



**Kariankei v Nkoitiko (Miscellaneous Application E004 of 2022)  
[2022] KEELC 12653 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12653 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
MISCELLANEOUS APPLICATION E004 OF 2022  
CG MBOGO, J  
SEPTEMBER 27, 2022**

**BETWEEN**

**KANTET OLE KARIANKEI ..... APPLICANT**

**AND**

**MARTINE OLE NKOITIKO ..... RESPONDENT**

**RULING**

1. Before this court for determination is a notice of motion application expressed to be brought under order 51 rule 1 & 3 and order 42 of the [Civil Procedure Rules](#) sections 1A,1B,3A,79G and 95 of the [Civil Procedure Act](#) seeking the following orders: -
  1. Spent.
  2. That this honourable court be pleased to enlarge time and grant the applicant leave to file an appeal out of time against the judgment of Hon George Wakahiu, CM in respect of Narok CM ELC No 59 of 2018 Kantet Ole Kariankei v Martine Nkoitiko delivered on April 13, 2022.
  3. Spent.
  4. That the cost of this application be provided for.
2. The application is premised on the grounds *inter alia* that the applicant intends to lodge an appeal against the judgment of the trial court which was rendered without notice and if the orders sought are not granted, the applicant stands to suffer substantial loss.
3. The application is supported by the affidavit of the applicant sworn on May 23, 2022. The applicant deposed in his sworn affidavit that the Honourable Chief Magistrate delivered judgment on April 13, 2022 in which he dismissed his case. Further that the said judgment was delivered without notice to his advocate on record and that prior to this the Honourable Chief Magistrate had on two occasions via the online teams portal advised that judgment was not ready and that it would be delivered at a later date.



4. The applicant further deposed that he intends to file an appeal against the said decision which appeal raises arguable issues, is meritorious, not frivolous and has a high probability of success and further that the respondent will not suffer any prejudice if the orders are granted.
5. The respondent, in opposition to the application filed a replying affidavit sworn on June 6, 2022. The respondent deposed that the applicant has not provided sufficient reasons as to why they were not present in court on April 13, 2022 when the matter was coming for judgment whereas his advocate owes a duty to his client to follow up on the progress of the case with no delay or excuse. Further, that the applicant's counsel became aware of the delivery of judgment four days after it was delivered and therefore had sufficient time to lodge an appeal and therefore no justification has been provided for the delay.
6. The respondent further deposed that it is evident that the applicant was indolent since he waited until time had lapsed for him to move the court seeking enlargement of time, the same being an abuse of the court process. Further, that the actions of the applicant demonstrate that he did not care about the outcome of the suit and he ought to have been resilient since he claimed he faces apprehension of execution of the judgment. Further, that the suit was first filed in the year 2010 and since then the applicant has found creative ways of delaying the case and it is in the interest of the public that this court ought to take care that appeals are brought before it, are done within proper time and before the proper court or registry.
7. Also, that the applicant has not demonstrated the special circumstances to warrant exercise of discretion in his favour and that there being inordinate delay, the applicant was under a duty to show the court the steps he took to prosecute the matter in time but failed to do so. The respondent further deposed that he will be adversely prejudiced if the orders are granted as he will be denied the chance to enjoy the fruits of judgment and there is real likelihood that the applicant will use the stay of execution to interfere with his quiet enjoyment of the suit property which he has been enjoying for many years.
8. The respondent further deposed that the applicant has not met the conditions for grant of stay of execution where he was required to demonstrate substantial loss he is likely to suffer and having resided on the suit property for a long, there is no risk of eviction that is imminent on the part of the applicant and since the judgment is non-monetary, no loss can accrue to the applicant that cannot be compensated by an award of costs.
9. The applicant filed a supplementary affidavit sworn on June 21, 2022. The applicant deposed that after obtaining interim orders of stay of execution and serving the same upon the respondent's counsel on May 26, 2022, the respondent approached the Deputy County Commissioner, Narok South to aid him in evicting the applicant the stay notwithstanding. Further that the Deputy County Commissioner summoned him to his office to enquire when he would give vacant possession and it was after supplying the Deputy County Commissioner with a copy of the said order that he allowed his continued stay on the suit property. Finally, that the suit property is his matrimonial home and only source of livelihood hence eviction shall occasion his family and substantial loss due to inability to cultivate and earn a living therefrom.
10. The applicant filed written submissions dated June 28, 2022. The applicant submitted that this court enjoys unfettered discretion in allowing expansion of time to file appeal out of time. On whether there was inordinate delay in filing the instant application, the applicant invited the court to take judicial notice of the Easter holidays and the Late former President Mwai Kibaki's funeral and thirty days from the date of judgment would be May 14, 2022 and therefore the last day in filing an appeal would be May 19, 2022 which cannot amount to undue delay.



11. On whether the reason for delay is valid, the applicant submitted that the trial Magistrate was proceeding for retirement in the month of March and judgment was not delivered on a number of occasions and that any opposition to this application by the respondent is needless unless they had prior notice of the delivery of judgment. The applicant relied on the case of *Hellen Wanza Maeker v Bernard Njoroge Gathua & another* HCC Misc App No 289 of 2009 and *Banco Arabe Espanol v Bank of Uganda* [1999]2 EA 22.
12. On whether the appeal is arguable, the applicant submitted that it is not necessary to go into the merits at this juncture and relied on the case of *Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union* Civil Application Nai No 72 of 2001.
13. The applicant further submitted that the respondent in his replying affidavit has admitted that the judgment does not culminate to a money decree and therefore no irreparable prejudice would be great that would not be adequately compensated for by an award of costs. The applicant relied on the case of *Philip Kelpto Chemwoto & another v Augustine Kubende* (1986) KLR 492 and *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 others* [2015] eKLR.
14. On whether the stay of execution is merited the applicant submitted that stay of execution is necessary since the applicant relies on the same as his source of livelihood and if not granted, the applicant will be evicted and subjected to premature penury. While relying on the case of *Arun C Sharma v Ashana Runkundalia T/A Rairundalia & Co Advocates & 2 others* [2014] eKLR, the applicant submitted that the objective of the legal provisions of order 42 rule 6 (2) on security was never intended to fetter the right of appeal and the instant suit being a land matter security for due performance of the decree may not be necessary. The applicant submitted that the failure to comply was not intentional and there is a good explanation for the same.
15. The respondent filed undated written submissions on August 29, 2022. The respondent raised two issues for determination as follows: -
  - a. Whether the applicant should be granted leave to appeal out of time against the judgment of Hon George Wakahiu CM, in respect of Narok CM ELC No 59 of 2018.
  - b. Who bears the costs for the suit.
16. On the first issue, the respondent submitted that extension of time is a matter of discretion and the law gives this court jurisdiction to extend time however on sufficient reason and the discretion must be exercised within the established principles of the law and the factors to be considered when determining such an application as was held in the case of *Velji Shahmad v Shamji Bros & Popatlal Karman & Co* [1957]EA 438 and *Omar Shurie v Marian Rashe Yafar* (Civil Application No 107 of 2020) and *Teachers Service Commission v Simon P Kamau & 19 others* [2015] eKLR.
17. The respondent further submitted that the requirement to furnish security is to secure costs that may become payable irrespective of whether the amount is in dispute, it is also to ensure that frivolous, vexatious and or unsuccessful proceedings do not prejudice the respondent. The respondent relied on the case of *Evans Nyambaso Zedekiah & another v IEBC & 2 others*.
18. I have carefully analysed and considered the application, replies thereof and the written submissions filed by both parties and the issue for determination is whether the application has merit.
19. Section 75G 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.”

20. It is not disputed that the judgment in the lower court was delivered on April 13, 2022 and that this application was filed on May 24, 2022 which was beyond the 30 days stipulated in section 79G of the [Civil Procedure Act](#). The applicant’s counsel has given an explanation that ELC Case No 59 of 2018 had been listed for delivery of judgment on a number of occasions but the court had indicated that it would be delivered at a later date. On April 18, 2022, upon enquiry from the court administrator, counsel for the applicant was informed that the same had been delivered on April 13, 2022 but the file had not been taken back to the registry. In his supplementary affidavit, the applicant annexed a copy of letter from the court administrator informing the applicant’s counsel that indeed the matter was fixed for judgment on March 14, 2022 but it was delivered on April 13, 2022 and the original file was returned to the registry on May 18, 2022. Albeit the respondent claims that there is no good explanation to warrant delay in filing the intended appeal despite being aware of the same 4 days after delivery, I do note that the file was taken back to the registry on May 18, 2022. This court does not find that the delay is inordinate as to deny the applicant an opportunity to ventilate his grievances by way of an appeal to this court. I find the reason for delay excusable.
21. On whether the intended appeal has chances of success is not for this court to decide at this stage save that from the draft intended memorandum of appeal annexed, I am satisfied that the intended appeal is not frivolous on the face of it. The applicant will have an opportunity to satisfy the court on the merits of its appeal and the respondent will have a chance to respond to the merits or demerits of the appeal once filed.
22. On the prayer for stay of execution of judgment of the trial court pending the hearing and determination of the intended appeal, order 42 rule 6(2) of the [Civil Procedure Rules](#) provides that:

“No order for stay of execution shall be made under subrule (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.
23. This court has discretion to grant stay of execution of decree pending appeal. In [JMM v PM](#) [2018] eKLR it was stated:

“As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”
24. Order 42 rule 6 of the [Civil Procedure Rules](#) grants this court as an appellate court wide discretion to stay execution of decrees pending appeal. In the present case, there is no dispute that leave to appeal out of time has been granted and as stated above, from the draft Memorandum of Appeal, it is clear to me that it is not frivolous. I do note that no execution proceedings has commenced. Indeed, the judgment



is non-monetary save for costs and therefore the question of the appeal being rendered nugatory if successful does not arise as it can be seen that the judgment is non-monetary.

25. Grant of stay of execution pending appeal is provided for under order 42 rule 6 of the [Civil Procedure Rules](#), which 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—

- (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.

(3) ...

(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.”

26. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in order 42 rule 6(2), aforementioned: namely

- (a) that substantial loss may result to the applicant unless the order is made,
- (b) that the application has been made without unreasonable delay, and
- (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

27. In [Butt v Rent Restriction Tribunal](#) [1979], the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted



so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion. Thirdly, 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. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

28. As to what substantial loss is, the court observed in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the CPR. This is so because execution is a lawful process. 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”(emphasis mine)

29. In this case, the applicant deposed that the suit property is his source of livelihood and risks being evicted if the orders sought are not granted. On the other hand, the respondent has not provided evidence that in the event he succeeds in the appeal, that the applicant would not be able to meet the costs. This court being mindful of the applicant's right to be heard on appeal, it is only fair that he is granted the right to ventilate his issues. In addition, the appeal can be fast tracked to be heard expeditiously so that no party loses out.
30. Arising from the above, I find and hold that the prayer for leave to appeal out of time is merited. The same is allowed and the applicant is granted seven days from the date of this order to file and serve the respondent with the memorandum of appeal together with the order herein granting leave.
31. This court grants stay of execution of judgment in Narok ELC Case No 59 of 2018 until the intended appeal is filed, heard and determined, on condition that the applicant meets the costs of this application assessed at Kshs 12,000/- failure to which the stay granted lapses. It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**Hon C.G. MBOGO**

**JUDGE**

27/9/2022

In the presence of:

CA:Chuma

