



**Kitoto (Sued as the Secretary General and a registered Trustee of Kenya Assemblies of God Church) & another v Wanyoike & another (Environment and Land Appeal E019 of 2022) [2022] KEELC 13570 (KLR) (13 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13570 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E019 OF 2022  
LN MBUGUA, J  
OCTOBER 13, 2022**

**BETWEEN**

**PHILIP KITOTO (SUED AS THE SECRETARY GENERAL AND A REGISTERED TRUSTEE OF KENYA ASSEMBLIES OF GOD CHURCH) ..... 1<sup>ST</sup> APPELLANT**

**JOHN KARANJA WANJENGU (SUED AS THE OFFICE BEARER OF KENYA ASSEMBLIES OF GOD KARIOBANGI RIVER BANK CHURCH) ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SIMON KURIA WANYOIKE ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNTY ..... 2<sup>ND</sup> RESPONDENT**

*(Arising from the decision of the Principal Magistrate DO Mbeja delivered on June 4, 2021 in Milimani CM's Court Case No 5493 of 2018.)*

**RULING**

1. By way of a memorandum of appeal dated March 14, 2022, the appellants filed this suit challenging the decision of the Principal Magistrate DO Mbeja delivered on June 4, 2021 in Milimani CM's Court Case No 5493 of 2018. The appeal was filed contemporaneously with an application dated March 14, 2022 where the applicant seeks orders of a stay of execution of the aforementioned judgement, warrants of attachment restraining the 1st respondent their agents, servants or employees from attaching the applicant's property in satisfaction of the decree and that leave be grant to the applicant to file an appeal out of time against the said judgement. The applicant also prays that the draft memorandum of appeal be deemed as duly and properly filed.



2. The said application was filed under a certificate of urgency and presented to court on March 17, 2022 of which a date for interpartes hearing was given for May 19, 2022. A day later on March 18, 2022, the applicants filed another application seeking orders of stay in the interim period. This second application was presented before the court on March 23, 2022 of which orders of stay were granted and the matter was to be heard on May 19, 2022 alongside the earlier application.
3. The 1st respondent filed their own application dated May 6, 2022 seeking orders to review, vary or discharge the orders of March 23, 2022 of which the court directed that the same be served for hearing on May 19, 2022.
4. On May 19, 2022, both the applicants and 1st respondent were represented in the virtual platform at 9.00 am when the court gave directions that the parties were to address the court orally on the application of May 6, 2022 at 11.00 am. Come 11.00 am and there was no appearance for the applicant. Counsel for the 1st respondent addressed the court to the effect that the appeal was filed without extension of time hence the orders of stay were in a vacuum. The court then proceeded to discharge the orders given on March 23, 2022, while giving directions that the substantive application of March 14, 2022 and the one of March 18, 2022 be heard on June 20, 2022.
5. The applicants filed another application dated May 30, 2022 seeking orders for reinstatement of the stay of execution orders, of which the court declined to grant the orders and directed that further directions were to be given on June 20, 2022.
6. On June 20, 2022, directions were given by this court for the closure of the application dated May 30, 2022. In respect of the initial application the court gave directions that; The 2nd respondent was to file and serve their replying affidavit by June 21, 2022; the applicants/appellants were to file and serve their submissions and any further affidavit by July 5, 2022 while respondents were to file their submissions by July 19, 2022.
7. This ruling therefore relates to the initial application dated March 14, 2022. However, as i was perusing the digital file in the CTS, I came across another application dated July 29, 2022 where the applicant is again seeking orders of stay of execution of the lower court judgment. That application is superfluous in view of the fact that the court is already dealing with the issue of stay in this ruling. Similarly, the applications dated March 18, 2022 and May 6, 2022 have been subsumed in the determination of the main initial application of March 14, 2022.
8. In terms of proper case management and in upholding the overriding objective set out in section 1A and 1B of the *Civil Procedure Act* all the other applications (dated March 18, 2022, May 6, 2022 and July 29, 2022) are marked as spent, See my decision in *Lawrence Kinyua Mwai v Nyariginu Farmers Co Ltd & another* [2019] eKLR.

### **Application Dated March 14, 2022**

9. The case for the applicants is premised on the grounds in support of the application and the supporting affidavits of the 2nd applicant. They contend that they had been residing on the suit land for the last 15 years. They were sued in Milimani CMCC No 5493 of 2018 and Judgment was delivered against them on June 4, 2021. They were aggrieved by the said judgment and they promptly filed an appeal at the High Court in Case No E 345 of 2021. However, respondents filed a preliminary objection culminating in the dismissal of their suit as the court had ruled that it had no jurisdiction to determine the mater.
10. The applicants contend that auctioneers had already been instructed to go to the applicant's premises to attach their property.



11. In their submissions dated July 1, 2022, the applicants have reiterated the averments set out in their application adding that the court should seek to give substantive justice. Reference was made to the cases of *Microsoft Corporation v Mitsumi Garage Ltd & another* Nairobi HCCC 810 of 2001 [2001] EA 460, *Ruga Ali & another v Commodity House Limited & 3 others* [2021] eKLR, *Wachira Karani v Bildad Wachira* [2016] eKLR and *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] eKLR,
12. The 1st respondent opposed the application vide the replying affidavit of one Simon Kuria dated May 6, 2022. He contends that the applicants invaded the suit property for a period of 12 or so years prompting him to file a suit against them. He further states that there is no valid appeal hence no orders of stay should be granted, adding that the lodging of an appeal before this court after filing another at the High Court amounts to forum shopping.
13. In his submissions dated July 19, 2022, the 1st respondent avers that applicants should have invoked the proper provisions of law or jurisdiction of this court to extend time, and that the application is based on an incompetent appeal. To buttress his arguments, the 1st Respondent has cited the cases of *County Executive of Kisumu v County Government of Kisumu & others* [2017] eKLR & *Joyce Liku Tanda v Care International* [2009] eKLR.
14. The 2nd respondent opposed the application vide the replying affidavit of its Ag County Solicitor, one Abwao Erick Odhiombo dated June 17, 2022. They contend that judgment of the lower court was delivered on June 4, 2021 where they were absolutely exonerated from any liability. It is averred that the so called mistake in filing the suit at the wrong forum is not sufficient reason to grant extension of time to file an appeal. The 2nd respondent has noted that the applicant has not put up any security for costs. No submissions were filed by the 2nd respondent.
15. Having regard to all the arguments proffered herein I find that there are two issues falling for determinations; Whether the court should grant extension of time to lodge an appeal noting that one has already been filed, and whether a stay of the lower court judgment should be granted.
16. The provisions of section 79G, of the *Civil Procedure Act* gives directions on how appeals are prosecuted in the High Court.

In the case of *Nyinyanga Kavole v Mailu Gideon* [2019] eKLR the court stated that;

“Under the proviso to section 79G of the *Civil Procedure Act*, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so”.

17. This far, I find no error in the filing of an appeal alongside the application to enlarge time. Nevertheless, the enlargement of time is a province of the court’s discretion as was held in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No NA/255 of 1997 cited in the Court of Appeal case of *Peter Muriungi & another v Trustees, Registered Catholic Parish DOD Laare* [2020] eKLR.
18. On the question of delay, I find that the applicants have given a plausible account of why they approached this court late in the day. After the delivery of the lower court decision on June 4, 2021, they lodged an appeal on time on June 16, 2021, but the same was filed in the High Court as Civil Appeal No E345 of 2021. The said appeal was struck out for want of jurisdiction on March 8, 2022. That explanation is plausible.
19. On the question of the chances of appeal succeeding and the prejudice which may be occasioned to the 1st respondent, I pose the question: What is the claim of the applicants in so far as the suit property plot



No 150 in Kariobangi – River bank is concerned. I have keenly gone through the affidavits of Pastor John Karanja Wanjegu and the only assertion of the applicants' interest in the land is their occupation thereof for a period of 15 years. They have not demonstrated the basis of their occupation of the suit land.

20. Having failed to establish their legal claim over the suit property, I then decline to exercise the discretion of this court in favour of the applicants. The end result is that the question of stay has fallen by the way side.
21. In that regard, the Application dated March 14, 2022 partially succeeds in terms of prayer 3 & 4 only. The applicants are condemned to meet the costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N MBUGUA**

**JUDGE**

**In the presence of:-**

Kiagothi holding brief for Mr Kiogara for appellant/applicant.

Njuguna for 1st respondent.

Kuria for 2<sup>nd</sup> respondent.

Court assistant: Eddel/Joan.

