



REPUBLIC OF KENYA



KENYA LAW
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**Ngetich v Metto (Miscellaneous Application E046 of 2021)
[2022] KEELC 14700 (KLR) (10 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14700 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
MISCELLANEOUS APPLICATION E046 OF 2021
JM ONYANGO, J
NOVEMBER 10, 2022**

BETWEEN

HUMPHREY KIBET NGETICH APPLICANT

AND

RICHARD METTO RESPONDENT

RULING

1. What is before me is a Notice of Motion dated December 16, 2021 seeking the following orders:
 - a. Spent.
 - b. The Honourable court be pleased to extend time for filing of a memorandum of Appeal against the judgment delivered by Hon. Naomi Wairimu on May 28, 2021 in Eldoret CMC E&L Case No. 293 of 2017.
 - c. Upon prayer (b) above, the memorandum of Appeal annexed herewith be validated and the same be deemed duly filed. (*sic*)
 - d. The Honourable Court be pleased to give a temporary stay of execution of the judgment issued on May 28, 2021 pending the hearing and final determination of this application and thereafter pending hearing and determination of the intended appeal against the said judgment.
 - e. Costs of this application be in cause.
2. The application is anchored on the grounds set out therein and the Applicant's Supporting Affidavit sworn on the 16th day of December 2021 in which she explains the reason for the delay in filing the appeal. The long and short of it is that judgment was entered against the Applicant on May 28, 2021 in Eldoret CMC E&L Case No. 293 of 2017. The Applicant then instructed his former advocate to lodge an appeal but instead of filing a Memorandum of Appeal in this Court, he filed a Notice of Appeal ostensibly to the Court of Appeal on June 11, 2021. By the time the Applicant realized the



mistake, the time for filing an appeal had lapsed. It is the applicant's contention that the mistake of his former advocate should not be visited upon him.

3. The Applicant maintains that his appeal raises arguable issues and has good chances of success. He also contends that if a stay of execution is not granted, he will suffer substantial loss as he will be evicted from his home as the Respondent has pursuant to the judgement entered the suit property, remove the roof of the store and harvested the maize that the Applicant planted.
4. The application is resisted by the Respondent through his Replying Affidavit sworn on the July 19, 2022. In the said affidavit he contends that the application has been made too late in the day and it has been overtaken by events as the suit property has been transferred to a third party who is not a party to these proceedings. It is his position that in the circumstances the appeal would be a mere academic exercise.
5. He contests the applicant's assertion that he has an arguable appeal and states that the appeal has no chances of success as the Applicant failed to prove his case in the lower court.

The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

Issues for Determination

6. The application raises two issues for determination:
 - i. Whether the applicant should be granted leave to file his appeal out of time.
 - ii. If (a) is granted, whether there should be a stay of execution pending appeal.

Analysis and Determination

7. The principles for granting an application for leave to appeal out of time are now well settled. In the case of *Nicholas Kiptoo Arap Salat v IEBC & 7 Others* (2014) eKLR, it was held that:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. “extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;



6. whether the application has been brought without undue delay;”
8. In the instant case the Applicant’s delay of 6 months has been explained by the blunder made by the Applicant’s former advocate who file a Notice of Appeal instead of a Memorandum of Appeal with the prescribed time. The Applicant has explained that by the time he discovered the blunder, six months later the time for filing an appeal had lapsed. It is his plea that his advocate’s mistake should not be visited on him.
9. Even if I were to be persuaded by the Applicant’s reason for the delay, I would need to consider the rebuttal by the Respondent who has submitted that the appeal has no chances of success as it has already been overtaken by events. This is because the suit property which the Applicant hopes to salvage has been transferred to a third party who is not a party to these proceedings. The Applicant did not deem it fit to counter this averment in the Respondent’s Replying Affidavit, which means that it is true.
10. The question I must grapple with is whether it would serve any useful purpose to allow the Applicant to file an appeal out of time when it is obvious that the subject matter of the Appeal has changed hands and is now in the hands of a party who is not a party to these proceedings. I agree with the Respondent that even if I were to allow the Applicant to file his appeal, the same would merely be an academic exercise and it would serve no useful purpose. I therefore decline to grant leave to the Applicant to file his appeal out of time.
11. The second question regarding the stay or execution is tied to the question to whether the Applicant will be granted leave to file his appeal out of time. Having declined to grant the Applicant leave to file his appeal out of time, it would be futile to delve into the issue of stay of execution. At any rate there is nothing to be stayed as the property has changed hands and the orders would be incapable of being enforced.
12. The upshot is that the application lacks merit and the same is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 10TH DAY OF NOVEMBER 2022.

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J.M ONYANGO

JUDGE

