



**M'Bachu v Bokole & another (Environment and Land Appeal
8 of 2023) [2024] KEELC 5187 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5187 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 8 OF 2023**

EK MAKORI, J

JULY 4, 2024

BETWEEN

JAMES GICHURU M'ITINYAI M'BACHU APPLICANT

AND

FERDINARD CHARO BOKOLE 1ST RESPONDENT

COUNTY GOVERNMENT OF KILIFI 2ND RESPONDENT

RULING

1. The pending application dated 7 September 2022 seeks to extend the time within which to appeal, stay of execution, injunction to restrain the respondent from further construction on the suit property, and a site visit with costs. I did not see any response from the respondents.
2. Based on the materials I have before me, I believe the issues for the Court's determination to be whether to extend the time within which to appeal, stay of execution, and who should bear the costs of the application.
3. The applicant, in his affidavit deposed on 7 September 2023 and a further one dated 19 October 2023, avers that the judgment in Mariakani ELC No. 166 of 2015 – James Gichuru M'itinyai M' Bachu v Ferdinard Charo Bokole & another was delivered on 22 March 2022. The reason for failing to file an appeal within the time limit was that the typed proceedings and judgment were obtained late, hence the delay. He also states that he fell sick and had to attend treatment. He also says that despite the current appeal being filed, the respondent has continued to act with impunity and has erected a permanent building on the disputed portion. He believes that from the filed Memorandum of Appeal, he has an arguable appeal with a high chance of success, hence the need to preserve the status quo or the substratum of the suit pending the hearing and determination of the intended appeal so that the appeal is not rendered nugatory.



4. Section 79G of the *Civil Procedure Act* provides:

“Every appeal from a subordinate court to the High Court shall be filed within a period of 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. Judgment in this matter was delivered on 22 March 2022. The applicant filed the Memorandum of Appeal herein on 28 August 2023. It took over 17 months to lodge the appeal. The applicant asserts that he could not procure the proceedings and judgment in good time, and at the same time, he fell sick. The applicant’s request to file an appeal out of time may only be accepted if he satisfies the Court that he had good and sufficient cause for not filing the appeal in good time. The Supreme Court of Kenya, in the case of *County Executive of Kisumu v County Government of Kisumu & others [2017] eKLR*, while relying upon its decision in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others [2014] eKLR*, reiterated the considerations to be made before grant of extension of time as follows:

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 for 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. Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the 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.”

6. This Court has considered the delay from 22 March 2022 to 28 August 2023, and the reasons provided for the delay are not germane. The applicant has not shown that he applied for typed proceedings and judgment and was denied. The sickness he alludes to did not impair his ability to seek redress in this Court. He did not state why he could not file a Memorandum of Appeal in good time. No certificate of delay has been provided. The applicant was not vigilant in bringing up the appeal. I, therefore, find that the applicant’s 17-month delay is inexcusable.

7. On the issue of stay of execution pending appeal, Order 42 Rule 6 of the *Civil Procedure Rules* provides as follows:

“Stay in case of appeal [Order 42, rule 6.

1. 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.”

8. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417, the Court of Appeal gave guidance on how a Court should exercise discretion in an application of a stay of execution and held that:

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. 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 appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute, and the appellant had an undoubted right of appeal.
5. The court, in exercising its powers under Order XLI rule 4(2)(b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

9. Without delving into the merits of the learned Magistrate’s judgment, the case before him involved a boundary dispute essentially. The plaintiff was alleging encroachment by the 1st defendant, which allegedly was a creation of the 2nd defendant. No evidence was presented to show the actual size of the plaintiff’s plot, vis a vis that of the 1st defendant, leading to the dismissal of the suit. The Magistrate opined that the plaintiff’s pleadings were not specific and did not plead for rectification of the boundary between his plot and that of the 1st defendant.

10. In ELC matters, the Court is usually concerned with preserving the suit’s substratum pending appeal. In this case, the Lower Court found no boundary feud existed between the plaintiff and the 1st defendant.

11. Flowing from the preceding, I am equally not satisfied that the applicant has set out a case for himself for this Court to grant him a stay of execution pending appeal. In any event, I already found that extending the time to appeal is untenable, as has been sought. It is my opinion that the prayer for stay cannot also succeed.



12. The upshot is that the application dated 7 September 2022 is hereby dismissed with no order as to costs since the respondents did not participate.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 4TH DAY OF JULY 2024 WITHOUT PARTIES WHO WERE INFORMED OF THE SAME. THE DEPUTY REGISTRAR OF THIS COURT IS TO NOTIFY THE PARTIES OF THE OUTCOME.

E. K. MAKORI

JUDGE

