



REPUBLIC OF KENYA



KENYA LAW
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**Kimutai v Kosgei (Environment and Land Appeal 4 of 2022)
[2022] KEELC 15332 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15332 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL 4 OF 2022**

**L WAITHAKA, J
DECEMBER 8, 2022**

BETWEEN

BARNABAS KIPRUNO KIMUTAI APPELLANT

AND

JOSEPH KOSGEI RESPONDENT

*(Appeal against the Ruling of Hon. C. Kutwa (SPM)
in Iten Environment and Land Case No. E018 of 2021)*

RULING

1. On February 10, 2022, Barnabas Kipruto Kimutai, hereinafter referred to as the Applicant filed the notice of motion dated February 9, 2022 seeking leave to file appeal out of time against the ruling of Hon Charles Kutwa SPM delivered on December 22, 2022 in Iten CMCC ELC Case No E018 of 2021-Barbabas Kipruto Kimutahi v Joseph Kosgei.
2. The application is premised on the grounds on its face and the affidavit the applicant swore in support thereof. Essentially, the applicant faults the Trial Magistrate for denying him an opportunity to be heard in the suit he preferred before the lower court and in the application for taxation of the bill of costs emanating from the judgment of the court.
3. Through the replying affidavit he swore on June 17, 2022 the respondent contends that the application is frivolous, vexatious, bad in law and an abuse of the court process; that there was inordinate and unexplained delay in filing the application (delay of 5 months).
4. Terming the application an afterthought meant to delay him from enjoying the fruits of his judgment, the respondent states that the application was filed after he commenced execution of the order of costs issued in his favour.



5. Concerning the plea for stay of execution, it is contended that the applicant has not specified the order he wants stayed; that there was delay in seeking for stay; that the judgment and ruling whose execution is sought to be stayed are regular and that the applicant's conduct disentitles him of exercise of the discretionary power vested in this court in his favour.
6. In a rejoinder, the applicant filed a further affidavit arguing that the suit at the lower court was withdrawn and that the respondent had no locus standi to take up execution proceedings against him.
7. In response to the issues raised in the applicant's further affidavit, the respondent filed the supplementary affidavit he swore on October 3, 2022. In that affidavit, the respondent inter alia depones that the respondent is either ignorant of the proceedings before court or wants to mislead the court; that the applicant having sued him cannot be heard to claim that he has no locus standi to execute the order issued in his favour after he successfully defended himself; that the belated action of the respondent of withdrawing the suit could not deny him costs of the suit and that the applicant cannot be heard to claim that he was denied an opportunity to be heard after he failed to defend the bill of costs respondent presented to court for taxation.
8. Pursuant to directions given on June 21, 2022, the application was disposed of by way of written submissions.

Submissions

Applicant's submissions

9. In his submissions filed on July 19, 2022, the applicant has reiterated his contention that the respondent did not have locus standi to execute the order for costs issued in his favour as the suit had been withdrawn and a notice of withdrawal served on the respondent by the applicant; that, out of malice, the respondent proceeded in an illegality by filing his bill of costs and obtaining warrants of arrest against the applicant.
10. On the issue of stay of execution pending appeal, reference is made to Order 42 Rule 6(2) of the [Civil Procedure Rules](#) and the case of [JMM vs. PM](#) (2018) E KLR and submitted that this court has discretionary power to grant stay of execution pending appeal. Based on the grounds on the draft memorandum of appeal, it is submitted that the appeal is not frivolous.
11. On the issue of delay in filing the application, it is submitted that the delay is attributable to the fact that the applicant had withdrawn the suit in order to pursue out of court settlement of the dispute he had taken to court with the respondent, who is said to be the applicant's relative, cousin.
12. It is submitted that, unless stay is granted, the applicant will suffer substantial loss as he will be forced to pay Kshs 263,000/= as costs arising from the impugned court proceedings.

Respondent's submissions

13. In his submissions filed on October 3, 2022, the respondent has given a brief overview of the circumstances leading to filing of the instant application and framed two issues for the court's determination. These are:- whether the application before court is competent and whether the applicant should be granted leave to file appeal out of time;
14. On the competency or otherwise of the application, reference is made to the draft memorandum of appeal annexed to the affidavit in support of the application and pointed out that the decision sought to be appealed is the one delivered on December 12, 2021, dismissing the application dated September 14, 2021.



15. Terming the application incompetent and incurably defective, the respondent submits that the application has nothing to do with the taxed costs and the decree issued in respect thereof. Explaining that the order in respect of which the application is premised is a negative order (order of dismissal), the respondent submits that the order is incapable of being stayed. Even assuming that an order of stay could issue, it is submitted that stay would still not issue in favour of the applicant because the Memorandum of Appeal does not challenge the decree for costs issued in favour of the respondent. In effect, the respondent submits that the application is fatally defective for failure to specify the orders the applicant is challenging.
16. On whether the applicant has made up a case for being granted leave to file appeal out of time, it is submitted that no plausible reason has been given by the applicant for the inordinate delay in applying for leave to file appeal out of time. It is pointed out that the applicant was at all times represented by counsel and submitted that there is no explanation for the delay in challenging the taxation of costs.
17. Terming the application an abuse of the process of the court, the respondent contends that the application dated September 14, 2021, whose outcome the intended appeal is premised, was an application for review disguised as an application for setting aside ex parte proceedings.
18. Based on the decision in the case of *Gerald Kithu Muchanje vs. Cathrine Muthoni Ngare & another* (2020)e KLR it is submitted that the applicant has no right of appeal against the outcome of the application dated September 14, 2021.
19. It is further submitted that the grounds of appeal in the draft Memorandum of Appeal and the prayers are not in sync with the grounds and import of the application and the affidavit in support thereof.
20. Terming the application an afterthought meant to deny the respondent the fruits of his taxed costs, the respondent maintains that the applicant has not made up a case for being granted the orders sought.
21. On whether stay should be granted, it is reiterated that the application is incurably and fatally defective; that no plausible or good cause has been shown for the inordinate, unreasonable and inexcusable delay in bringing the application and submitted that the applicant has not demonstrated how stay of orders emanating from the ruling delivered on December 22, 2021 are going to assist him.
22. Arguing that there is no nexus between the ruling of December 22, 2021 and the invitation of the court to look at the taxed costs, the respondent submits that this court lacks jurisdiction to scrutinize the taxed bill as there is no reference before it concerning the taxed bill.
23. Explaining that the order for costs was made on September 8, 2021 and not December 22, 2021 the respondent submits that challenge of the orders of December 22, 2021 whose orders are different from those of September 8, 2021 cannot form a basis of staying the orders of September 8, 2021. Further, that the applicant has not demonstrated that the respondent would not be able to refund the sum paid in satisfaction of the decree.

Power of the court to grant leave to file an appeal out of time

24. This court has discretionary power to grant leave to file an appeal out of time. That power is granted by Section 79G of the *Civil Procedure Act*. In that regard see the case of *Edward Kamau & Another vs. Hannah Mukui Gichuki & Another* where it was stated:-

“On whether this court should grant extension of time for filing an appeal, the applicable law is section 79G of the *Civil Procedure Act*...



Under the proviso to the said section 79G of the *Civil Procedure Act*, an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

25. In the case of Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, SC Appl 16/2014 (unreported) the Supreme Court laid down the following as the underlying principles that a court should consider in exercise of discretion to extent time: -
- i. Extension of time is not a right of a party. It is equitable remedy that is available to a deserving party at the discretion of the court;
 - ii. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - iii. As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case-by-case basis;
 - iv. Where there is a reason for the delay; the delay should be explained to the satisfaction of the court;
 - v. Whether there will be any prejudice to be suffered by the respondents if the extension is granted;
 - vi. The application should have been brought without undue delay; and
 - vii. In certain cases, like election petitions, public interest should be a consideration for extending time.”
26. In the circumstances of this case, the application for leave to file appeal out of time was filed on February 10, 2022 about 2 months from the date the decision sought to be appealed from was made, December 22, 2021. No reasonable account or explanation has been given for the delay in filing the appeal. The applicant has merely stated that the delay was occasioned by his late instructions to his counsel on record. The averments contained in the applicant’s further affidavit filed on July 19, 2022 do not help things as there is no attempt to offer any plausible explanation for the delay in filing the appeal or application for leave to appeal out of time. In that affidavit, the respondent claims that he had withdrawn the suit to pursue out of court settlement, a fact not supported by the evidence in the court record, namely the notice of withdrawal dated May 19, 2021, BKK-1. That notice is indicated to be in respect of an application dated April 13, 2021 and not the suit. In the circumstances, the averment by the applicant that he had withdrawn the suit to pursue out of court settlement is not factually correct.
27. Although the delay of two months in filing the application is not so inordinate to warrant denying the applicant leave to file appeal out of time, the manner in which the applicant has packaged his application and the intended appeal does not strike this court as a person who knows what he wants. Whereas the intended appeal appears to be premised on alleged improper exercise of discretionary power vested in the Trial Magistrate by refusing to set aside the ex parte proceedings that the applicant sought to be set aside; the applicant appears to be challenging the decree for costs emanating from the impugned ex parte proceedings. To me, it appears the applicant was awakened from slumber land by the taxed bill of costs obtained against him. No explanation, whatsoever has been offered why the applicant did not defend the bill of costs presented by the respondent for taxation. I agree with the respondent that, in the absence of any reference before this court, this court lacks jurisdiction to scrutinize and pronounce itself on the taxed bill of costs.



28. With regard to the applicant's contention that the respondent had no locus standi to execute the order for costs, I agree with the respondent that the applicant having taken the respondent to court cannot be heard to claim that the respondent lacks capacity to execute the order for costs issued in his favour after he successfully defended the suit the applicant instituted against him.
29. I have already addressed the other reason, given by the applicant for arguing that the respondent had no capacity to execute the order for costs given in his favour; to wit, the suit had already been withdrawn. I pointed out that what was withdrawn was the application the applicant had filed in court and not the suit. Moreover, by the time the applicant purportedly withdrew the application, the court had already pronounced itself on the dispute brought before it. There was therefore, no suit on which the application for withdrawal could hinge on.
30. It deeply pains the court to say that the approach used by the applicant, who is represented by counsel, paints him as a person who is not sure what he wants. This observation, should act as a wakeup call to advocates, to provide proper counsel to their clients and take every necessary effort in protecting their client's interests. In the circumstances of this case, no explanation, whatsoever was offered for the applicant's failure to defend the bill of costs the respondent presented before court for taxation and the failure to challenge it through the legally recognized procedure, filing a reference before this court.
31. The upshot of the foregoing is that the applicant has not made up a case for exercise of the discretionary power vested in this court in his favour. Consequently, I dismiss the notice of motion dated February 9, 2022 with costs to the respondent.
32. Orders accordingly.

Dated, signed and delivered, at Iten this 8th day of December, 2022.

L. N. WAITHAKA

JUDGE

Ruling delivered in open court in the presence of:

Mr. E. K. Kiptoo for the Appellant

Ms. Koech for the Respondent

Christine Towett: Court Assistant

