



**County Government of Migori & another v Ogada (Environment and Land Miscellaneous Application E003 of 2022) [2022] KEELC 14450 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 14450 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E003 OF 2022  
MN KULLOW, J  
SEPTEMBER 27, 2022**

**BETWEEN**

**COUNTY GOVERNMENT OF MIGORI ..... 1<sup>ST</sup> APPLICANT**

**CHIEF HEALTH OFFICER ..... 2<sup>ND</sup> APPLICANT**

**AND**

**GEORGE OUMA OGADA ..... RESPONDENT**

**RULING**

1. By Notice of Motion dated 4<sup>th</sup> March, 2022 and filed under Certificate of Urgency, the Applicants sought for the following orders: -
  - a. Spent.
  - b. Spent.
  - c. That this honourable court be pleased to stay the execution of the judgment dated 09/11/2021 and the Decree issued on 10/02/2022 and all other consequential orders issued thereon pending the hearing and determination of the Applicants' intended Appeal.
  - d. That this honourable court be pleased to grant the Applicants' leave to file the appeal out of time against the judgment of the honourable Senior Principal Magistrate M. Obiero delivered on 09/11/2021 in Migori ELC Chief Magistrate's Court ELC Case No. 69 of 2019; George Ouma Ogada v County Government of Migori & 2 Others.
  - e. That this honourable court be pleased to make an order that the Memorandum of Appeal dated 24/02/2022 be deemed to have been duly lodged and is properly filed on record.
  - f. That the costs of this Application be provided for.



2. The application is based on the grounds thereof and the Supporting Affidavit sworn by the County Secretary of the 1<sup>st</sup> Applicant; Christopher Odhiambo Rusana on 04.03.2022. The applicant herein avers that judgment was delivered on 09/11/2021 in the absence of the Defendants/ Applicants. Consequently, the Decree and Certificate of Costs were issued on 10/02/2022 and 11/02/2022 respectively. However, he only became aware of the same on 15/02/2022 when he was informed by the County Attorney.
3. It is his contention that they were never notified by its erstwhile advocates M/s Omonde Kiseru & Co. Advocates, of the date of the delivery of the judgment or the outcome of the same at all.
4. It is their claim that being dissatisfied with the entire judgment they intend to appeal against the said decision and urged the court to extend the time to lodge the appeal. It is his contention that when the applicants became aware of the said judgment dated 09/11/2021; the time allowed for lodging the appeal had long lapsed and that the said delay was occasioned by unfortunate circumstances beyond the Applicants' knowledge and control.
5. It is further their averment that the Applicants' have an inherent right to a fair trial which includes the right to appeal against the judgment of the trial court and the same ought not to be denied on grounds of an inadvertent mistake or indolence not occasioned by the Applicants and they should not therefore be punished for the mistakes of their previous advocate on record.
6. He also deposed that the Applicants' intended Appeal raises several arguable points with very high chances of success and ought to be heard and determined on merits.
7. On the issue of stay of execution; it is his contention that on the date of delivery of the judgment on 09/11/2021, the honorable court issued a 30 days stay of execution which has since lapsed.
8. The Applicants are apprehensive that the Respondent shall commence execution proceedings for the recovery of the decretal amount of Kshs. 9,200,000/- together with costs and interests thereon having obtained the decree and Certificate of Costs dated 10/02/2022 and 11/02/2022 respectively; unless an Order for stay of execution is issued.
9. He further contends that unless the orders of stay sought are granted, the subject of the proposed/ intended appeal shall be rendered nugatory and which in turn will cause them irreparable loss and damage as the Applicants risk permanently losing the decretal sum.
10. He further stated that the decretal amount of Kshs. 9,200,000/= is a substantial amount which funds belong to and would be drawn from the public fund and therefore the public stands to suffer substantial and irreparable loss, harm and prejudice if orders for stay of execution and enlargement of time to lodge the intended appeal is not granted.
11. Conversely, it was his assertion that the Applicants are ready and willing to comply with such conditions on security and directives as shall be ordered by the honourable court.
12. It is also his assertion that the Respondent's income or source of funds are unknown and he is a man of straw and thus there is a likelihood that the decretal sum if paid to the Respondent shall never be recovered should the intended Appeal be successful. He further stated that the Respondent would not suffer any prejudice if the Applicants' application is allowed as prayed.
13. He urged the court to allow the Application by extending the time to lodge the appeal and the Memorandum of appeal filed be deemed as duly and properly filed and to further stay the execution of the judgment pending the hearing and determination of the intended appeal.



14. The application was opposed. The Respondent filed a Replying Affidavit sworn on 17.03.2022 in response to the instant Application. He dismissed the assertions by the Applicants that they only became aware of the judgment on 15/02/2022 and that they were not notified by their previous advocate on record Omonde Kisera advocate as alleged. It is his contention that the Applicants became aware of the said judgment delivered on 09/11/2021 on the 24/11/2021 as evidenced in the Applicants' letter dated on even date seeking proceedings and a copy of the judgment.
15. It is therefore the Respondent's assertion that the delay in filing the intended appeal is an inordinate delay which has not been sufficiently explained and further that the same was not occasioned by any unfortunate circumstances beyond the Applicants' knowledge and control as alleged. He further stated that the right of any litigant ought to be exercised within the confines of the law and the litigant must be vigilant.
16. On the issue of stay of execution; it was his contention that the decree in question is a money decree and that no substantial loss may be occasioned. He further stated that the mere fact that he is not a man of means is not a justification to be denied the fruits and benefits of his judgment.
17. It was also his claim that the application had been made in bad faith and if allowed then he shall suffer prejudice and further that the Applicants' are unlawfully in occupation of the suit parcel.
18. This court issued directions that the Application be disposed of by way of written submissions. The Respondent's counsel filed his submissions dated 04.04.2022 which I have taken into consideration in arriving at my Ruling. Despite being given sufficient time to file their submissions, the Applicants' failed to file the same and I consequently find that they waived their right to file written submissions. Be that as it may, I will proceed to give my Ruling as hereunder;

#### **ANALYSIS AND DETERMINATION**

19. The issues arising for determination from the instant Application is: -
  - i. Whether Leave can be granted to file an Appeal out of time.
  - ii. Whether an Order for Stay of Execution can issue against the decree and the judgment dated 09/11/2021.

#### **A. Whether Leave can be granted to file an Appeal out of time.**

20. Section 79G of the [Civil Procedure Act](#) provides as follows;

“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.

21. Section 95 of the [Civil Procedure Act](#) provides thus: -

“95. 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.”

22. The principles to be considered in determining whether or not to enlarge time to Appeal were stated in the case of *First American Bank of Kenya Ltd v Gulab P. Shah & Others* HCC 2255/2000 [2002] IEA 65 as follows: -
  - 1) The explanation if any, for the delay;
  - 2) The merits of the contemplated action, whether the appeal is arguable;
  - 3) Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favor of the applicant.
23. The first ground to be established The length of the delay and the explanation if any. The present Application was filed on the 04.04.2022 after the trial court delivered its judgment on the suit on the 09/11/2021. Even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. See *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR.
24. In explaining the 4-month delay in filing of the Application, it was the Applicant’s contention that the same was occasioned by unfortunate circumstances beyond their control and further that they only became aware of the judgment on 15/2/2022. The Respondent on the other hand dismissed the said claims and referred this court to the Applicant’s letter dated 24/22/2021 seeking the typed proceedings and a copy of the judgment.
25. I have looked at the annexures herewith and I do note that the Applicant’s through its legal officer indeed wrote a letter to the court requesting for the typed proceedings in the matter and a copy of the judgment vide its letter dated 24/11/2021. It is therefore not true that they only became aware of the judgment on the 15/2/2022 as alleged.
26. However, in the interest of justice and having looked at the annexed copy of the Memorandum of Appeal, I will grant the Applicants the benefit of doubt.
27. The second limb is Chances of success of the intended Appeal. I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case at this stage. Having that in mind, from a perusal of the annexed Memorandum of Appeal, it raises legitimate issues on the compensation amount awarded and factors that ought to have been considered which in my opinion are matters which can only be adequately determined upon hearing the appeal on merit, hence the need to extend time to file the Appeal.
28. The final element to be established The third limb is whether the Respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favor of the Applicant. It is my considered view that the same would not be prejudicial to the Respondent since the Appeal seeks to determine the claim in finality.
29. In view of the foregoing, I find that the Applicants have satisfactorily proved the 3 elements to be established for the grant of extension of time to lodge an Appeal to the required threshold.



**B. Whether an Order for stay of execution can issue against the decree and judgment dated 09/11/2021**

30. Order 42 Rule 6(1) of the *Civil Procedure Rules*, 2010 empowers the court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. It sets out the grounds to be considered and provides as follows: -

(2) No order for stay of execution shall be made under sub- rule (1) unless—

- (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
- (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.

31. The purpose and objective of the order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not defeated. In the case of *Consolidated Marine. v Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), the Court held that: -

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.

32. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how such discretion should be exercised as follows:

1. “The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

33. Pursuant to Order 42 Rule 6 (1) above; the first ground to be established is whether substantial loss may result if an Order stay of execution is not granted. What amounts to substantial loss was expressed



by the Court of Appeal in the case of Mukuma v Abuoga (1988) KLR 645 where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

34. The onus is on the Applicant to demonstrate the damages he would suffer if the order for stay of execution sought is not granted by giving sufficient cause to the court to enable it exercise its discretion in granting the orders sought. It is not sufficient to merely state that substantial loss may occasion on the Applicant. (See New Stanley Hotel Ltd v Arcade Tobacconist (1980) KLR 757).
35. It is the Applicant’s assertion that the decretal sum if paid would be withdrawn from the public fund. He further maintained that the Respondent is a man of straw with no known source of income and therefore there is a likelihood that if the decretal sum is paid and the Appeal is successful then the same shall never be recovered.
36. The Respondent on the other hand deposed that the decree in question is a money decree and therefore there is no substantial loss that will be occasioned. It was further his position that there was no justification to deny him the fruits of his judgment and maintained that the mere fact that he is a man of straw should not be used as a reason. With respect this is a misdirection and/or misapprehension.
37. In National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] eKLR the Court of Appeal stated that:

“This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”
38. The judgment and decree awarded by the trial court was for Kshs. 9,200,000/= which in my view is a substantial sum. The Applicant has expressed apprehension and fear that if the said decretal sum paid out to the Respondent; he may be unable to make a refund, thus rendering the appeal nugatory and exposing the Applicant to substantial loss. The Respondent in the other hand dismissed the allegations by the Applicant and maintained that he should be given an opportunity to enjoy the fruits of his judgment. he did not provide any evidence of his sources of income or ability to pay back the decretal sum if paid and the appeal is successful.
39. Therefore, given the substantial amounts of the decree and in the absence of proof of the Respondent’s financial means, this court is of the view that if the decretal sum is paid out, there is a likelihood that the Applicant may be unable to recover the amount paid out from the public fund kitty in the event that the appeal successful consequently rendering the appeal nugatory.
40. In view of the foregoing, I find that the Applicants have satisfactorily proved that they are likely to suffer substantial loss unless orders for stay of execution are granted and therefore, there is need to stay the execution of the said decree and the withdrawal of the said amount from the public fund kitty pending the hearing and determination of the Appeal.
41. The second limb is on the whether the Application has been filed without undue delay. This court rendered its judgment on the 09/11/2021 while the instant Application was filed on the 04/03/2022,



after a period of about 4 months. However, the Applicants have explained that the 4-month delay in filing the instant Application was occasioned by an unfortunate and inadvertent mistake. That they only became aware of the judgment delivered in their absence and that of their advocate on 15/2/2022 after the lapse of the 30-day period. They urged the court not to visit the mistake of their former advocate on them as the circumstances were beyond their knowledge and control.

42. The Respondent on the other hand maintained that the Applicants became aware of the judgment on the 24/11/2021 as evidenced in their letter dated on even date seeking proceedings and copy of the judgment and dismissed the averments made by the Applicants that they only became aware of the judgment on the 15/02/2022.
43. Even though I acknowledge that there is indeed a letter dated 24/11/2021 attached, showing that the Applicants sought the typed proceedings and a copy of the judgment, there is no evidence of whether the same were actually supplied as requested, immediately or at all and in the circumstances, I seek to grant the Applicants the benefit of doubt.
44. I therefore find that the Applicants have given a sufficient explanation of the 4 months' delay in filing the instant Application and have satisfied the 2<sup>nd</sup> limb of the conditions set out in Order 42 Rule 6(2).
45. The last limb to be proved is on the deposit of security for costs for the due performance as the court may direct. At Paragraph 18 of the Supporting Affidavit; the Applicant has shown his readiness and willingness to furnish any reasonable and justifiable security as the court may deem just and fit in the circumstance for the due performance of any such orders as the court may grant.
46. Security for costs may take many forms and provided the said security is adequate then its form is immaterial. The court seeks to protect to protect the substratum of the Appeal and to preserve the rights of both parties pending Appeal.
47. Further, the amount of security to be deposited ought to be balanced against the interests of both the Applicant and the Respondent, the said amount should be adequate and not be disadvantageous to the party depositing the security. See *Rosengerens Ltd Safe Deposit Centre Ltd* 919840M 3 ALL ER 198)
48. In view of the foregoing, I am of the considered opinion that the Applicants have sufficiently proved the 3 prerequisite conditions for the grant of an order for stay of execution of the judgment and decree pending the determination of the intended Appeal.
49. In the upshot, I accordingly find that the Application dated 4<sup>th</sup> March, 2022 is merited and I proceed to allow the same on the following terms: -
  - a. Leave be and is hereby granted to the Applicant to file the Intended Appeal within 7 days from the date of this Ruling.
  - b. Further, the Memorandum of Appeal dated 24/2/2022 be and is hereby deemed to have been properly filed.
  - c. There be an Order for Stay of Execution of the Judgment dated 9<sup>th</sup> November, 2021 and Decree issued on 10<sup>th</sup> February, 2022 together with all consequential orders arising therefrom pending the hearing and determination of the Intended Appeal.
  - d. The Applicant to deposit a Banker's Guarantee equivalent to the decretal sum of Kshs. 9,200,000/= in court being Security for Costs for the due performance of the decree within 45 days from the date of this Ruling.



- e. Failure to comply with order (a) and (d) hereinabove, Order (c) hereinabove shall automatically lapse.
- f. Costs of the Application to abide the Appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 27<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**MOHAMED N. KULLOW**

**JUDGE**

Ruling delivered in the presence of: -

Non-Appearance for the Applicant

Non-Appearance for the Respondent

Tom Maurice - Court Assistant

