future will be jeopardized.
- j. That the children in question will also suffer monumental loss.
- k. That the source of food from plot No 3xx Athi River shall be suddenly cut leaving the applicant and her two minor children without any alternative source of food as the applicant is not in any gainful employment.
- l. That the applicant and the children in issue will not be able to access the grave of their late husband and father which shall cause them grave emotional trauma and thus affect their learning process.
- m. That the appeal shall otherwise be rendered nugatory.



- n. That the applicant has an arguable appeal with very high chances of success and she ought not, to in all fairness, be shut from the seat of justice just because time for filing her appeal has expired.
 - o. That the applicant stand the risk of being evicted from the suit house and land by the respondents if an order for stay of execution of the judgement of the lower court is not granted and the respondents be restrained from interfering with the applicant's continued occupation of the suit premises.
 - p. That the applicant will suffer irreparable loss and damage should she be evicted from the suit premises.
 - q. That it is only fair and just that the applicant be accorded time to pursue her appeal without any disruption of the *status quo*."
3. The respondents have opposed the application through the replying affidavit of the 2nd respondent, Lilian Mumbua Kalondu dated June 29, 2022 where it is deponed as follows;
- "1. That the said application is seeking to deny us the right to judgment and enjoying the same from a decree of July 30, 2021.
 - 2. That the lower court decision was rendered on merit and there is nothing new in fact or law being presented by the applicant on the following grounds:-
 - a. The applicant is the daughter-in-law of the 1st respondent and the interested party (deceased).
 - b. Properties LR No Nairobi/block 75/5xx and Athi River Plot No 3xx are all registered and were bought by the 1st respondent. (Attached herein and marked LMK 1 is a copy of the said original title)
 - c. That Property LR No Nairobi/block 75/5xx is composed of a 3 bedroomed house and a 1 bedroomed servant quarter it defeats justice and equity why the applicant has continued to deny us access, economic gains in terms of rent of Kshs 600,000/- Six Hundred Thousand annually.
 - d. Rights of a registered proprietor are enshrined in the Constitution 2010, Land Act 2012, Land Registration Act 2012 and are all accorded to the 1st respondent.
 - e. The applicant has not and did not in the lower court demonstrate any interest in the said properties that she acquired and hence seeks in a clandestine manner to deny the 1st respondent right of her property.
 - f. The applicant has no locus whatsoever on the suit properties since possession is not ownership.
 - g. The applicant has not provided any cogent reasons on why she inter-alia moved the High Court Civil division as she was not acting in person to claim ignorance but had instructed counsel



who ought in the first instance concede to our P O dated September 22, 2021 immediately it was filed and served upon them.

- h. That the applicant has demonstrated she is a frivolous malicious litigant and abusing the courts to deny us justice,
 - i. That the interested party herein was my father and died legally married to my mother the 1st respondent having filed a divorce and matrimonial proceedings during his life time which were never terminated as at his demise.
 - j. That the interested party herein Paul Nyamai Mutungi took part in the lower court proceedings but is deceased and there are numerous pending succession disputes at Nakuru Chief Magistrate Court Succession Cause E139 of 2021 and High Court Nairobi *Succession Cause E202 of 2022* regards to his estate and hence no proper locus to anyone claiming to be the representative of the estate of the deceased. (Attached herein and marked LMK 2 are copies showing the said pleadings).
 - k. That the applicant has not demonstrated to-date that she has attempted to have the typed proceedings from the lower court so as to have her record of appeal ready 1 year down the line.
3. That the applicant will not be prejudiced if the orders sought are not granted as she is a woman of means as demonstrated can easily fend for her minors, children and lease her own house and imputing that the respondents have the responsibility to forcefully shelter her and the minors at their expense ought not to be entertained.
 4. That the 1st respondent who is my mother has been denied the rights to enjoy her property has been curtailed since 2016 by the actions and inactions of the applicant.
 5. That since leave to appeal out of time is being sought, order number four on the notice of motion dated June 20, 2022 is frivolous and malicious and only when there is a proper record of appeal filed in this court can an issue of stay against a judgment be canvassed so as rules of stay in an appeal as stipulated in Orders 42 rule 6 be applicable and not just a blanket stay.
 6. That the applicant has demonstrated it is due to her own laches while she had proper representation that she declined to concede on preliminary objection dated September 22, 2021 at the HCCA E518 of 2021.
 7. That I am further guided by my counsel on record advise that I strongly believe to be true that the applicant is on the verge of setting a precedent whereby strangers could forcefully deny registered proprietors their rights as provided by the law.
 8. That all what is deponed herein is true to the best of my knowledge and belief.”



Determination

4. I have duly considered the arguments raised by the parties herein including the rival submissions. I have also perused the judgment delivered on July 30, 2021 in Milimani Chief Magistrate’s court civil case no 5447 of 2017. The issues for determination are; Whether the applicant should be granted extension of time to lodge an appeal and whether the court should grant a stay of the lower court judgment.
5. On extension of time, section 79G of the [Civil Procedure Act](#) provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty 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:

Provided 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”.
6. The Supreme Court of Kenya in [Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others](#); [2014] eKLR had this to say on extension of time;

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.”
7. I find that the applicant has given an account of how he filed an appeal on time but the same was filed at the High Court. The respondent then moved the High Court on the question of jurisdiction through a preliminary objection which was upheld. The explanation given by the applicant is certainly plausible. The court takes into consideration that a dispute can have cross cutting issues. And upon reading the judgment of the lower court, I discern that parties are close family members of which the occupation of the property by the applicant is anchored on having been married to a son of 1st respondent. In the final analysis, I am inclined to allow the applicant to file an appeal out of time.
8. On the issue of stay, I make reference to the provisions of Order 42 rule 6 of the [Civil Procedure Rules](#) which provides as follows:

“6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court appealed from whose decision the appeal is preferred may apply to the appellate court to have such order set aside”.
9. In [Loice Khachendi Onyango v Alex Inyangi & another](#) [2017] eKLR the court held as follows;

“The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the applicant”.



10. I have keenly read the judgment delivered on July 30, 2021 in Milimani Commercial court case no 5447 of 2017. I discern that the suit before the lower court was filed by the applicant herein where she was seeking orders of injunction to restrain the respondents from evicting her from the suit premises. However, the applicant did not establish any legal right over the said suit premises which land apparently belongs to the 1st respondent and the applicant had only been granted permission to stay on that land. In the circumstances, the prayer for stay of the magistrate's court judgment is hereby declined.
11. In the end, the application partially succeeds and I proceed to give the following orders;
 1. The applicant is hereby granted leave to file an appeal out of time within 14 days from the date of delivery of this judgment failure to which, the leave granted shall lapse.
 2. The prayer for stay of proceedings in Milimani Chief Magistrates court case no 5447 of 2017 is hereby declined.
 3. The applicant shall bear the costs of this suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

Odhiambo for the Respondent

Court Assistant: Joan

