



**Almudy v Ponda as holder of power of Attorney for Uberti Maria Grazia & another
(Miscellaneous Application 47 of 2021) [2022] KEELC 13788 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13788 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS APPLICATION 47 OF 2021
MAO ODENY, J
OCTOBER 26, 2022**

BETWEEN

ALI OMAR ALMUDY APPLICANT

AND

**VALENTINE HINZANO PONDA AS HOLDER OF POWER OF ATTORNEY
FOR UBERTI MARIA GRAZIA 1ST RESPONDENT**

MAHERS INVESTMENTS LIMITED 2ND RESPONDENT

RULING

1. This ruling is in respect of Notice of Motion dated November 10, 2021 by the Applicant seeking the following orders: -
 - a. Spent
 - b. That the record of appeal herein be deemed as duly filed and the court do extend the time for service of the record of appeal herein.
 - c. Spent.
 - d. Spent.
 - e. That this Honourable Court be pleased to order stay of proceedings in Malindi MCELK No. 41 of 2020 Valentine Hinzano Ponda versus Ali Omar Almudy & another pending the interpartes hearing and determination of this Appeal.
 - f. That the costs of this application be in the cause.
2. The application is based on the grounds on the face of the application together with the supporting affidavit of Gicharu Kimani, counsel for the Applicant, who deposed that on February 5, 2021, Honourable W. Chepseba delivered a ruling in Case No. 41 of 2020, on a Preliminary Objection. Being



aggrieved by the said ruling, the Applicant sought to have copies of the proceedings and ruling vide letters dated February 18, 2021 and March 18, 2021 but to no avail. Counsel further deposed that the Respondent has since moved to execute the said ruling.

3. In response to the application, the 1st Respondent filed a Replying Affidavit sworn on November 30, 2021 by counsel Samuel Odhiambo Eliakim, who deposed that the application is unmeritorious as the Applicant did not explain the reason for the inordinate delay in filing the application.
4. Counsel further deposed that the appeal will not be rendered nugatory if the Applicant pays costs arising from the impugned ruling.
5. Counsel agreed to canvas the application *vide* written submissions but as at the time of writing this ruling only the Applicant had complied.
6. Counsel for the Applicant identified two issues for determination namely; whether the court has power for stay of proceedings and whether the court has powers to extend time to file and serve the record of appeal.
7. On the first issue counsel relied on Order 42 rule 6 (1) and (3) of the *Civil Procedure Rules* on the conditions that must be met for stay of execution pending appeal and cited the case of *Mukunya Mugo A & another v Elizabeth Mugure Mukunya* [2019] eKLR.
8. Counsel submitted that the Applicant has an arguable case with high chances of success and that the application was filed timeously given the surrounding circumstances.
9. On the second issue, the Applicant submitted that by virtue of Section 95 of the *Civil Procedure Act*, this court has power to extend time to file the appeal out of time in the interest of justice.
10. According to counsel since the delay in filing the application was occasioned by the late certification of the proceedings and relied on the cases of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR; *Nicholas Kiptoo Arap Korir Salata v IEBC & 7 others* [2014] eKLR; and *Charles Karuri Mbutu v Samuel Muhoro* Nbi Civil App. No. 51 of 1999 and urged the court to allow the application.

Analysis and Determination

11. The issue for determination is whether the Applicant has met the threshold for stay of proceedings and extension of time to file and serve a record of appeal out of time.
12. The statutory provisions in respect of an appeal from the judgment or decree of a subordinate court to the High Court is Section 75G of the *Civil Procedure Act* which provides that: -

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.

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.
13. The impugned ruling of the lower court was delivered on February 5, 2021 and the current application was filed on November 11, 2021 which approximately 10 months after the 30 days stipulated in section 79G of the *Civil Procedure Act* had lapsed.
14. The Applicant has attempted to explain the delay stating that there was a delay in certification of the proceedings. It should be noted that the Applicant has admitted that he applied for certified copies of



the proceedings vide a letter dated March 18, 2021 which was after the 30-day statutory period had lapsed. The period lapsed on March 7, 2021.

15. There was no explanation given why the Applicant waited that long to request for certified proceedings. One can only conclude indolence on the part of the Applicant and that the present application or intended appeal is therefore an afterthought.
16. In the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR the Supreme Court of Kenya explained that; -

“the delay of getting typed proceedings is not a *prima facie* panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered.”
17. The Applicant has also not attached a certificate of delay to show that the delay was occasioned by the court in procuring the typing of the proceedings.
18. I have considered the application and find that the application lacks merit and is therefore dismissed with costs to the Respondent. There are no proceedings to be stayed having dismissed the first limb of the application on extension of time.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF OCTOBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

