



**Barasa v Omollo (Environment & Land Case 55 of 2019)
[2022] KEELC 12827 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12827 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 55 OF 2019
AA OMOLLO, J
SEPTEMBER 29, 2022**

BETWEEN

JOHN ODUNGA BARASA APPLICANT

AND

VINCENT BARASA OMOLLO RESPONDENT

RULING

1. The Applicant brought the present application under section 1A, 1B, 3, 3A of the [Civil Procedure Act](#), order 9 rule 9 Order 22, rule 22, Order 42 rule 6, Order 50 rule 6 and Order 51 rule 1, 3 of the [Civil Procedure Rules](#) on the 9th of May, 2022 for orders:
 - a. Spent;
 - b. Spent;
 - c. That this Court be pleased to extend time within which to lodge a Notice of Appeal and serve out of time;
 - d. Spent;
 - e. That there be a stay of execution of the judgement/decree delivered on the 16th March, 2022 and any consequent orders pending interpartes hearing and determination of this application;
 - f. That there be a stay of execution of the judgement/decree delivered on the 16th March, 2022 and any consequent orders pending interpartes hearing and determination of the intended appeal; and
 - g. That the costs of the application be provided for.
2. The Application is supported by the affidavit of Vincent Barasa Omollo together with the following grounds:



- a. That the judgement in this matter was delivered on the 16th of March, 2022 without any notice to neither the Respondent/Applicant nor his advocates;
 - b. That if the judgement notice had been issue to his advocates, the Respondent/Applicant of his advocate would have attended court and sought for stay of execution of the judgement/decrece pending the intended appeal to the Court of Appeal;
 - c. That unless these orders are issued the Respondent/Applicant’s appeal will be rendered nugatory to his detriment and the damage would be irreparable.
3. The Respondent filed his Replying Affidavit on the 13th of June, 2022 urging this Court not to grant the stay of execution and that the present application is a waste of the courts time and the same should be dismissed with costs. He deposed that the judgement date was taken by consent of both parties in Court with Wanyama, advocate holding brief for the Applicant hence the allegation that neither the Applicant nor his advocate were aware of the date cannot stand. He deposed further that the Applicant had failed to explain the one-month delay after the judgement that it took for him to retain the services of another counsel. That the Applicant slept on his right of appeal and no reasons have been proffered to explain the delay in filing the appeal therefore necessitating the dismissal of the present application.
4. The parties canvassed the application by way of written submissions with both parties filing their respective submissions on the 13th of June, 2022. The Applicant submitted that Article 50 of the Constitution provides every citizen has the right to be accorded a fair hearing which right is also provided under the overriding objectives under section 1A of the Civil Procedure Act. That section 65 of the said Act, mandated parties to lodge an appeal to the Higher Court from the subordinate court and as such he had rightly moved the Court for the leave for enlargement of time to lodge a notice of appeal and serve the same out of time.
5. While quoting order 40 (1) of the Civil Procedure Rules, the Applicant further submitted that the subject matter of this case was a parcel of land measuring 0.4HA which land the Court ordered that the same be transferred to the Respondent’s name. That this will make him not only lose his land, his livelihood and economic rights but will also be cumbersome for the registration to be restored in the event he wins the appeal. That unless the stay is granted, the appeal will be an academic exercise as the suit property will already have been transferred to third parties. The Applicant relied on the case of Amal Hauliers Limited & Abdulnasir Abubakar Hassan (2017) eKLR where the Court laid down the guidelines on how the Courts should exercise discretion and held that:
- “The powers of the court to grant or refuse an application for stay of execution is discretionary powers. The discretion should be exercised in such a way as not to prevent an appeal.”
6. The Respondent on the other hand submitted that section 79G of the Civil Procedure Act provided for a thirty-day period within which a party aggrieved can lodge an appeal to the High Court from the subordinate court and 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. He buttressed his argument relying on the case of First American Bank of Kenya vs. Gulab P. Shah & 2 others (Nairobi Milimani) HCCA No. 2255 of 2002 (E.A), where the Court set out the following factors to be considered when deciding on whether or not to enlarge time:
- a. The explanation if any, for the delay;



- b. The merits of the contemplated action, whether the matter is an arguable one deserving a day in Court or whether it is a frivolous one which would only result in the delay of the course of justice;
 - c. Whether or not the respondent can adequately be compensated in costs or any prejudice that he may suffer as a result of discretion in favour of the applicant.
7. The Respondent stated that he filed a suit against the Applicant for adverse possession and the matter was heard to finality and a judgement date set on the 16th of March, 2022 when judgement was delivered in his favour although neither the Applicant nor his advocate attended court for the judgement. That the assertion that the Applicant's advocate was not aware of the judgement date does not explain why he delayed in filing his notice of appeal citing the case of *Parry vs. Murray Alexander Carson* (1963) EA 546 where the Court opined as follows with regard to extension of time:

“Though the provisions for the extension of time requiring sufficient reason should receive a liberal construction, so as to advance substantial justice, when no negligence or inaction nor want bona fides is imputed on the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy and the appeal should be dismissed as time barred even at the risk of hardship and injustice to the applicant.”

8. With regards to the issue of stay of execution, the Respondent submitted that the Applicant had not demonstrated what substantial loss he is likely to suffer if the stay is not granted. He relied on the case of *Mary Mwaki Masinde vs. County Government of Vihiga & 2 others* (2015) eKLR. The Respondent dwelt on the failure of the Applicant to furnish the court with security and stated that this is an indication that there is no good faith on the Applicant's part. He urged the Court to dismiss the application with costs.

9. Enlargement of time is provided for under section 95 of the *Civil Procedure Act*, Cap 21 which states thus:

“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.

10. The Applicant has alleged that his advocate failed to attend court on the date of the judgement because he was never served with the judgement notice a fact that has been denied by the Respondent. The Applicant states that he only became aware of the judgement delivered on the 16th of March, 2022 and decree issued on the 23rd of March, 2022 upon service of the decree. The Applicant filed this application on the 9th of May, 2022 almost 37 days after the delivery of the judgement. The enlargement of time is solely the court's discretion as held in the Court of Appeal case of *Leo Sila Mutiso v. Hellen Wangari Mwangi* [1999] 2 EA 231 where the Court set out the principles that guide this Court in such an application as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the



appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

11. The Applicant’s explanation for not attending Court on the day of judgement was because his counsel on record alleged that the notice was not served on him. The Court’s record does show there was an advocate holding brief for the Applicant’s advocate when the judgement date was set. If the counsel holding brief did not relay the date of the judgement, the blame lies solely at the doorstep of the Applicant. Be that as it may, I am alive to the principle that in certain instances, counsel’s mistake and failure to attend Court can and should not be visited upon the Applicant. See the case of *Gideon Mose Onchwati versus Kenya Oil Co. Ltd & Another* (2017) eKLR where the Court held that;

“Although it is an elementary principle of our legal system that a litigant who is represented by an Advocate, is bound by the acts and omissions of the advocates in the course of representation, in applying that principle, Courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default unless the litigant is privy to the default or the default results from failure, on the part of the litigant, to give the advocate due instructions.”

12. The applicant was brought after 37 days post-delivery of the judgement, which delay this Court finds is not inordinate and was not wilfully occasioned by the Applicant.

13. On the principle of substantial loss, the Applicant has stated that he will suffer irreparable harm if the decree is executed in that he will lose his home, and his livelihood. He stated that his entire family lived on the land and that the process of transferring the land back to him in the event his appeal succeeds will be cumbersome. In the case of *James Kamau & 42 others vs. Leonid Limited* (2021) eKLR the Court stated that:

“It is incumbent upon an applicant to demonstrate, within the application for stay pending appeal, that he stands to suffer substantial loss if stay is not granted. In other words, the applicant needs to inform the court exactly what loss he stands to suffer if stay is not granted so that the court may assess whether this loss meets the standard of substantial loss. Thus, evidence of such loss must be provided by the applicant, ordinarily within the affidavit in support of the application, and it is not for the respondent, or the court, to speculate on the loss the applicant stands to suffer if stay is not granted....”

14. The loss explained by the Applicant is loss of livelihood and that the re-transfer of the title to his name will be cumbersome. I am persuaded that the process of and costs implications of transferring and re-transfer of the land in the event the Applicant succeeds in appeal will be cumbersome. In balancing the rights of the two parties, I note from the decree issued that the Respondent is in possession so a delay in processing the title in his name will not occasion him so much injustice in terms of enjoying the fruits of his judgement. With regards to the issue of security, I direct that a restriction be placed on the title to safeguard the interests of the Respondent during the pendency of the appeal in the Court of Appeal.

15. In light of the foregoing, I find the Applicant’s application for enlargement of time to appeal and that of stay is merited and that he has proved that substantial loss will occur in the event that execution of the decree proceeds. Therefore, the application is allowed on terms that:

- a. Time is hereby extended for the Applicant for 14 days from the date of this ruling to file and serve the notice of appeal;



- b. Stay of execution pending hearing and determination of the appeal is granted on condition that the notice of appeal is filed within the timeframe given.
- c. A restriction be placed on the suit title Bukhayo/Bugengi/15029 pending hearing and determination of the appeal as security for interests of the Respondent.
- d. In default of compliance with (a) above, the stay of execution automatically lapses.
- e. The costs of this application awarded to Respondent in this application.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 29TH DAY OF SEPT., 2022.

A. OMOLLO

JUDGE

