



Wabule & 2 others v Mulupi & another (Miscellaneous Application E017 of 2022) [2022] KEELC 14749 (KLR) (10 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14749 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
MISCELLANEOUS APPLICATION E017 OF 2022
EC CHERONO, J
NOVEMBER 10, 2022**

BETWEEN

**MASASABI WABULE 1ST APPLICANT
JOSEPHAT WANGILA SAWA 2ND APPLICANT
JOHANSON WAFULA MASASABI 3RD APPLICANT**

AND

**TIMOTHY WEKESA MULUPI 1ST RESPONDENT
JAMES MALIEKHE KOKONYO 2ND RESPONDENT**

*(Judgment made by the Hon. S.O. MOGUTE on the
6th April 2022 in Bungoma CMCC NO. 437 of 2001)*

RULING

1. By a notice of motion application brought under certificate of urgency dated September 20, 2022, the applicants seek the following orders;
 1. (Spent)
 2. That leave be granted to the firm of Nabibia & Company Advocates to come on record for the applicants in place of the firm of Nanzushi & Company Advocates
 3. That a stay of execution in Bungoma CMCC No 437 of 2001 be granted pending the hearing and determination of this application
 4. The court be pleased to grant leave to the defendants to appeal out of time against the judgment made by the Hon S O Mogute on the April 6, 2022 in Bungoma CMCC No 437 of 2001
 5. That the said leave do operate as a stay of all proceedings



6. The costs of this application be provided for.
2. The application is supported by the affidavit sworn by Josephat Wangila Sawa and 14 grounds shown on the face of the said application. The application was filed under certificate of urgency. However, when the application was placed before the duty judge, the same was not certified urgent but the judge granted orders in terms of prayers 2 & 3 thereof. The duty judge also directed that the said application be conversed by way of written submissions. When the said application came up for mention to confirm compliance on October 12, 2022, the respondents through their advocate requested for more time to file their response and submissions.
3. By the time of writing this ruling, the respondents had not filed a response nor submissions as directed by the court. The application is therefore treated as unopposed.

Legal Analysis and Determination

4. I have considered the application dated September 20, 2022, the supporting affidavit and a copy of a memorandum of appeal attached thereto. The applicant herein is seeking a myriad of orders. Prayers no 1 & 2 were dealt with in the first instance and are now spent. The 4th prayer is for leave to appeal out of time against the judgment made on April 6, 2022 by Hon S O Mogute in CMCC No 437 of 2001. Section 79G of the *Civil Procedure Act* provides as follows;

“Every appeal from a subordinate court to the High court shall be filed within 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.”

5. The applicants have not attached a copy of the impugned judgment indicating when the trial court rendered herself. According to the depositions in the supporting affidavit, the applicants contend that the impugned judgment was delivered on April 6, 2022. Assuming that is true, the applicants took about five months to bring the present application. The explanation for the delay in bringing the application within the statutory timelines is that after the delivery of the judgment, they instructed their former advocates to apply for typed proceeding for purposes of lodging an appeal but the same has not been supplied to date. The applicants also contend that their former advocate never bothered to file an appeal despite instructing and paying for her legal fees.
6. The applicants further deposed that they made follow ups with their former advocate on the progress of their case but nothing was forthcoming. They said that they decided to engage the current firm of advocates.
7. Section 1A, 1B and 3A of the *Civil Procedure Act* under which this application has been brought speaks to the overriding objective of the Act and the mandatory requirements of litigants and their advocates to comply with all orders and directions issued by the courts to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed under the Act. court. Section 79G of the *Civil Procedure Act* gives the timeline within which a litigant who is aggrieved by a judgment or order of a subordinate court can appeal to the high court and courts of equal status. The judgment/decree which is the subject of this application is said to have been delivered by the trial Magistrate Hon S O Mogute on April 6, 2022. Order 42 rule 6(2) *CPR* sets out the grounds under which an applicant must satisfy before an order for stay pending appeal is granted by the court. The first ground is that the application must be brought without unreasonable delay. Secondly, the applicant must show



that he will suffer substantial loss unless the application is allowed and finally, the applicant must give security for the due performance of the decree as may ultimately be binding on him. The impugned judgment by Hon O Mogute was delivered on April 6, 2022 while the present application was filed on September 20, 2022. The applicant took almost five months to bring the application. The reasons given by the applicant for the delay is that after the delivered of the impugned judgment, they instructed their former advocates M/S Nanzushi & Co Advocates to lodge an appeal against the decision. They attached a copy of a letter by the said firm of Nanzushi & Co Advocates requesting for certified copies of judgment and proceedings dated April 8, 2022 as well as a draft memorandum of appeal dated April 26, 2022. The said letter dated April 8, 2022 was received by the Chief Magistrate's Court on April 22, 2022. There is no indication that the court proceedings were ever typed and supplied to the applicants or their advocates.

8. I am satisfied with the explanations given by the applicants for the delay to lodge appeal within the stipulated period provided for under the rules.

9. The second ground is whether the applicants will suffer substantial loss unless the stay order is granted. At paragraph 9 of the supporting affidavit, the applicants deposed as follows;

“ The plaintiff is likely to execute the decree herein at any time and lose their parcel of land making the applicants suffer irreparable loss as they are likely to be evicted for the said parcel of land together with their families hence the need for stay pending appeal as the appeal will be rendered nugatory if stay is not granted.”

10. Substantial loss in its various forms is the state of affairs where the applicant demonstrates to the satisfaction of the court that unless the application is granted, his intended appeal, if successful, will be rendered nugatory. Execution in itself cannot render an appeal nugatory, the same being a lawful process unless it is shown that the same cannot be reversed on appeal. The applicant must demonstrate that the respondent will be unable the subject matter of the appeal to its original position before execution commenced. He must demonstrate that the respondent will dispose of, alienate mortgage or sell to third parties who may acquire the same for value without notice. It behoves applicant to establish other factors which can trigger substantial loss as a result of execution of a judgment or decree. In this case, the applicant has failed to show how execution of the judgment/decree alone can cause substantial loss.

11. Substantial loss is the cornerstone of an application for stay pending appeal. Having failed to demonstrate how execution would cause substantial loss, the application dated September 20, 2022 partly succeed and the same is allowed as follows;

1. The applicants are granted leave to appeal against the judgment/decision by Hon S O Mogute, (SPM) issued on April 6, 2022 (CMCC No 437/2001 (Bungoma) within 7 days from the date of this ruling
2. The temporary stay of execution orders issued on the first instance on September 21, 2022 are hereby vacated.
3. Since this application is not defended, I make no order as to costs. It is so ordered

READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 10TH NOVEMBER, 2022.

HON. E.C CHERONO

ELC JUDGE



In the presence of;

1 Mr Nabibia for Applicant

2 Mr Murunga for Respondent

3 Joy C/A

