



**Ngugi v Kungu & 2 others (Environment and Land Miscellaneous Application
E002 of 2024) [2024] KEELC 6500 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6500 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E002 OF 2024
YM ANGIMA, J
OCTOBER 3, 2024**

BETWEEN

ANN WANJIRU NGUGI APPLICANT

AND

SAMUEL NJOROGE KUNGU 1ST RESPONDENT

SETTLEMENT FUND TRUSTEES 2ND RESPONDENT

LUCY WACHUKA NJAU 3RD RESPONDENT

RULING

A. Applicant's Application

1. By a notice of motion dated 06.03.2024 brought pursuant to Order 42 rule 6 of the *Civil Procedure Rules*, 2010, (the Rules) Sections 1A, 1B, 3A, 79G and 95 of the *Civil Procedure* (Cap.21) and any other enabling provisions of the law, the Applicant sought the following orders:
 - a. Spent;
 - b. That the firm of M/S. Waichungo Martin & Co. Advocates be granted leave of the court to come on record for the Applicant in place of M/S. Munene Chege & Co. Advocates.
 - c. Spent.
 - d. That this Honourable court be pleased to grant the Applicant leave to appeal out of time against the ruling read on 07.11.2023 in Nyahururu ELC No. 250 of 2018 - Ann Wanjiru Ngugi -vs- Samuel Njoroge Kungu, Settlement Fund Trustee and Lucy Wachuka Njau.
 - e. That this honourable court be pleased to issue an order for stay of execution of the judgment delivered on the 26.08.2021 in Nyahururu CM ELC No. 250 of 2018 - Ann Wanjiru Ngugi



-vs- Samuel Njoroge Kungu, Settlement Fund Trustee and Lucy Wachuka Njau pending the hearing and determination of the intended appeal.

- f. That the costs of this application be provided for.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Applicant, Ann Wanjiru Ngugi on 06.03.2024. The Applicant contended that her application to set aside the ex parte judgment entered against her was dismissed by the trial court on 07.11.2023 and that she was unable to file her intended appeal within the prescribed period due to the default of her previous advocates in failing to notify her of the outcome of the said application. It was the Applicant's case that she only became aware of the ruling dated 07.11.2023 on 27.02.2024.
3. The Applicant further stated that if she were to be evicted from the suit property at this stage she would suffer substantial loss since she had resided thereon since 1983. It was the Applicant's case that the Respondent had already commenced contempt of court proceedings against her for her failure to vacate the suit property hence she prayed for a stay of execution of the decree to be granted pending the filing, hearing and determination of her intended appeal.

B. Respondent's Response

4. The Respondent filed a replying affidavit sworn on 26.04.2024 in opposition to the said application. It was contended that the Applicant's advocate was present when the ruling dated 07.11.2023 was delivered hence there was no reasonable explanation for the delay of 3½ months in filing the instant application. It was pleaded that in the premises the Applicant had failed to satisfy the principles for extension of time to file an appeal out of time.
5. The Respondent opposed the prayer for stay of execution of the decree on the basis that execution had already been carried out and the Applicant evicted by M/S Tango Auctioneers. It was contended that the Appellant had wrongfully returned to the suit property in consequence whereof he instituted contempt of court proceedings against her. It was thus contended that the Applicant had not come to court with clean hands hence he was not entitled to the prayers sought. As a result, the court was urged to dismiss the application with costs.

C. Directions on Submissions

6. When the application was listed for inter partes hearing, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Applicant filed written submissions dated 03.07.2024 whereas the Respondent's submissions were dated 29.07.2024.

D. Issues for determination

7. The court has perused the Applicant's notice of motion, the replying affidavit in opposition thereto as well as the material on record. The court is of the view that the following are the key issues which arise for determination:
 - a. Whether the Applicant is entitled to leave to change advocates after judgment.
 - b. Whether the Applicant has made out a case for extension of time to file an appeal out of time.
 - c. Whether the Applicant has made out a case for the grant of a stay of execution of the decree.
 - d. Who shall bear costs of the application.



E. Analysis and Determination

Whether the Applicant is entitled to leave to change advocates after judgment

8. The court has considered the material on record. It is evident that the Respondent did not raise any objection to the intended change of advocates by the Applicant. The court is of the view that the Applicant has a legal right to be represented by an advocate of her choice in these proceedings. As a result, the court is inclined to allow the prayer for leave of court to change advocates after judgment.

Whether the Applicant has made out a case for the extension of time to file an appeal out of time

9. The court has considered the material and submissions on record on this issue. Whereas the Applicant contended that she had satisfied the principles for the extension sought, the Respondent contended otherwise. It was the Applicant's case that her failure to file her intended appeal within the prescribed period was not deliberate but was occasioned by her previous advocates' fault. It was her contention that the mistake of her previous advocate should not be visited upon her.
10. The factors to be considered in granting or refusing an extension of time were summarized in the case of *Thuita Mwangi -vs- Kenya Airways Ltd* [2005] eKLR as follows:

“Over the years the Court has, of course, set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the Respondent if the application is granted”

11. The court has noted that the period of delay was about 4 months, that is, the period between 07.11.2023 and 07.03.2024 when the instant application was filed. The court has also considered the explanation rendered for the delay. The Applicant entirely blamed her previous advocates for failing to notify her of the ruling delivered on 07.11.2023. It is noteworthy that the Applicant's application for setting aside the ex parte judgment was dated 13.10.2022. There is no indication at all on record to demonstrate what steps, if any, the Applicant took to follow up on the progress of the matter with her former advocates. The obligation to prosecute a matter or application lies with the litigant who has filed the same. He has an obligation to make all necessary inquiries from his advocates and give full and proper instructions at all material times. A litigant who fails to follow up on his matter more than a year after filing an application is not a diligent one and may not be entitled to an extension of time.
12. The court has also noted that the Applicant has not exhibited a copy of any letter or affidavit from the previous advocates acknowledging the alleged default of failing to notify the Applicant of the ruling dated 07.11.2023. It is noteworthy that the said advocates had sworn an affidavit in support of the setting aside application dated 13.10.2022 in which they indicated that they had failed to notify the Applicant of the hearing date for the defence case due to an administrative error or mistake in their office.



13. The court finds it strange that there was no similar communication from the said advocates in support of the instant application. The court does not find the Applicant's allegation against her former advocates credible. It is also telling that the Applicant has not exhibited a single letter or other communication to her former advocates protesting their alleged failure to brief her on the progress of the matter. As a result, the court finds no credible or plausible justification for the Applicant's failure to lodge her appeal within the prescribed period. The court is thus not inclined to grant the application for an extension of time.

Whether the Applicant has made out a case for the grant of a stay of execution of the decree

14. The court has already found that the Applicant has failed to demonstrate sufficient cause to warrant an extension of time to file her intended appeal out of time. The court is of the opinion that under Order 42 of the *Rules* a stay of execution is only available to a party who has a pending appeal or one who has complied with the requirements for filing an appeal. Since the court has declined to grant an extension of time, it would follow that a stay of execution is not available to the Applicant. The court takes the view that a stay of execution ought not to be granted in a vacuum. As a result, the court is not inclined to grant the stay sought.

Who shall bear costs of the application

15. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Husein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the 1st Respondent who participated in the proceedings shall be awarded costs of the application.

F. Conclusion and Disposal Order

16. The upshot of the foregoing is that save for the prayer for leave to change advocates after judgment, the court finds no merit in the Applicant's instant application. As a consequence, the court makes the following orders for disposal of the notice of motion dated 06.03.2024:
- a. The Applicant is hereby granted leave to change advocates in terms of Order No. 2 of the motion.
 - b. The rest of the orders sought in the said motion are hereby declined.
 - c. The 1st Respondent is hereby awarded costs of the application.

Orders accordingly.

RULING DATED AND SIGNED AT NYANDARUA THIS 3RD DAY OF OCTOBER, 2024 AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS PLATFORM.

Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Gakenia Gicheru for the Applicant

Mr. Gakuhi Chege for the 1st and 3rd Respondents

N/A for the 2nd Respondent



C/A - Carol

