



REPUBLIC OF KENYA



**Achieng v Onyango (Environment and Land Miscellaneous Application
E008 of 2023) [2024] KEELC 385 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 385 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E008 OF 2023
GMA ONGONDO, J
FEBRUARY 1, 2024**

BETWEEN

JOASH FREDRICK OTHUON ACHIENG APPLICANT

AND

SAMUEL OCHIENG ONYANGO RESPONDENT

RULING

1. On 19th October 2023, the applicant through Opola and Associates Advocates mounted an application by way of a Notice of Motion dated 4th October 2023 pursuant to, inter alia, Sections 3A, 79G and 95 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya as read with Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010. He is seeking the orders infra;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That this Honourable Court do grant leave to the intended appellant to file the record of appeal out of time.
 - e. That this honourable court be pleased to stay the execution of the orders/judgment of 16th March 2022 pending the hearing and determination of the applicant's intended appeal.
 - f. That the costs be in the cause.
2. The anchorage of the application is the applicant's unsigned affidavit and documents marked as "JOA-1" to "JOA-4" annexed thereto which are: a copy of the impugned judgment, a copy of a notice of appeal dated 23rd March 2022, a copy of the letter to the Executive Officer requesting for certified copy of the proceedings, certified copy of the proceedings and a draft memorandum of appeal.



3. From the Notice of Motion hereinabove referenced, the applicant's case is that on 16th March 2022, the trial court in Homa Bay Law Courts Environment and Land Case No. 32 of 2019 entered judgment against him. That on 23rd March 2022, he filed a notice of appeal and accordingly applied for a copy of the proceedings. That after several follow ups, he was able to obtain the certified copy of the proceedings on 21st August 2023, hence the delay in lodging an appeal herein. That there is a likelihood of the respondent executing the trial court's judgment thereby occasioning him irreparable loss. That no prejudice will be suffered by the respondent should the instant application be allowed.
4. The application is unopposed.
5. On 9th November 2023, the court ordered and directed that the application be argued by way of written submissions pursuant to Order 51 Rule 16 of the *Civil Procedure Rules*, 2010. See also Practice Direction No. 32 of the Environment and Land Court Practice Directions, 2014.
6. Consequently, learned counsel for the applicant filed submissions dated 15th November 2023 and identified a single issue for determination thus: whether the application is merited. Briefly, learned counsel submitted that the delay in lodging the appeal was occasioned by failure to obtain proceedings of the trial court in time. That the appeal is arguable with high chances of success.
7. Further, counsel stated that executing the trial court's judgment would render the intended appeal nugatory and no prejudice will be occasioned to the respondent if the instant application is allowed. Thus, counsel urged the court to allow the application as prayed. To fortify his submissions, counsel relied on various authorities including the case of *Butt -vs- Rent Restriction Tribunal* (1979) eKLR.
8. The respondent did not file any submissions herein.
9. From the foregoing, the following are the issues for determination:
 - a. Whether the applicant has proved the conditions set for grant of leave to file an appeal out of time;
 - b. Whether the applicant has proved the conditions set for grant of orders of stay of execution; and
 - c. Who should bear the costs of the instant application?
10. It is important to note that an unsigned supporting affidavit is fatally defective and of no value to the applicant's motion. Addressing itself to the effect of an unsigned affidavit, the Supreme Court in *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* (2018) eKLR, observed that such an affidavit is of no legal value to the matter before the court and that, in so far as it is defective, it is deemed that there is no affidavit on record.
11. On the first issue, Section 75 of the *Civil Procedure Act* Chapter 21 Laws of Kenya sets out the orders from which appeal lies. Section 79 G of the same *Act* stipulates the time for filing of appeals from subordinate courts.
12. Order 50 Rules 4, 6, 7 and 8 of the *Civil Procedure Rules*, 2010 provides for when time does not run, power to enlarge time, enlargement of time and computation of days respectively.
13. It is trite law that an applicant for extension of time must show good and substantial reasons for the delay, and, prima facie good cause why the intended appeal should be heard. That the court has to balance the competing interests of the applicant with those of the respondent, see *M/S Portreitz Maternity v James Karanga Kabia* Civil Appeal No 63 of 1997.



14. This court is guided by the Supreme Court of Kenya decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* {2014} eKLR, where the court set out the considerations to guide the court in exercising its discretion in cases of this nature. It stated: -
- a. "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;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
15. The applicant's counsel stated that the delay in filing the memorandum of appeal was occasioned by impediment in obtaining the trial court's proceedings. That although judgment of the trial court was delivered on 16th March 2022 and a request for the certified copy of the proceedings made on 23rd March 2022, the same was only availed to the applicant on 21st August 2023.
16. This court is conscious of the rights of the applicant under Articles 48, 50 (1) as read with Article 25 (c) of the *Constitution* of Kenya, 2010. Although the applicant did not produce a certificate of delay herein, it is not the intention of this court to deprive the appellant his right of appeal as enshrined in the said Constitutional provisions.
17. Clearly, the applicant is entitled to appeal herein as per the view held in *Palata Investment Limited v Butt & Sinfield Ltd* (1985) 2 ALL ER 517 (CA) as well as the decision in Butt case (*supra*) that;
- "...The appellant has an undoubted right of appeal."
18. As regards the second issue, the applicant's counsel submitted that there is a likelihood of the respondent executing the trial court's judgment thereby occasioning him irreparable loss. That such execution would also render the intended appeal nugatory. He averred that no prejudice will be suffered by the respondent should the instant application be allowed.
19. The conditions concerning grant of an order for stay of execution are stipulated under Order 42 Rule 6(2) (*supra*), which provides in part thus:
2. No order for stay of execution shall be made under subrule (1) unless:
 - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. (Emphasis supplied)



20. It is noteworthy that the judgment sought to be stayed is that dismissing the applicant's suit with costs to the defendant.
21. This court subscribes to the Court of Appeal decision in *Pharmacy and Poisons Board & another v Mwiti & 21 others* (2021) KECA 97 (KLR) where the court remarked thus:

“...A negative order dismissing an application cannot be stayed...”
22. In light of the foregoing, it is my considered view that the applicant has failed to advance sufficient and good reason for the grant of the order of stay of execution of the trial court's judgment as provided for under Order 42 Rule 6(2) (*supra*).
23. The upshot is that only prayer 4 sought in the application dated 4th October 2023 as set out in paragraph 1(d) hereinabove, is hereby granted accordingly. For clarity, prayer 5 for stay of execution of the trial court's judgment is declined thereby.
24. The applicant's counsel shall file the appeal and serve the record of appeal within thirty (30) days from this date.
25. Costs of the application to abide the prospective appeal.
26. It is so ordered.

DELIVERED, SIGNED AND DATED AT HOMA BAY THIS 1ST DAY OF FEBRUARY 2024.

G M A ONGONDO

JUDGE

Present

1. Applicant
2. Terrence, Court Assistant

