



Kibata v Ngure & 3 others (Environment and Land Miscellaneous Application E001 of 2022) [2022] KEELC 12773 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12773 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2022
YM ANGIMA, J
SEPTEMBER 22, 2022**

BETWEEN

CATHERINE KIBATA APPLICANT

AND

MESHACK WAWERU & MICHAEL NGURE 1ST RESPONDENT

CHARLES KABANGI GUANDARU 2ND RESPONDENT

PETER NJENGA KINUTHIS 3RD RESPONDENT

RAPHAEL KABUGU WARUI 4TH RESPONDENT

RULING

A. Introduction

1. By a notice of motion dated January 20, 2022 grounded upon sections 1A, 1B, 3A, 79G & 95 of the *Civil Procedure Act* (Cap 21) Order 42 rules 6(1) &(2) & Order 51 rule 1 of the *Civil Procedure Rules*, 2010 (the Rules), and all other enabling provisions of the law, the applicant sought the following orders:
 - (a) Spent.
 - (b) Spent.
 - (c) Spent.
 - (d) That the applicant/intended appellant's be granted leave to appeal out of time against the judgment delivered on October 28, 2021 in Nyahururu CM ELC Case No 43 of 2018 *Meshack Waweru & Michael Ngure (Suing on behalf of the estate of the late Agnes Wambui Kariuki) & 3 others -vs- Catherine Kibata*.



- (e) That pending the hearing and determination of the Intended Appeal, there be a stay of execution of the judgment delivered on October 28, 2021 in Nyahururu CM ELC Case No 43 of 208 and all the consequential orders issued pursuant thereto.
 - (f) That the costs of this application be costs in the cause.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the applicant on January 20, 2022. The applicant contended that she was not aware that judgment was entered against her on October 28, 2021 because the office of the Attorney General which was representing her in the suit did not notify her of the judgment until December 22, 2021 when the time stipulated for lodging an appeal had already expired. The applicant further contended that she was desirous of appealing against the said judgment and that the intended appeal had high chances of success.
 3. The applicant contended that she was a public servant of modest income and that unless a stay of execution of the decree was granted her intended appeal might be rendered nugatory. It was her case that she was willing to provide security for due performance of the decree and that the respondents shall not suffer any prejudice if the orders sought were granted. The court was consequently urged to grant the application as prayed.

B. The Respondents' Response

4. The 3rd respondent filed a replying affidavit sworn on February 14, 2022 on his own behalf and on behalf of his co-respondents. The respondents contended that if the applicant was dissatisfied with the representation of the Attorney General she was at liberty to seek alternative legal representation early enough. It was further contended that the applicant was at liberty to visit the court registry and peruse the court file if the Attorney General had failed to notify her of the outcome of the case.
5. The respondents further contended that the applicant had not demonstrated that she stood to suffer any substantial loss if execution was levied and that, in any event, the decretal amount awarded by the trial court was not so large as to be beyond her means. It was further contended that the suit before the trial court took over 11 years to be concluded hence granting the orders sought would delay the respondents' enjoyment of the fruits of their judgment. Finally, it was contended that there was no good reason offered for the delay of about 3 months in filing the instant application. The respondents thus urged the court to dismiss the application.

C. Directions on Submissions

6. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the applicant's submissions were filed on May 19, 2022 whereas the respondents' submissions were not on record by the time of preparation of the ruling.

D. The Issues for Determination

7. The court has considered the notice of motion dated January 20, 2022, the replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:
 - (a) Whether the applicant has made out a case for the grant of leave to appeal out of time.



- (b) Whether the applicant has made out a case for the grant of an order for stay of execution pending appeal.

E. Analysis and Determination

a. Whether the Applicant has made out a case for the grant of leave to appeal out of time

8. The court has considered the submissions and material on record on this issue. The applicant contended that at all material times she was represented by the office of the Attorney General before the trial court. It was her case that she was never notified of the judgment delivered on October 28, 2021 until December 22, 2021. She blamed the office of the Attorney General for the delay in communicating the judgment and stated that upon learning of the judgment she immediately instructed her own advocates to pursue the intended appeal on her behalf.
9. Section 79G of the *Civil Procedure Act* stipulates 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.”
10. The principles which guide a court in granting or refusing an application for leave to appeal out of time were considered in the case of *Leo Sila Mutiso v Rose Hellen Mwangi* Civil Application No Nai 255 of 1997 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 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 court has considered the material and submissions on record on this issue. The respondents have not denied that the applicant was represented by the office of the Attorney General in the suit before the trial court. The respondents have not disputed that the applicant was not notified by the Attorney General of the outcome immediately upon delivery of the judgment. It is not usual for parties who are represented by advocates or the Attorney General to peruse the court file on regular basis just to counter-check if they have been briefed by their legal advisors. The court is thus satisfied that the applicant acted reasonably in the circumstances and that she has given a reasonable explanation for the delay in filing the instant application. The court is further of the opinion that the period of delay of about 3 months is not so prolonged or inordinate so as to drive the applicant out of the seat of justice.
12. The respondents have not demonstrated that they shall suffer any significant prejudice if the applicant were to be granted leave to file an appeal out of time. The right of appeal is a statutory right which the applicant could have exercised without seeking leave of court if she had filed her memorandum of appeal within the stipulated period. The respondents have not demonstrated any discernible prejudice which they stand to suffer as a result of the delay of 3 months or so. It is not enough to state that the suit before the trial court took several years to be heard and determined.



13. The court is further of the opinion that the intended appeal is not prima facie, frivolous or vexatious. The applicant has proposed to argue in the intended appeal that the trial court erred in law in holding her personally liable for acts which were done in her official capacity as a national government official. The court is of the opinion that that is an arguable point which should be canvassed in the appeal. However, an arguable point does not mean one which must necessarily succeed on appeal. The court is thus of the opinion that the applicant has made out a good case for the grant of leave to appeal out of time against the judgment and decree of the trial court.

b. Whether the Applicant has made out a case for the grant of an order for stay of execution pending appeal

14. The court has considered the material and submissions on record on this issue. The requirements for granting a stay pending appeal are stipulated in Order 42 rule 6(2) of the *Rules* as follows:

“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.”
15. The applicant contended that she is a public servant of low income who could not raise the decretal amount in the sum of Kshs 400,000/= and that if execution were to be levied she would suffer substantial loss. She further contended that she was the sole bread winner in her family and that execution shall render her and her children destitute. She consequently urged the court to grant the stay sought.
16. The court is of the opinion that the applicant has demonstrated the risk of substantial loss within the meaning of Order 42 rule 6(2) of the *Rules* unless a stay of execution was granted. There is no doubt that a chief in the employment of the National Government is paid a modest salary and that attachment thereof may cause substantial hardship and suffering. The court is further of the opinion that even if the respondents were to apply for the applicant’s committal to civil jail or attachment and sale of her assets that may still constitute substantial loss in the circumstances of this case. The court is of the view that the applicant ought to be given a chance to ventilate her intended appeal before execution can proceed.

F. Conclusion and Disposal

17. The upshot of the foregoing is that the court finds merit in the applicant’s application. Accordingly, the court makes the following orders for disposal of the notice of motion dated January 20, 2022:
- (a) Leave be and is hereby granted to the Applicant to lodge an appeal out of time against the judgment and decree of the trial court dated October 28, 2021 in Nyahururu CM ELC No 43 of 2018.
 - (b) The applicant shall file and serve her memorandum of appeal upon the respondents within 14 days from the date hereof.
 - (c) There shall be a stay of execution of the judgment and decree of the trial court dated October 28, 2021 in Nyahururu CM ELC No 43 of 2018 together with all consequential orders for a



period of 2 years with effect from today or until conclusion of the appeal, whichever comes first.

- (d) The applicant shall file and serve a record of appeal within 45 days from the date hereof and fix a date for directions on the hearing of the appeal.
- (e) In default of the applicant's compliance with orders (b) and (d) hereof, the stay granted herein shall lapse automatically.
- (f) Costs of the application shall be costs in the appeal.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU THIS 22ND DAY OF SEPTEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Waichungo for the Applicant

Mr. Gakuhi Chege for the Respondent

C/A - Carol

Y. M. ANGIMA

JUDGE

