



**Kubai v Thobia (Environment and Land Miscellaneous Application
E007 of 2021) [2022] KEELC 15220 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15220 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E007 OF 2021**

CK YANO, J

DECEMBER 7, 2022

BETWEEN

MARY NKIROTE KUBAI APPLICANT

AND

STEPHEN MUKARIA THOBIA RESPONDENT

RULING

1. The applicant herein moved this court by the notice of motion dated February 23, 2021 brought under order 51 rules 1, order 42 rule 6 of the *Civil Procedure Rules* and section 3, 3A 63 (3) and 79 (a) 1 & 1A of the *Civil Procedure Act* and all enabling provisions of law. The applicant mainly seeks for leave to appeal out of time and stay of execution of the judgment and decree in Tigania PMCC ELC No 111 of 2003 pending the hearing and determination of this application and the intended appeal.
2. The application is supported by the affidavit of Mary Nkirote Kubai, the applicant sworn on February 25, 2021 and is premised on the following grounds.
 - i. That judgment in that case was delivered on December 15, 2020.
 - ii. That on January 5, 2021, the applicant's advocate applied for certified copies of the proceedings and judgment which were never supplied in time
 - iii. That the proceedings and judgments were supplied on February 22, 2021.
 - iv. That the delay in filing the appeal was because of being supplied with proceedings and judgment late.
3. In the supporting affidavit, the applicant has annexed copies of certificate of delay, letters requesting for certified copies of the proceedings and judgment and draft memorandum of appeal.



4. The applicant avers that she has no alternative land and depends entirely on the suit land. That appeal is a constitutional right but there was delay in supplying the proceedings and judgment to enable her file the appeal.
5. In opposing the application the respondent filed a replying affidavit sworn by himself on March 10, 2021. He states that judgment in this matter was delivered in the presence of the parties and their advocate on December 15, 2020 and that the file was always in the registry contrary to the averments by the applicants. That the applicant herein applied for typed proceedings in January, 2021 while the judgment was read on December 15, 2020, and that if she intended to appeal, she should have applied for proceedings and judgments immediately the judgment was read. That the applicant is guilty of delay. The respondent wondered how the letter requesting for proceedings was received if the file could not be traced. The respondent avers that there is no receipt annexed showing that the applicant paid for the proceedings, hence proceedings could not have been typed without payment of court fees. That annexure 2 explaining that the court file was missing is a mere fabrication intended to mislead the court into granting the orders. The respondent further avers that the orders of stay of execution cannot legally be granted in this miscellaneous application and that it can only be sought when the appeal is filed. The respondents contends that the application herein is merely meant to deny him the fruits of his judgment.
6. The application was canvassed by way of written submissions. The applicant filed her submissions on August 4, 2022 in which she reiterated that the judgment was delivered in the absence of her advocate. That she requested for the proceedings timeously on January 5, 2021 given that judgment was delivered on December 15, 2020 and by then advocates for the applicant had closed their offices for the christmas holiday and requested for the proceedings and judgment immediately they reopened. It is submitted that the respondent will not be prejudiced in any way as he will be given a chance to oppose the appeal on merit
7. In his submissions filed on August 11, 2022, the respondent repeated the averments in the replying affidavit.
8. I have considered the application the response and the rival submissions. In my opinion, the issues for determination is whether leave should be granted to the applicant to appeal out of time and whether stay of execution of the judgment in Tigania ELC No 111 of 2013 should be granted pending the hearing and determination of the intended appeal.
9. The decision which is sought to be appealed is from the lower court. Under section 79G of the *Civil Procedure Act*, appeals from the decisions of the subordinate court to the High court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section however allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.
10. The principle upon which the court should exercise the said decision and grant leave to appeal out of time are now well settled. The court ought to consider the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted (see *Leo Sila Mutiso v Rose Hellen Wangari Mwangi – Civil Application No NAI 255 of 1997* (unreported) and *Thuita Mwangi v Kenya Airways Limited [2003] eKLR*. The question therefore is whether taking into account the facts of this instant case, the applicant has satisfied the said conditions.



11. As for the length of the delay, the judgment of the trial court was delivered on December 15, 2020 while the instant application was filed on February 26, 2021. The application has been brought after a period of about two months, this is considering that the period between 21st December and 6th January is not counted in law. It is my considered view that the application has been brought without unreasonable delay.
12. In justifying the said delay, the applicant deposed that she applied for copies of the proceedings and judgment but that the same were supplied on February 22, 2021 when the 30 days within which to file appeal had lapsed. It is the applicant's contention the delay was not deliberate and the applicant has exhibited copies of letters requesting for the proceedings and judgment and the certificate of delay issued by the court. It is my opinion that the reason for the delay is well explained and reasonable and the delay was not inordinate.
13. As for the chances of the appeal succeeding, the court has perused the draft memorandum of appeal. The same inter alia faults the trial magistrate for allowing the respondent's claim when there was no evidence to support the claim, and for dismissing the applicant's counterclaim when there was evidence of fraud. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court, one which is not frivolous. (see *Joseph Gitabi Gachau & another v Pioneer Holdings (A) Ltd & 2 others*, Civil Application No 124 of 2008). In my view, the intended appeal raises triable issues and is not frivolous.
14. As for the prejudice which the parties might suffer, the respondent has merely averred that the application before court is meant to deny him the fruits of judgment, but has not come out clearly what the prejudice would be. However, the applicant on her part has stated that she stands to suffer irreparable loss if evicted from the suit property.
15. Where a party is aggrieved and wishes to pursue an appeal, it would be fair to exercise discretion in his/her favour and especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way. The applicant having expressed her intention to be heard by this court on appeal, it is my considered opinion that she ought to be given an opportunity to pursue the appeal since the delay is not inordinate.
16. The other issues to consider is whether the order of stay of execution should be granted. The purpose of a stay order is to prevent the intended appeal from being rendered nugatory and the court will also consider whether the applicant will suffer substantial loss if the stay is not granted.
17. It is trite law that before grant of stay of execution of a decree or order, the applicant is supposed to satisfy the requirements set under order 42 rule 6(2). Generally, stay of execution is provided for under order 42 rule 6 of the *Civil Procedure Rules*. Sub rule 1 gives the court discretionary powers to stay execution. The said provisions states that the applicant must satisfy the court that substantial loss may result to the applicant unless the order is made, that the application has been made without unreasonable delay and such security as the court orders for due performance of such decree or order as may ultimately be binding on the applicant has been given.
18. The power of the court is discretionary and the discretion should be exercised in such a way as not to prevent justice. Further the general principle in granting or refusing a stay is if there is no other overwhelming hindrance, a stay must be granted so that an application may not be rendered nugatory should the court reverse the lower court's decision. Therefore, for the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.



19. In the case of *Kenya Shell Limited v Benjamin Karuga Kigubu & another* (KAR 1018), the court of Appeal stated that:

“It is usually a good rule to see if order XLI rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay”

20. In this case, the applicant has stated that if she is evicted, she will suffer irreparable loss as the suit property is where she was born and as such will be rendered destitute. In my view, if the applicant is evicted as alleged, the loss suffered by the applicant will be irreversible and may render the intended appeal nugatory. Accordingly, the court will grant the order of stay of execution but on condition.

21. The court will thus make the following orders-;

1. Leave is hereby granted to the applicant to file appeal out of time.
2. The appeal shall be filed and served within 14 days from the date of the ruling herein.
3. Stay of execution of the judgment and decree in Tigania PMCC ELC case No 111 of 2013 is granted on condition that the applicant deposits Kshs 100,000/= in court as security within 30 days from the date herein and in default the stay shall lapse.
4. Costs of the application to the respondent in any event.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF DECEMBER, 2022.

In the presence of

Court assistant – Kibagendi

No appearance for applicant

No appearance for respondent

C K YANO

ELC JUDGE

