Mohamed & another (Suing as administrators of the estate of Mohamed Bumbere Tengeza) v Mwabagala & 3 others (Environment and Land Appeal E001 of 2022) [2022] KEELC 14561 (KLR) (28 September 2022) (Ruling)

Neutral citation: [2022] KEELC 14561 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT AND LAND APPEAL E001 OF 2022

AE DENA, J

SEPTEMBER 28, 2022

BETWEEN

ASKIA VWENDE MOHAMED ..... 1ST APPLICANT

SULEIMAN MOHAMED ..... 2ND APPLICANT

SUING AS ADMINISTRATORS OF THE ESTATE OF MOHAMED BUMBERE TENGEZA

AND

MWINYIUSI ABDALLA MWABAGALA ..... 1ST RESPONDENT

MAZOA NG'ANG'A ..... 2ND RESPONDENT

ALI ALI MWATAMBARA ..... 3RD RESPONDENT

THE DISTRICT LAND REGISTRAR-KWALE ..... 4TH RESPONDENT

RULING

Background

1. The application subject of this ruling is dated May 24, 2022. It is brought under the provisions of sections 1A, 1B, 3A, 63E, 79G and 95 of the *Civil Procedure Act* and order 22 rule 22[1], order 42 rule 6 and order 50 rule 6 of the *Civil Procedure Rules*. It seeks for extension of time for the applicants to appeal against the ruling delivered on February 16, 2022 in Kwale CMCC Land Case No E064 of 2021 and an order of stay of execution of the same pending the hearing and determination of the intended appeal. The applicants were the plaintiffs in Kwale CMCC Land Case No E064 of 2021 and the respondents were the defendants.

2. The subject of the said ruling was a preliminary objection raised by the respondents that the said suit was res judicata and time barred. The learned magistrate upheld the objection and dismissed the suit.

The applicants were aggrieved and it is their case that they have an arguable appeal and stand to suffer irreparable loss and harm if the orders sought are not granted. The application is supported by an affidavit sworn by Askia Vwende Mohamed one of the applicants herein where she avers that a bill of costs has been filed with the possibility of execution against the applicants. The deponent states that they were served with a letter dated March 28, 2022 informing them that their suit was dismissed and have run out of the stipulated time limit within which they were expected to file an appeal thus this application.

The Response

3. The respondents filed grounds of opposition dated May 31, 2022 and a replying affidavit sworn by Mwinyiusi Abdalla Mwabagala. It is averred that the application is scandalous, and an abuse of the court process having been filed to delay the respondents from reaping the fruits of their judgement. It is stated that the intended appeal ought to have been filed by March 22, 2022 considering the statutory period of 30 days within which an appeal from the subordinate court ought to be filed the ruling having been delivered on Febuary 16, 2022. That the order was served on the applicants on March 23, 2022 who waited for a further 60 days before preferring an appeal against the said ruling. Further that the applicants have not given any valid reason as to why the court should exercise its discretion in their favour by granting the orders sought. It is stated that the applicants had not demonstrated any substantial loss to be suffered in the event that the extension is not granted and no security for costs had been furnished before court. The court is urged to dismiss the instant application with costs.

Submissions Of The Parties

4. The application was canvassed by way of written submissions.

Applicants submissions

5. The applicants filed their submissions on June 14, 2022. Citing the provisions of section 79G and 95 of the *Civil Procedure Act* it was submitted that the ruling and order were issued on February 16, 2022, the application for leave lodged on May 24, 2022 being a timeframe of 3 months was not inordinate delay. That the applicants needed to call for a family meeting to discuss the outcome of the case and raise advocates fees. Counsel urged this court to admit the appeal out of time and that the applicants should not be denied the chance to ventilate their case through the appeal. The court was further asked to issue stay of execution of the ruling pursuant to the provisions of order 42 rule6 [2] of the *Civil Procedure Rules* as well as an award for costs. Reliance was placed upon Machakos High Court Civil appeal no 142 of 2013 *Dilpack Kenya Limited v William Muthama Kitonyi* (2018) eKLR.

Respondents Submissions

6. The respondents submissions were filed before court on June 27, 2022. It was submitted that the extension of time for a party was not a matter of the party's right but an equitable remedy only available to deserving parties as was held in *Abubaker Mohamed Al Amin v Firdaus Siwa Somo* [2018] eKLR. Rehashing the principles to guide the exercise of such discretion as laid out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR and which I will refer to later in this ruling, it was submitted that the same had not been met.

7. It was also submitted that since no Memorandum of Appeal had been annexed, there was no appeal on record to warrant grant of the order of stay of execution pending appeal. That the prayer for stay of execution could only be canvassed after the appeal has been filed pursuant to the leave granted by

court. The respondents submitted that it had not been demonstrated what injury they would suffer in the event that the appeal was not allowed. The court is urged to dismiss the application in tandem with the decision in *Wambugu Road Estate Limited & another v Kesharia & another* [Civil Application 227 of 2019] KECA 2018 KLR. It was also stated that the applicants had not offered any security at the time of filing the application, which was a prerequisite before grant of the stay orders sought. The respondents prayed for costs of the application.

Analysis And Determination

8. The court has considered the application, affidavits in support and opposition of the same together with the party's submissions. The issue for determination is whether the applicants have met the threshold for grant of the orders sought. Section 79G of the *Civil Procedure Act*, provides as follows on the power of the court to extend time: -

> " 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:
>
> i. 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."

9. The court is thus required to be satisfied if there were good reasons for the delay. The applicant referred this court to the case of Machakos High Court Civil appeal no 142 of 2013 *Dilpack Kenya Limited v William Muthama Kitonyi (supra)* where the court gave guidelines of the factors to be considered which include the explanation for the delay, the merits of the contemplated action and whether the respondent will suffer irreparable loss that cannot be compensated by was of costs. Odek JJA in *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR stated thus:

> " .... Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.") Emphasis is mine)

10. I will therefore proceed to consider if the delay was reasonable in terms of time and if the reasons for the same are satisfactory and then consider the degree of prejudice to the respondents if the orders are granted.

11. From the material before this court we are looking at a delay of about three (3) months since the ruling on the preliminary objection was delivered on February 16, 2022 and the current application on May 24, 2022. The reasons advanced for the delay stated in paragraph 8 of the supporting affidavit thus; -

> " .....That we brought the said documents to our advocate who informed us, which information we believe to be true, that we need to appeal the ruling and order as a matter of urgency but we needed more time to convene a family meeting and decide on the way forward."

12. The above is the only explanation that was given to this court. The applicants did not bother to explain why it took a whole three months to convene such a meeting and a full disclosure of constraints suffered if any to enable an informed assessment. Counsel in his submissions added that a family meeting was

also to enable them mobilize required funds for instructing an advocate which was not one of the reasons given by the applicants in their affidavit. The applicants vaguely deponed at paragraph 7 of their supporting affidavit that they were served with a letter dated March 28, 2022 stating their suit was dismissed and a bill of costs attached and then presented the same to their advocates. They do not state when they were served and by who noting that the letter they refer to is addressed to Mr Birir and is not copied to them. Infact a look at the order of 16th February 2022 reveals that Ms Munyoki held the brief of Mr Birir on the day the ruling was delivered. This I must say is too opaque. In the same breath I find the delay unreasonable given the explanation given. I find and hold that the reason given for the delay in filing an appeal in this matter does not meet the threshold expected in the proviso to section 79G of the *Civil Procedure Act*.

13. The other consideration is if there was an arguable appeal and this is what has been referred to above as the merits of the contemplated action and if they would warrant consideration of the court. I have seen the proposed memorandum of appeal attached as 'AKM4'. A copy of the impugned ruling is not attached. This court found it difficult to make an informed assessment of this requirement and whether it had been met. Clearly the court would require to consider the grounds vis a vis the impugned ruling to infer if the action is arguable or not. This court could not in the circumstances. Again, no record of appeal was presented to further assist this court to interrogate this limb. This takes me to the respondents contention that there is no appeal before the court and which I will consider with the prayer for stay of execution of the order of the lower court.

14. The applicants also seek an order of stay of execution of the ruling and order delivered on February 16, 2022 pending the hearing and determination of the intended appeal on the basis of an impending eviction pursuant to the order.

15. The grant of orders for stay pending appeal is regulated under order 42 rule 6 of the *Civil Procedure Rules*, the relevant part states as follows:

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
>
> (2) No order for stay of execution shall be made under subrule (1) unless—
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> a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
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> b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
>
> (3) ...
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> (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
>
> (5) ...
>
> (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms

as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

16. The above provisions of the law traditionally seem to prescribe three (3) conditions precedent before grant of orders of stay of execution pending appeal, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. I say traditionally because this is what has been commonly litigated upon. Counsels for the respondents urged that since there was no record of appeal it follows there is no appeal upon which the prayer for stay of execution could be grounded since the same can only be canvassed after the appeal has been filed pursuant to the leave granted by court. This objection seems to raise a forth condition to the effect that there must be an appeal and I tend to agree. The words or phrases which I have added emphasis above namely, No appeal or second appeal..... to which such appeal is preferred..... provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with" all envisage that there is an appeal before the court being moved to grant the orders except the Court of Appeal where a notice of appeal will suffice. I'm further guided by the court of appeal decision in the Abubaker Mohamed Al Amin versus Firdaus Siwa Somo (supra). Therefore, having declined to grant leave for the filing of appeal out of time there is no basis upon which this court can consider the prayer for stay.

17. Assuming I'm wrong on the above and or there was an appeal I would have rendered myself as hereunder.

18. Further, the application must be made without unreasonable delay. In the instant suit the applicants have stated that they are bound to suffer loss in the event that the orders sought are not granted. It is however clearly not disclosed on the nature and extent to which the applicants feel that the dismissal of their suit might cause them loss. From the pleadings the suit was dismissed through a preliminary objection that raised issues of res judicata. The same simply means that the issues raised in the suit had already been ably dealt with by a court of competent jurisdiction. In my view no sufficient cause has been given as to why orders of stay pending appeal should be issued. On satisfaction of substantial loss, the court in Bungoma High Court Misc Application No 42 of 2011 - *James Wangalwa & another v Agnes Naliaka Cheseto* stated;

> " The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail."

19. It is trite law that in every litigation costs must follow the event, the filing of the bill of costs by the respondents is therefore procedural and as per the law. Every party taking part in litigation must be aware of the fact that at the end of such litigation one is bound to have the final orders either for or against their interests. For the bill of costs to be served upon the applicants, it simply means they are expected to cater to the costs incurred by the respondents after dragging them to court. The same does not amount to them being subjected to suffering substantial loss. Kuloba J persuasively stated in *Machira T/A Machira & Co Advocates v East African Standard* (No 2) [2002] KLR 63:

> " To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or

execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

20. The upshot is that the applicant's application lacks merit and is hereby dismissed with costs to the respondent.

Orders accordingly.

DELIVERED AND **DATED** AT **KWALE** THIS **28TH** DAY OF **SEPTEMBER, 2022**

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Rewazi holding brief for Mr. Birir for the Applicant.

Mr. Osoro for the 1st, 2nd and 3rd for the Respondents.

Mr. Denis Mwakina- Court Assistant.