



REPUBLIC OF KENYA



**KENYA LAW**  
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**Rapemo v Ogile (Miscellaneous Application E011 of 2022)  
[2022] KEELC 13838 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13838 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
MISCELLANEOUS APPLICATION E011 OF 2022  
GMA ONGONDO, J  
OCTOBER 31, 2022**

**BETWEEN**

**DANIEL OWUOR OURE RAPEMO ..... APPLICANT**

**AND**

**ELINA ALUOCH OGILE ..... RESPONDENT**

*(Being an Application for stay of execution and leave of court to file the appeal out of time from the judgment and orders of the trial court, Hon T. M. Olando (Principal Magistrate) in Homa Bay Chief Magistrate's Court Civil Suit No. 66 of 2019 dated 14th September 2021)*

**RULING**

1. On 4<sup>th</sup> August 2022, the applicant, Daniel Owuor Rapemo through H. Obach & Partners Advocates mounted an application by way of a Notice of Motion dated 2<sup>nd</sup> August 2022 pursuant to, inter alia, Sections 1A, 1B, 63(e), 79G and 79 of the Civil Procedure Act, Chapter 21 Laws of Kenya, Order 42 Rules 1, 2, 4 and 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. He is seeking the orders infra;
  - a. Spent
  - b. That this honourable court be pleased to grant leave to the Applicant/Appellant to file Memorandum of Appeal out of time.
  - c. That this honourable court be pleased to grant an order for stay of execution of the judgment and the consequential order issued on the 14<sup>th</sup> day of September 2021 in Homa Bay Chief Magistrate's Court Civil Suit No. 66 of 2019 pending the hearing and determination of this application.
  - d. The costs of the Application be provided for.



2. The application is anchored on the applicant's supporting affidavit, filed on even date, and annexed documents namely a copy of the judgment dated 14<sup>th</sup> September 2021 (DO-1), a copy of a draft memorandum of appeal dated 16<sup>th</sup> September 2021 (DO-2) and a copy of warrant of attachment dated 29<sup>th</sup> July, 2022 (DO-3).
3. Briefly, the applicant deponed that the delay in filing the memorandum of appeal was occasioned by the negotiations that were ongoing between the parties after delivery of the judgment on 14<sup>th</sup> September 2021. That being aggrieved by the said judgment, the applicant wishes to lodge an appeal against the same out of time, thereby necessitating the instant application.
4. Moreover, the applicant stated that the respondent is at the verge of executing the decree against him and has served him with a warrant of attachment. That the instant application has been brought without unreasonable delay. Further, the applicant contends that the intended appeal has high chances of success and that allowing the instant application will not occasion any injustice to the respondent herein.
5. In a replying affidavit sworn on 5<sup>th</sup> September 2022, the respondent, Elina Aluoch Ogile, through her counsel, M/s Aluoch Odera & Nyauke Advocates, opposed the application. She sought that the same be dismissed with costs.
6. The respondent deposed, inter alia, that the instant application is an attempt to evade and/or delay execution. That the instant application has been lodged nearly a year after judgment was entered. She denied that parties engaged in negotiations after judgment was issued. She stated that in fact, on 10<sup>th</sup> February 2022, the respondent's Bill of Costs subsequent to the judgment, was assessed by consent and the same adopted by court. That the applicant was granted 30 days to comply with the payment but he failed to do so. That therefore, the respondent prepared warrants and the applicant's movable properties were proclaimed.
7. On 8<sup>th</sup> August 2022, the vacation duty judge sitting at the Environment and Land Court, Kisii, ordered and directed that the application be argued by way of written submissions pursuant to Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction No. 33 of the Environment and Land Court (ELC) Practice Directions, 2014.
8. Accordingly, learned counsel for the applicant filed submissions dated 19<sup>th</sup> September 2022 on 21<sup>st</sup> September 2022 giving the background of the matter. Counsel identified one issue for determination thus: whether the appellant's prayer for extension of time is merited? Counsel cited Section 79G of the *Civil Procedure Act*, 2010 and relied on the case of *Edith Gichungu Koine –vs- Stephen Njangi Thoithi* (2014) eKLR and *Stecol Corporation Limited –vs- Susan Awuor Mudembi* (2021) eKLR, to fortify the submissions.
9. Learned counsel for the respondents filed their submissions dated 16<sup>th</sup> September 2022 on 19<sup>th</sup> September 2022. Counsel identified twin issues for determination, to wit, whether the applicant's application has merit and whether the applicant is entitled to order of stay of execution. Counsel submitted that the instant application lacks merit. Further, that the applicant has not met the conditions for grant of order of stay under Order 42 Rule 6 of the Civil Procedure Rules 2010. Thus, counsel urged the court to dismiss the application with costs. Counsel relied on the following authorities: *Serephen Nyasani Menge –vs- Rispah Onsase* (2018) eKLR and *John Gachanja Mundia – vs- Francis Muriira alias Francis Mutbika & Another* (2017) eKLR, to buttress the submissions.
10. In the foregone, the following issues fall for determination:



- a. Whether the applicant has proved the conditions set for grant of leave to file an appeal out of time;
  - b. Whether the applicant has proved the conditions set for grant of orders of stay of execution; and
  - c. Who should bear the costs of the instant application?
11. On the first issue, Section 75 of the *Civil Procedure Act* Chapter 21 Laws of Kenya sets out the orders from which appeal lies. Section 79 G of the same Act stipulates the time for filing of appeals from subordinate courts.
  12. Order 50 Rules 4, 6, 7 and 8 of the Civil Procedure Rules, 2010 provides for when time does not run, power to enlarge time, enlargement of time and computation of days respectively.
  13. The applicant deponed that the delay in filing the memorandum of appeal was occasioned by the negotiations that were ongoing between the parties after delivery of the judgment on 14<sup>th</sup> September 2021. However, the respondent denied that parties engaged in negotiations after judgment was issued. She further stated that the instant application is an attempt to evade and/or delay execution since it has been lodged nearly a year after judgment was entered.
  14. This court is conscious of the rights of the applicant under Articles 48, 50 (1) as read with Article 25 (c) of *the Constitution* of Kenya, 2010. So, it is not the intention of this court to deprive the appellant his right of appeal as enshrined in the said Constitutional provisions.
  15. Clearly, the applicant is entitled to appeal herein as per the view held in *Palata Investment Limited-vs-Butt & Sinfield Ltd* (1985) 2 ALL E.R 517 (CA) as well as the decision in *Butt-vs-Rent Restriction Tribunal* (1979) eKLR that;
 

“.....The appellant has an undoubted right of appeal.”
  16. Additionally, the draft memorandum of appeal contains triable issues to be heard and determined on merits thus, the applicant be let to file an appeal out of time; see *Philip Keipto Chemwolo and another-vs-Augustine Kubende* (1986) eKLR.
  17. As regards the second issue, the applicant lamented that the respondent is at the verge of executing the decree against him and has served him with a warrant of attachment but this assertion was denied by the respondent who stated that in fact, on 10<sup>th</sup> February 2022, the respondent’s Bill of Costs subsequent to the judgment was assessed by consent and the same adopted by court. That the applicant was granted 30 days to comply with the payment but he failed to do so. That therefore, the respondent prepared warrants and the applicant’s movable properties were proclaimed. This is evidenced by a copy of warrant of attachment dated 29<sup>th</sup> July, 2022.
  18. The conditions concerning grant of an order for stay of execution are stipulated under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 which provides in part thus:
    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. (Emphasis supplied)



19. Having considered the applicant's lamentation, I find the respondent's contention as contained in paragraphs 5, 6 and 9 hereinabove quite cogent. It is therefore, my considered view that the applicant has failed to advance sufficient and good reason for the grant of the orders of stay of execution of the trial court's judgment as provided for under Order 42 Rule 6(2) (supra).
20. The upshot is that only prayer 2 sought in the application dated 2<sup>nd</sup> August 2022 and filed on 4<sup>th</sup> August 2022 as set out in paragraph 1(b) hereinabove, is hereby granted accordingly. For clarity, prayer 3 for stay of execution of the judgment is declined thereby.
21. The applicant's counsel shall file the appeal and serve the record of appeal within forty (40) days from this date.
22. Costs of the application to abide the prospective appeal.
23. It is so ordered.

**DELIVERED, SIGNED AND DATED AT HOMA BAY THIS 31<sup>ST</sup> DAY OF OCTOBER 2022**

**G M A ONGONDO**

**JUDGE**

Present

Mr. A. Ogutu, holding brief for H. Obach, Learned Counsel for the applicant

Ms. A. Odera, Learned Counsel for the respondent

Okello and Mutiva- Court Assistants

