



**Chore v Ong'Ayo (Environment and Land Miscellaneous Application  
E001 of 2022) [2022] KEELC 12640 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12640 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2022  
DO OHUNGO, J  
SEPTEMBER 27, 2022**

**BETWEEN**

**LAWRENCE M. CHORE ..... APPLICANT**

**AND**

**MARCELLA K. ONG'AYO ..... RESPONDENT**

**RULING**

1. By notice of motion dated January 20, 2022, the applicant seeks the following orders:
  1. [spent]
  2. That leave be granted to the applicant/appellant to file appeal out of time.
  3. [spent]
  4. That there be stay of execution of the decree issued by Hon Alegoon the February 22, 2021 *vide* Kakamega Chief Magistrate's court Misc Application No E011 of 2020 with all other subsequent orders pending the hearing and determination of the intended appeal.
  5. That costs be in cause.
2. The application is grounded on a supporting affidavit and further affidavit, both sworn by the applicant. He deposed that he is the respondent's tenant in respect of premises known as LR No Kakamega/Block/1/72 located in Kakamega town and that he filed Kakamega Business Premises Rent Tribunal Application No 126 of 2019 in which the tribunal issued restraining orders against the respondent on July 23, 2019. That the respondent filed Kakamega CM Misc Application No E011 of 2020 seeking to evict him and that the Magistrate's Court proceeded to the application without jurisdiction and despite a preliminary objection which he filed. That he timeously filed Kakamega High Court Civil Appeal No E017 of 2021 but the appeal was dismissed on December 10, 2021 for want of



jurisdiction. He added that he honestly believed that issues of rent were not within the jurisdiction of this court and that the delay in filing this application and the intended appeal was not deliberate.

3. The respondent filed a replying affidavit in which she deposed that the applicant defaulted in payment of rent and that despite the applicant obtaining the restraining order from the Business Premises Rent Tribunal, he persisted in default and opted not to prosecute the tribunal application. That owing to the want of prosecution, she filed Kakamega CM Misc Application No E011 of 2020 seeking to set aside the tribunal orders and to evict the applicant. She added that her application was allowed by the court through a ruling delivered in February 2021 and that the appellant's appeal to the High Court was struck out for want of jurisdiction. That despite the pendency of the present application before this court, the applicant instituted Kakamega Business Premises Rent Tribunal Case No E016 of 2022 seeking restraining orders against her and the tribunal granted him *ex-parte* orders on February 10, 2022 and scheduled inter parte hearing on March 9, 2022. That the applicant failed to attend the tribunal on March 9, 2022 and upon an oral application by her advocate, Kakamega Business Premises Rent Tribunal Case No E016 of 2022 was dismissed for want of prosecution. That yet again, the applicant filed an application dated March 9, 2022, seeking reinstatement of Kakamega Business Premises Rent Tribunal Case No E016 of 2022. According to her, the applicant is a serial litigator. She reminded the court that there must be finality to litigation and each party must be allowed to enjoy the fruits of judgment.
4. The application was canvassed through written submissions which both sides duly filed and the contents of which I have duly noted. The applicant contends that his intended appeal raises an important question of whether the learned magistrate had jurisdiction to set aside the orders of the tribunal. On the other hand, the respondent contends that the applicant is guilty of delay and that the intended appeal is frivolous.
5. I have considered the application, the affidavits and the parties' respective submissions. The issues that arise for determination are whether the applicant is entitled to leave to file an appeal out of time and whether stay pending hearing and determination of the intended appeal should issue.
6. Whether or not to grant leave to file an appeal out of time is ultimately a matter of discretion. The Court of Appeal restated the principles applicable in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231 as follows:

It is also well stated 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.
7. Applying the principles to the present case, I note from the material on record that upon delivery of the ruling in Kakamega CM Misc Application No E011 of 2020 on February 22, 2021, the applicant herein timeously filed Kakamega High Court Civil Appeal No E017 of 2021 on March 22, 2021. As confirmed by both parties, the appeal was dismissed on December 10, 2021 for want of jurisdiction. The applicant then filed the present application on January 21, 2022, again timeously considering that pursuant to order 50 rule 4 of the [Civil Procedure Rules](#), the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following are generally omitted from computation of time. Until the High Court determined Kakamega High Court civil appeal No E017 of 2021 on March 22, 2021, the applicant could not be faulted for not filing an appeal to this court. I find that the delay in filing the appeal is reasonable and well explained.
8. The applicant has stated that he intends to raise in the proposed appeal the question of whether the learned magistrate had jurisdiction to set aside the orders of the tribunal. I think that is a matter worth



determination on appeal. As to any prejudice to the respondent if the application is granted, I see none that cannot be compensated by an award of costs. The respondent seems to be rather fatigued by the applicant's persistent litigation. That may be so, but it cannot be a valid reason to shut out the applicant. The applicant has made out a case for leave to file an appeal out of time being granted.

9. The next question for determination is whether stay pending hearing and determination of the intended appeal should issue. The court's power to grant stay pending appeal is founded on order 42 rule 6 (6) of the [Civil Procedure Rules, 2010](#) which provides as follows:

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.

10. Thus, the court can only grant stay pending appeal if the procedure for instituting an appeal has been complied with. The applicant herein does not, as at now, have any pending appeal against the order sought to be stayed. He may or may not ultimately file the appeal. I am not persuaded that I should grant the applicant stay pending appeal in the absence of an actual appeal. In stating so, I bear in mind the back and forth between the parties so far, especially before the Business Premises Rent Tribunal.

11. In view of the foregoing, I make the following orders:

- a. Leave is hereby granted to the applicant to file an appeal out of time against the ruling delivered in Kakamega CM Misc Application No E011 of 2020 on February 22, 2021.
- b. The memorandum of appeal be filed and served within 21 (twenty-one) days from the date of delivery of this ruling. In default, the leave shall automatically lapse, and notice of motion dated January 20, 2022 shall stand dismissed with costs.
- c. Prayer 4 of notice of motion dated January 20, 2022 is dismissed.
- d. Costs of notice of motion dated January 20, 2022 shall be in the appeal.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the applicant

No appearance for the respondent

Court Assistant: E. Juma

