Huma v Mwaura & 4 others (Environment & Land Miscellaneous Case 16 of 2022) [2022] KEELC 15566 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15566 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND MISCELLANEOUS CASE 16 OF 2022

EK WABWOTO, J

DECEMBER 20, 2022

BETWEEN

JOHN IRUNGU HUMA ..... APPLICANT

AND

PETER GICHUNGU MWAURA ..... 1ST RESPONDENT

ANGELINA MUTONO MUTISO ..... 2ND RESPONDENT

STEPHEN NJOROGE KAMAU ..... 3RD RESPONDENT

MIRIAM WANGARI GATUMA ..... 4TH RESPONDENT

SAMUEL IRUNGU IKUWA ..... 5TH RESPONDENT

(Being an application for leave to appeal out of time against the judgement made by Hon A.M Obura (Mrs) Senior Principal Magistrate in Civil Case No 5006 of 2018 at Milimani Commercial Court entered on June 21, 2019.)

RULING

1. The application before this court for determination was filed by the applicant and is dated April 4, 2022. The applicant sought the following orders:

    i. ...spent.

    ii. That there be suspension of the orders for the committal to civil jail made by Hon HM Nyaga (CM) on March 31, 2022 against the applicant pending the hearing and determination of this application.

    iii. That the court be pleased to grant the applicant leave to appeal out of time against the judgement made by Hon AM Obura (Mrs) Senior Principal

Magistrate in Civil Case No 5006 of 2018 at Milimani Commercial Court entered on June 21, 2019.

iv. That the honorable court be pleased to make such orders as it deems just and expedient to award under the circumstances.

v. That costs of this application to be provided for.

2. The application was based on 32 grounds and accompanied by a supporting affidavit dated April 4, 2022` sworn by John Irungu Huma.

3. Following a ruling by Lady Justice Mulwa on September 22, 2022, the file was transferred to the ELC Court after which the court ordered for the matter to be disposed of by way of written submissions.

4. In the applicant's submissions dated May 4, 2022, it was submitted that the respondents obtained judgement irregularly, cunningly and/or deceitfully since despite filing his defence, he was denied a chance to fair hearing.

5. It was further submitted that the intended appeal stood a high chance of success and that the delay was inadvertent and excusable since the applicant did not know of the judgement. It was averred that there were six main issues for consideration:

a. Whether leave should be granted to the applicant to appeal out of time against the judgement made by Hon A.M Obura (Mrs) Senior Principal Magistrate in Civil Case No 5006 of 2018 at Milimani Commercial Court entered on June 21, 2019;

b. Whether the applicant should be condemned for the mistakes of his legal adviser;

c. The issue of a draft notice of appeal as raised by the respondents;

d. The issue of the typed proceedings and certified copy of judgment as raised in the respondents grounds of opposition;

e. Whether the decretal sum of KES 11,693,246.71 awarded to the respondents is excessive and raises a bona fide ground to allow the appeal;

f. Whether there ought to be stay of execution of the judgement delivered by the trial court pending hearing and determination of the appeal.

6. In their grounds of opposition dated April 21, 2022 and replying affidavit sworn by James H Gitau Mwaura, the respondents argued that since the application to cease acting was unattended and not prosecuted by the applicant, the advocate on record then Muturi Njoroge & Co Advocates remained on record and have since been duly served without protest.

7. Additionally, the judgement notice dated May 10, 2019 were duly served and received not only by the applicant's advocate but also on the applicant himself. It was submitted that after issuance of the warrant of execution and warrant of attachment, the applicant continued to disregard the court's directions in the suit therefore his application lacks merit to pursue leave to appeal out of time after many years of trial.

8. Having considered the evidence and written submissions, it is clear that the issues for determination before this court are as follows:

    i. Whether the applicant is entitled to stay of execution?

    ii. Whether the applicant is entitled to leave to file an appeal out of time?

    iii. Who should bear costs of the application?

9. First, this court is guided by order 42 rule 6(1) of the *Civil Procedure Rules* where it is clearly stated that:

> "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."[Emphasis mine]

10. In my opinion the question of sufficient cause must be answered. I have taken into account that the suit stems from tribunal proceedings in 2011 and consequent civil case in 2018, therefore it is safe to conclude that the parties have engaged in the corridors of justice for over 10 years. With this in mind, I echo in the sentiments of the Supreme Court in the case of *Charo v Mwashetani & 3 others* [2014] KLR- SCK, in considering an application for extension of time stated:

> "In the emerging jurisprudence, the concept of 'timelines and timeliness' is generally upheld, as a vital ingredient in the quest for efficient and effective governance under the *Constitution*. However, even as we take account of that context, we remain cognizant of the court's eternal mandate of responding appropriately to individual claims, as dictated by compelling considerations of justice."

11. The Supreme Court again pronounced itself in *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, where it was stated:

> "... 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; and

7. whether in certain cases, like election petitions, public interest should be a consideration for extending time"[Emphasis Mine]

12. The courts have declared in several instances that the client should not be punished for the Advocate's errors. Even so, courts have equally highlighted that the client has an active role to play in following up their case. In *Rajesh Rughan v Fifty Investment Ltd & another* [2005] eKLR this court held:

> " It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction that is not excusable mistake which the court may consider with some sympathy.

13. In *Bains Construction Co Ltd v John Mzare Ogowe* [2011] eKLR the court observed:

> " It is to some extent true to say mistakes of counsel as is the present case should not be visited upon a party but it is equally true when counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences".

14. In *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, it was thus stated:

> " It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

15. It was argued that the applicant's advocate had ceased acting and when later served, documents were received under protest. This argument is defeated by the fact that service was effected personally upon the applicant. I find that it is quite late in the day, to bring an application for stay of execution almost three years after delivery of judgement.

16. Secondly, with regard to committal to civil jail, this court is guided by section 38 of the *Civil Procedure Act*:

> " Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons to be recorded in writing, is satisfied—
>
> (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree-
>
> (i) is likely to abscond or leave the local limits of the jurisdiction of the court; or
>
> (ii) has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his

property, or committed any other act of bad faith in relation to his property; or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law, or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree; or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account."

17. I echo in the words of Odunga GV (High Court judge as he was then) in *George Arab Muli Mwalabu v Senior Resident Magistrate Kangundo & 2 others; Festus Mbai Mbonye (Interested Party)* [2019] eKLR in finding that:

> "...a person who fails to satisfy a monetary decree may, if the conditions stipulated in section 38 of the *Civil Procedure Act*, are satisfied be committed to jail. Committal to jail in such circumstances in my view is exceptional in the sense that a person's liberty is curtailed not at the instance of the State but at the instance of a private individual though the person detained, in our circumstances, is placed in the custody of the state. Under our Constitution the right to liberty is enshrined in article 39(1) which codifies the right to freedom movement. That right however is not one of the non-derogable rights which under article 25 of the *Constitution*. Accordingly, pursuant to article 26 of the *Constitution* the right to freedom of movement can be limited pursuant to article 24 of the *Constitution*.

18. In the foregoing, I find that notice of motion dated April 4, 2022 is unmerited and the same is hereby dismissed in its entirety with costs to the respondents.

19. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF DECEMBER 2022.

EK WABWOTO

JUDGE

In the presence of: -

Ms Ngotho for the applicant.

Mr Gitau for the respondents.

Court Assistant; Caroline Nafuna.