



REPUBLIC OF KENYA



KENYA LAW
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**Kinyua v Asumwa (Miscellaneous Application E036 of 2022)
[2022] KEELC 14789 (KLR) (16 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14789 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
MISCELLANEOUS APPLICATION E036 OF 2022**

CK NZILI, J

NOVEMBER 16, 2022

BETWEEN

FAITH KANORIO KINYUA APPLICANT

AND

AGUSTINE AMBOKA ASUMWA RESPONDENT

RULING

1. The court is asked to extend time for the filing of an appeal arising out of a judgment delivered by the trial court on February 10, 2022 as well as stay of execution of the said judgment.
2. The reasons for the application are contained on the face of the application and the supporting affidavit of Faith Kanorio Kinyua sworn on September 7, 2022. The application is opposed through a replying affidavit sworn by Augustine Ambok Asumwa on October 28, 2022.
3. The principles to apply on whether to extend time or not were set out in *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others (2014) eKLR*. The court held that the discretion to extend time is not fettered and that an applicant must explain the reasons for the delay; state if there were extenuating circumstances; it is only available to a deserving party; the burden is on the applicant to lay the basis to the satisfaction of the court; where there is a reasonable cause for the delay the court should consider the application; prejudice to the opposite party must be considered and lastly the length of delay and public interest in the matter.
4. As regards stay of execution, a party seeking stay must demonstrate substantial loss; offer security for due realization of the decree should the appeal fail, file the application on time and lastly demonstrate that it is in the interest of justice to grant the orders sought.
5. While considering the above requirements for stay, the court in *James Wangalwa and another vs Agnes Naliaka Cheseto (2013) eKLR* held thus; “No doubt in law the fact that the process of execution has



been put in motion or is likely to be put in motion by itself does not amount to substantial loss. Execution is a legal process....”.

6. The applicant must therefore establish 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 applicant. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
7. In *RWW vs EKW (2019) eKLR*, the court held that the stay of execution is aimed at preserving the subject matter in dispute so that the rights of the appellant who is exercising an undoubted right of appeal are safeguarded and that in case his appeal succeeds it will not be rendered nugatory. Further, the court said that in doing so the court must also weigh the rights against those of a successful litigant who should not be deprived of the fruits of his judgment.
8. Applying the foregoing principles to the instant case, the delay in filing the appeal is attributed to a promise by the respondent that he would not take drastic action for the sake of the children after the suit was dismissed but has now turned around and issued eviction notices through his lawyers on record and secondly, that ends of justice require the extension of time.
9. As concerns stay, the applicant has stated that the judgment in the trial court gave his estranged husband a license to deal with the suit land as it pleased him without a spousal consent; that she has been threatened with eviction; her occupation rights remain and if the application is not allowed her appeal would be rendered nugatory.
10. In response the respondent has stated that he has applied for the lifting of the inhibition orders by an application attached as AAA “1”; that the applicant was living in his house with another man who can get her accommodation elsewhere; their children are in boarding schools and has secured accommodation for them while on holiday; the applicant was attempting to frustrate and or deny him access to his property and that the notice to vacate was necessary so that he can enjoy fruits of his judgment.
11. What the trial court issued was a negative order by simply dismissing the applicant’s suit with no orders as to costs. The applicant however states that there is a threatening notice to vacate the subject land. The respondent has admitted issuing the notice to vacate the land which has been under occupation by the applicant together with the children. He says there are alternative accommodation means for the minors who are in boarding schools.
12. Further the respondent has admitted that the applicant is living on his land or homestead with another man and that they have not been in direct contact for 10 years.
13. What was before the trial court was not a claim brought under the *Matrimonial Property Act* but a suit based on resultant customary trust based on alleged cohabitation. The trial court however made a finding that the two parties were suitors.
14. The applicant prays for leave to appeal against the judgment based on the draft memorandum of appeal. The delay was for 8 months in filing the application. She has explained the circumstances for the delay and the threats to be evicted.
15. Even though the delay is inordinately long, still I find the issues raised in the memorandum of appeal are weighty and in the interest of justice the application should be allowed so that the applicant can exercise her right of appeal.
16. Coming to the issue of stay, the applicant has said that she stands to suffer irreparable loss and damage if evicted and her appeal shall be rendered nugatory. The respondent has admitted that the two have



issues in their relationship. The respondent says the applicant is living on his house with an unnamed man who could as well house the applicant elsewhere. He has not stated where the minors will live while on holiday.

17. To my mind there is a substantial loss demonstrated and admitted by the opposite party. The respondent has not stated that the property is being wasted or alienated by the applicant.
18. The upshot is I allow the prayer for extension of time to file the appeal within 14 days from the date hereof.
19. The status quo subsisting as at today shall prevail for a period of 12 months.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 16TH DAY OF NOVEMBER, 2022.

In presence of:

C/A: Kananu

Gichunge for applicant

Rimita for respondent

HON C K NZILI

ELC JUDGE

