



Nchani v Salesa & 2 others (Environment and Land Miscellaneous Application 1 of 2023) [2024] KEELC 6603 (KLR) (8 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6603 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 1 OF 2023
PM NJOROGE, J
OCTOBER 8, 2024**

BETWEEN

JOTHAM KIAMBI NCHANI APPELLANT

AND

KALIMA SALESA 1ST DEFENDANT

ROBA GURA 2ND DEFENDANT

COUNTY GOVERNMENT OF ISIOLO 3RD DEFENDANT

RULING

1. The application in this matter was filed on 8th November, 2023. The application is supported by the affidavit of Jotham Kiambinchani, the applicant and seeks the following orders;
 1. That pending the hearing and determination of this application, an interim order do issue, staying the execution of the judgment in Isiolo ELC No. 85 of 2014, delivered on 19/9/2023.
 2. That there be an order of stay of execution/implementation of the decree of the court pending the hearing and determination of the intended appeal.
 3. That the Honourable Court be pleased to extend time to the applicant to file appeal against the decision/judgment of the Isiolo Senior Resident Magistrate in ELC. 85 of 2014, delivered on the 19/9/2023.
 4. There be no orders as to costs.
2. The application has the following grounds;
 - i. That the applicant was dissatisfied with the judgment of the court which was delivered on the 19/9/2023 in Isiolo ELC No. 85 of 2014.



- ii. That the judgment of the court was delivered online and sent via email and the applicant was unaware of its delivery and was therefore unable to seek for a 30 day stay.
 - iii. That the applicant could not have appealed as he was not aware that the judgment had been delivered.
 - iv. The applicant is aggrieved by the judgment of the court and wishes to appeal.
 - v. That it is in the interest of judgment that I be granted leave.
 - vi. That the dispute involves land and there is need to stay the execution of the decree to avoid waste or and alienation of the suit land.
 - vii. That an order of stay will preserve the subject matter till the appeal is heard and determined.
3. The application was canvassed by way of written submissions.
 4. A conspectus of the Applicants' submissions is that the impugned judgment was delivered online and by the time he became aware of the judgment the time stipulated for filing an appeal had lapsed. He submits that the delay was not inordinate and was, therefore, excusable.
 5. The Applicant's Advocate asks the court to issue an order for stay of execution of the impugned judgment. He says that this being a land matter, "Ordinarily" granting of stay does not require an imposition of a monetary condition. In my view, the applicant is through a circuitous route trying to evade the clear strictures stipulated by the law. Order 42 Rule 6(2) of the [Civil Procedure Rules](#) is unequivocal that, no stay of execution shall be made unless the condition requiring security for due performance for ultimate orders is satisfied.
 6. The Respondents, through their advocate have opposed the application. They say that as the applicant had fully participated in the hearing of the suit he cannot avoid his primary responsibility as the plaintiff by failing to know the date fixed for delivery of judgment. The advocate says that filing of an appeal within 30 days is made mandatory by the use of the word shall, provided that an appeal may be admitted out of time if the appellant satisfied the court that he had good and sufficient cause for not filing the appeal on time. The Respondent's Advocate submits that the applicant has not shown any cogent reason for failing to appeal on time.
 7. The Respondents' Advocate submits that as there are no residential houses on the suit land, the applicant had not demonstrated to the court what loss he would incur if stay is not granted. He proffers that the temporary house built on the plot had already been demolished even before the applicant filed his case in the lower court.
 8. Although perhaps these two issues could only be properly canvassed during an actual appeal, the Respondents advocate says:
 - a. That the documentary evidence tendered in the trial court does not prove the Applicants' ownership of the subject land.
 - b. That the Intended Appellant, the applicant, had never applied for the land from the defunct County Council of Isiolo.
 9. The Respondents also take issue with the fact that the applicant has failed to file a draft Memorandum of Appeal to show to the court the grounds the applicant has intended to rely on and to enable the court to gauge the probability of success of the intended appeal to oblivate entertainment of frivolous appeals.



10. I have considered the submissions and the pleadings filed by the parties. I do note that the applicant did not proffer or cite any case authority. I have considered the principles enshrined in the 3 cases cited by the Respondents. These cases are:
 - i. *Gerald M' Limbine v Joseph Kangangi* {2008} eKLR.
 - ii. *In the Matter of Edith Gichungu Kione v Stephen Njagi Thoitbi* {2014} eKLR.
 - iii. *Rajesh Rughani v Fifty Investment Limited & Another* {2005} eKLR.
11. Having perused the judgment delivered by the Hon. Magistrate in the lower court, I do find that the applicant fully participated during the hearing of the case. In my view, it is not a good excuse that he did not know that judgment had been delivered virtually. A diligent litigant ought to have followed up the progress of his suit diligently. To that extent he was veritably indolent. I find that he has not explained to the satisfaction of this court why time for filing of an appeal should be extended. Having so found, I find that it is not necessary to stay the execution of the impugned judgment. This would amount to a pyrrhic endeavor. Furthermore, his claim upon the suit land has very shaky grounds. He never applied for allocation of the suit plots. On the other hand, the respondents had done so, were allocated the plots and were paying rent and rates. The said allocations were through balloting.
12. A court of law cannot countenance a situation where a party allocates upon himself the onus of allocating land to himself. Where the land in question was under the administration of a local authority, the allocating authority was that council. If the litigant was claiming land under customary tenure, there was need for such allocation to be subjected to an adjudication process. Any other method that would allow parties to declare themselves owners of land would spawn veritable confusion and render the administration of justice very difficult. This is not what the law expects. The veritable upshot of what the court is saying is that litigants cannot autonomously allocate land to themselves.
13. In the circumstances, I issue the following orders;
 - a. This application is hereby dismissed.
 - b. Costs shall follow the event and are awarded to the Respondents.

DELIVERED IN OPEN COURT AT ISIOLO THIS 8TH DAY OF OCTOBER, 2024 IN THE PRESENCE OF:

Court assistant: Balozi/Rahma

Caleb Mwiti holding brief for Murango Mwenda for the Applicant.

Miss Mbogo holding brief for Miss Gikundi for the 1st and 2nd Respondents.

HON. JUSTICE P.M NJOROGE
JUDGE

