



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndeda v Ali (Environment and Land Miscellaneous Application  
E028 of 2022) [2022] KEELC 13841 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13841 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E028 OF 2022  
SO OKONG'O, J  
OCTOBER 31, 2022**

**BETWEEN**

**ELLY NDEDA ..... APPLICANT**

**AND**

**ALI FARUK ALI ..... RESPONDENT**

**RULING**

1. What is before the court is the Applicant's Notice of Motion application dated 19<sup>th</sup> September 2022 seeking the following orders;
  1. Spent.
  2. Spent.
  3. That this honourable court be pleased to grant the Applicant leave to appeal out of time against the whole judgement of Hon. W.Onkunya SRM delivered on 10<sup>th</sup> June 2022 at Kisumu in CMCELC No. 150 of 2019 (hereinafter referred to as "the lower court").
  4. That this honourable court be pleased to stay execution of the said judgement pending the hearing and determination of the intended appeal against the same.
  5. Costs be provided for.
2. The application has been brought on the grounds set out on the face thereof and on the affidavit of the Applicant sworn on 19<sup>th</sup> September 2022. The Applicant has averred that the Respondent sued him in the lower court seeking possession of a parcel of land whose particulars have not been given in the application. The Applicant has averred that the lower court suit was heard and the court delivered its judgment on 10<sup>th</sup> June 2022 in favour of the Respondent. The Applicant has averred that he was dissatisfied with the said judgment of the lower court and instructed his advocates to appeal against the same to this court. The Applicant has averred that his failure to file a memorandum of appeal on time



was occasioned by the delay on the part of the court registry to furnish him with copies of the judgment and proceedings of the lower court. The Applicant has averred that he requested for certified copies of the proceedings and judgment on 12<sup>th</sup> September 2022 and paid a deposit of Kshs. 2000/- for the same on 15<sup>th</sup> September 2022. The Applicant has averred that as at the time of filing the present application, he is yet to be supplied with the said proceedings and judgment. The Applicant has averred that the delay in filing the appeal was occasioned by factors beyond his control and as such the same is excusable.

- 3 The Applicant has averred that his intended appeal has high chances of succeeding and that the same will be rendered nugatory if the orders sought are not granted. The Applicant has averred that the Respondent will not suffer any prejudice if the application is allowed. The Applicant has averred that he on the other hand stands to suffer substantial loss and irreparable harm if the orders sought are not granted.
- 4 The application is opposed by the Respondent through a replying affidavit sworn on 28<sup>th</sup> September 2022. The Respondent has contended that soon after the lower court delivered its judgment, the Applicant filed an application before that court for stay of execution which application was heard and dismissed on 25<sup>th</sup> August 2022. The Respondent has averred that the Applicant did not require certified copies of the proceedings and judgment of the lower court to file a memorandum of appeal. The Respondent has averred that the application for certified copies of proceedings and judgment was made on 12<sup>th</sup> September 2022 while the judgment sought to be appealed was delivered on 10<sup>th</sup> June 2022. The Respondent has averred further that the Applicant's application for stay in the lower court was dismissed on 25<sup>th</sup> August 2022. The Respondent has averred that the Applicant has not explained the delay in filing the memorandum of appeal that should have been filed by 10<sup>th</sup> July 2022.
- 5 The application was argued by way of written submissions. The Applicant filed his submissions on 27<sup>th</sup> October 2022 while the Respondent filed his submissions on 30<sup>th</sup> September 2022. The Applicant has submitted that he has made out a case for the grant of the orders sought in his application. The Applicant has submitted he has demonstrated that he has had an interest in appealing against the decision of the lower court. The Applicant has averred that as soon as his application for stay was dismissed by the lower court on 25<sup>th</sup> August 2022, he filed the present application after about 14 days. The Applicant has submitted that the delay in filing the present application is not inordinate. The Applicant has submitted that his failure to file appeal within time was caused by his inability to obtain certified copies of the lower court proceedings and judgment and the delay in the disposal of his stay application in the lower court. The Applicant has contended that it would have amounted to an abuse of the process of the court if he had filed an appeal while his application for stay was pending in the lower court. On the issue of stay, the Applicant has submitted that if the court grants him leave to file the intended appeal out of time, the appeal would be rendered nugatory unless an order of stay of execution is similarly granted. The Applicant has submitted that the Respondent has not shown that he stands to suffer any prejudice if the order of stay sought is granted.
- 6 In his submissions in reply, the Respondent has submitted that the orders sought by the Applicant are discretionary and that when considering the application, the court should take into account factors such as; the duration or length of delay, the conduct of the parties or their counsels and the interest of the parties. The Respondent has submitted that the Applicant had an opportunity to file an appeal which he never utilized. The Respondent has submitted that the Applicant waited until after the dismissal of his application for stay by the lower court on 25<sup>th</sup> August 2022 to apply for proceedings and judgment that was delivered on 10<sup>th</sup> June 2022. The Respondent has submitted that the application for proceedings and judgment was made 92 days after the delivery of the judgment. The Respondent has submitted that if the Applicant had sought copies of the proceedings and judgment immediately after delivery of the judgment, the same would have been made available to him within the prescribed



period for filing appeal. The Respondent has submitted that the delay in filing the appeal has not been satisfactorily explained and that in any event, the delay was caused by the Applicant.

- 7 The Respondent has submitted further that the conduct of the Applicant is not deserving of the orders sought. The Respondent has submitted that the Applicant is not candid with the court. The Respondent has submitted that the Applicant cannot blame his failure to file the appeal on time on lack of certified copies of proceedings and judgment that he never applied for until 92 days after the delivery of the lower court judgment. The Respondent has submitted further that in any event, the Applicant did not require certified copies of proceedings and judgment to lodge a memorandum of appeal. The Respondent has also taken issue with the Applicant's failure to disclose that he had made an application for stay of execution in the lower court and that the same was dismissed. The Respondent has submitted that the Applicant had a duty to disclose this fact to the court.
- 8 Finally, the Respondent has submitted that he had commenced construction on the suit property which was stopped through a court injunction. The Respondent has submitted that due to the time it took to determine the lower court suit, his building materials went to waste. The Respondent has submitted that the stay sought if granted would cause hardship to him. The Respondent has submitted that he has a valid title over the suit property that has been upheld by the lower court. The Respondent has submitted that the Applicant has not placed sufficient material before the court on the basis of which the court can determine whether the intended appeal is arguable or not.

**Determination:**

- 9 Section 79G of the *Civil Procedure Act* Cap. 21 Laws of Kenya provides as follows:

79G. 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.

- 10 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.”

- 11 Order 42 Rule 6 provides as follows:

“6.

- (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.”

12 The Applicant’s application has two limbs; the first is seeking extension of time within which to file an appeal and the second is seeking a stay of execution pending the hearing and determination of the intended appeal. Whether to grant the orders sought or not is at the discretion of the court. In *Bagajo v Christian Children Fund* [2004] 2 KLR 73 the court set out the following as the factors to be considered in an application for extension of time;

- a. Length of the delay.
- b. The explanation for that delay.
- c. Whether the appeal is arguable.
- d. Any prejudice that may be caused to the respondent if the application is granted.
- e. The requirements of justice in the case also bearing in mind the importance of the case.

13 In *Nicholas Kiptoo Arap Korir Salat v IEBC and 7 Others* [2014] eKLR, the court set out the following as the principles that should guide the court in applications for extension of time within which to file an appeal;

- a. Such extension is not a right but only an equitable remedy available to a deserving party at the court’s discretion.
- b. A party seeking extension must lay a basis for the same to the satisfaction of the court.
- c. Where there is delay, the same must be explained to the satisfaction of the court.
- d. Whether any prejudice will be caused to the respondents if extension is allowed.
- e. The circumstances of each case must be considered.

14 I am not impressed with the reasons given by the Applicant for his failure to file appeal against the lower court judgment within the prescribed time. I am in agreement with the Respondent that the Applicant is not candid with the court as to the real reason why the appeal was not filed within the prescribed 30 days. As correctly submitted by the Respondent, the Applicant knew of the contents of the lower court judgment and sought a stay of execution thereof. The Applicant did not require certified copies of the proceedings and judgment of the lower court to file a memorandum of appeal. Again, failure on the part of the Applicant to file the appeal on time could not have been caused by his inability to secure the said certified copies of the proceedings and judgment of the lower court since he applied for the same 92 days after the date of delivery of the lower court judgment and over 2 months after the expiry of the time within which the appeal should have been filed.



15 I am of the view that the Applicant’s advocates failed to file the appeal within time as a result of an oversight on their part and not for the reasons that have been advanced in the present application. In *Patriotic Guards Ltd. v James Kipchirchir Sambu* [2018] eKLR the court stated as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

16 In *Phillip Chemwolo & Another v Augustine Kubede* [1982-88] KAR 103 at 1040, Apaloo J (as he then was) stated as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

17 In *Richard Nchapi Leiyangu v IEBC & 2 others*, Civil Appeal No. 18 of 2013, the court stated that:

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality”.

18 In the circumstances of this case, I am of the view that it would not be just to penalize the Applicant for the blunders of his advocates. I am satisfied from the material before me that the Applicant intended to appeal against the decision of the lower court and instructed his advocates to lodge the appeal. The Applicant’s advocates filed an application for stay of execution in the lower court but forgot to file an appeal before this court or failed to do so under the mistaken view that to file an appeal while there is a pending application for stay in the court appealed from would amount to an abuse of the process of the court. Soon after judgment was entered against him on 10<sup>th</sup> June 2022, the Applicant filed an application in the lower court on 14<sup>th</sup> June 2022 for stay of execution pending appeal to this court. This is evidence of the fact that the Applicant was dissatisfied with the decision of the lower court and wished to appeal against the same. The ruling on the application was not delivered by the lower court until 25<sup>th</sup> August 2022 by which date the time within which the appeal was to be filed had lapsed. I have noted that soon after the delivery of the said ruling, the Applicant brought the present application. The Applicant has a statutory right of appeal against the judgment of the lower court. I am of the view that the interest of justice would be served if the Applicant is given his day in the appellate court. Due to the foregoing, I am inclined to exercise my discretion in favour of granting the extension of time sought.



19 The limb of the application seeking stay of execution was brought under Order 42 Rule 6 of the *Civil Procedure Rules* that I have reproduced above. In *Kenya Shell Limited v Karuga* (1982 – 1988) I KAR 1018 the court stated that:

“It is usually a good rule to see if order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

20 I am satisfied that the Applicant is likely to suffer substantial loss if the stay sought is not granted. It is not disputed that the Applicant has a claim over the suit property. In the judgment of the lower court execution of which is sought to be stayed, the court has ordered that the Applicant be evicted from the suit property. What this means is that unless the stay sought is granted, the Applicant is likely to lose the suit property which is the substratum of his intended appeal before the hearing of his appeal against the decision of the lower court. Once the suit property is taken over by the Respondent pursuant to the said judgment of the lower court, nothing would stop the Respondent from disposing of the property while the intended appeal is pending. I am in agreement with the Respondent that the application for stay before this court has been brought after some delay. The delay has however been explained. The Applicant had exercised his right to seek a stay in the first instance in the lower court. I am satisfied that the Applicant has satisfied the conditions for granting an order for stay pending appeal. I will however impose conditions on the stay having regard to the fact that the Respondent who is the current registered owner of the suit property has been prevented from using his land and will no doubt suffer loss of use of the property as the Applicant pursues his right of appeal.

21 In conclusion, I hereby make the following orders on the Application dated 19<sup>th</sup> September 2022;

1. Pending the filing, hearing and determination of the intended appeal by the Applicant to this court, execution of the judgment delivered on 10<sup>th</sup> June 2022 by Hon. W.Onkunya SRM in Kisumu CMCELC No. 150 of 2019 and consequential orders are stayed.
2. The Applicant shall deposit in an interest earning bank account in the joint names of the advocates for the Applicant and the advocates for the Respondent a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=) as security within thirty (30) days from the date hereof in default of which the stay order granted herein shall lapse automatically without any further reference to the court.
3. The time for filing the intended appeal is extended up to and including 15<sup>th</sup> November 2022.
4. The appeal shall be filed in a separate appeal file and not in this file.
5. Each party shall bear its own costs of the application.

**DELIVERED AND DATED AT KISUMU THIS 31<sup>ST</sup> DAY OF OCTOBER 2022**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Achura for the Applicant

Mr. Yogo for the Respondent

**Ms. J.Omondi-Court Assistant**

