



**Wachira v Kamau (Environment & Land Case 92 of 2016)
[2022] KEELC 15119 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15119 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 92 OF 2016
MD MWANGI, J
NOVEMBER 24, 2022**

BETWEEN

THOMAS CYRUS WACHIRA PLAINTIFF

AND

JOSEPH MUNGAI KAMAU DEFENDANT

RULING

1. By a notice of motion dated September 6, 2022, the defendant herein seeks to be ‘granted leave to file his appeal as he intends to in the first instance’. He also prays for costs of the application.
2. The application is premised on the grounds inter alia, that the defendant was not aware that the plaintiff had already obtained a decree against him as his previous advocate abandoned him without notice hence he was not aware of the court proceedings.
3. The defendant further states that he intends to file an appeal against the judgement delivered.
4. Interestingly, he also states that there is a pending succession matter in court, pending issuance of grant of letters of administration. He prays for time for the grant to be confirmed to enable him to transfer the suit property to the plaintiff, as he is still willing to do so.
5. The defendant states that the plaintiff is in possession of the suit premises and no prejudice will be occasioned to him. He asserts that it is only fair, just and in the interest of justice that the orders sought be granted as the application has been filed timeously.
6. The application is further supported by the affidavit of Joseph Mungai Kamau, the defendant herein, deponed on the September 6, 2022. The deponent restates the grounds on the face of the application.



Response by the plaintiff

7. In opposing the application, the plaintiff filed grounds of opposition dated September 19, 2022. He contends that the defendant's application is misconceived, frivolous, vexatious and an abuse of the court process and should be dismissed with costs as it is a total waste of judicial time. Further that the defendant is an indolent litigant; the judgement having been entered on the September 22, 2017.
8. The plaintiff states that the reasons given by the defendant are neither satisfactory nor reasonable. This is so considering that the defendant was served with the decree and the taxation proceedings including the notice to show cause as evidenced by the affidavits of service filed at every stage. The defendant was therefore fully aware of the judgement.
9. The plaintiff asserts that the delay of 6 years since judgement was entered to file the application is inordinate, unreasonable and greatly prejudicial to the plaintiff. The plaintiff has been denied the enjoyment of the fruits of his judgement for no justifiable reason.
10. The application lacks merit and should be dismissed with costs to the plaintiff to bring this long outstanding matter to a close.

Court's Directions

11. The court directed that the application be canvassed by way of written submissions. The defendant filed his submissions dated the October 5, 2022 whereas the plaintiff filed his written submissions dated the October 18, 2022.

defendant's Submissions

12. The defendant submits that the sole issue for determination is whether the court should grant the order of stay of execution of the decree pending appeal. That the applicable law is order 42 rule 6(2) of the [Civil Procedure Rules](#) on the grant of stay of execution pending appeal. He cites the case of [RWW v EKW \(2019\) eKLR](#) on the principles for grant of an order of stay of execution pending appeal.
13. The stay of execution is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. But while at it, the court should weigh this right against the rights of the successful litigant who should not be deprived of the fruits of his/her judgement. He further restates the four principles for the grant of stay of execution pending appeal as stated in the case of [Butt v Rent Restriction Tribunal \(1979\) EA](#).
14. On substantial loss, the defendant avers that he stands to suffer loss if the orders sought are not granted. He states that he has established other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the defendant as the successful party in the appeal.
15. The defendant further submits that the application has been made without unreasonable delay. Extension of time to file an appeal out of time is a matter of exercise of judicial discretion. Therefore, where a party is aggrieved and wishes to pursue an appeal, it would be fair to exercise discretion in his favour. Especially where the delay in filing the appeal is not inordinate, or is explained to the satisfaction of the court and the adverse party will not be prejudiced in any way.
16. He relied on the case of [Tana & Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 Others \(2015\) eKLR](#), where the court held *inter alia* that while a mere negligent mistake by counsel



may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude.

17. That in the instant case, the defendant submits that he was abandoned by his previous advocate and he has not exhibited a careless attitude.
18. On the issue of security of costs, the defendant avers that he stands to suffer substantial loss, including losing the decretal amount as well as costs and interest if stay of execution is not granted. He further avers that the plaintiff lives in the suit premises, being in possession of the land; therefore, there would be no need of depositing security for costs as conceived in law. His interests are secured by his continued possession of the land which is peaceful and has not been interfered with.

plaintiff's Submissions

19. The plaintiff avers that the court entered judgement after a full hearing of the suit on merit and final submissions by both parties on September 22, 2017. That all along, the defendant was duly represented. A decree was thereafter extracted and issued on the 6th July, 2017. That despite the decree being served upon the defendant, he did not comply with the orders of the court. It is then that the matter proceeded to taxation. The Bill of costs was taxed at a sum of Kshs 391,227/=.
20. The plaintiff states that the defendant failed to transfer Plot No C known as LR No 4885/122 being a sub-division from the original LR No 4885/111/12 as ordered in the decree. He also refused or neglected to pay the taxed costs of Kshs 391,227/=. Consequently, the plaintiff extracted a certificate of taxation on February 28, 2022 and filed an application for execution and a notice to show cause.
21. The plaintiff avers that the notice to show cause was served upon the defendant via his email address and a return of service duly filed. The defendant failed to appear in court hence warrants of arrest were issued against him. The court further directed the plaintiff to prepare the transfer documents for execution by the deputy registrar in compliance with order number 3 of the decree.
22. The plaintiff alleges that it is only upon the issuance of the warrants of arrest that the defendant filed the instant application. The plaintiff submits that the court cannot grant stay of execution where no notice of appeal has been filed and leave to appeal out of time granted. The application is therefore not only fatally defective but also lacks merit and is misconceived. The plaintiff further argues that stay of execution cannot be granted where there is no notice of appeal properly filed or until leave to appeal out of time is granted.
23. That the court cannot exercise discretion to grant the orders sought as the applicant failed to take any action for 5 years after entry of judgement. Further, that the defendant has been indolent and displayed contempt of court in the matter. He cannot blame his former advocate. That the application is therefore fatally defective and devoid of merit and should therefore be dismissed with costs. Execution orders issued on the August 24, 2022 should be allowed to proceed so that the plaintiff can obtain his title for the suit property.

Issues for Determination

24. In the court's opinion, the issue for determination in this matter is whether the defendant's application is grounded in the law and whether it has merit.



Analysis and Determination

25. The defendant/applicant brought his application under the provisions of section 3A of the *Civil Procedure Act* and order xx rule 11(2) and order xxi rule 22 of the *Civil Procedure Rules* and all other enabling provisions of the law.
26. The substantive prayer is prayer number 4 in the application framed as follows;

“ 4 That the applicant/defendant be granted leave to file his appeal as he intends to in the first instance”
27. I am at a loss. I don't understand what exactly the defendant/applicant is seeking.
28. First and foremost, the provisions cited by the defendant are non-existent in the *Civil Procedure Rules, 2010*. I suspect that the defendant's advocate was probably referring to the repealed *Civil Procedure Rules*; before the 2010 Rules.
29. Secondly, no leave is required to file an appeal against an original decree. A dissatisfied party has an automatic right to appeal in accordance with the provisions of section 66 of the *Civil Procedure Act*.
30. Thirdly, the defendant's submissions are not consistent with the application before court. The defendant submits on stay pending appeal. There is no notice of appeal filed by the defendant in this matter. No leave to appeal out of time has been sought either having mind the fact that judgement in this matter was given way back in September 2017.
31. I will spend no more time on this matter. The defendant's application is not only fatally defective but lacks merit. I am not persuaded that the provisions of section 3A cited by the defendant/applicant would rescue his application either.
32. From the foregoing, the defendant's application has no basis in law. It is hereby dismissed with costs to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022

M D MWANGI

JUDGE

In the virtual presence of:

Parties Absent.

Court Assistant: Hilda/Yvette.

M D MWANGI

JUDGE

