



Titus v Mungai & 2 others (Environment & Land Miscellaneous Case E003 of 2024) [2024] KEELC 6527 (KLR) (9 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6527 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND MISCELLANEOUS CASE E003 OF 2024
LN GACHERU, J
OCTOBER 9, 2024**

BETWEEN

SAMUEL KAMANDE TITUS APPLICANT

AND

PETER KIMANI MUNGAI 1ST RESPONDENT

MARY NYOKABI MWAURA 2ND RESPONDENT

LAND REGISTRAR, MURANG'A 3RD RESPONDENT

RULING

1. The Notice of Motion Application for determination is the one dated 7th February, 2024, and filed on 12th February 2024, brought under Section 79G of the *Civil Procedure Act*, Order 42 and Order 51 of the Civil Procedure Rules, wherein the Applicant has sought for orders;
 1. That the Law Firm of Kanyi Kiruchi & Co Advocates, be allowed to come on record for purposes of appeal in place of the Law Firm of J. NGUMO & Co Advocates, for the appellant/ applicant.
 2. That this Court be pleased to grant leave to the Intended Appellant/ Applicant to file this Appeal out of time as per the annexed memorandum of appeal.
 3. That this Court be pleased to order for stay of execution of all that judgment/decree in relation to land parcel Loc. 6/ Gikarangu /1418 now sub-divided to Loc. 6/Gikarangu/ 4505 and Loc. 6/Gikarangu/450 pending the hearing and determination of the appeal herein.



4. That the costs of this Application be provided for.
2. The Application is supported by the annexed Affidavit of Samuel Kamande Titus, sworn on 7th February, 2024, wherein he averred that he was the Plaintiff in MCL & E E93 of 2019 (Chief Magistrate’s Court at Murang’a), wherein Judgment was entered on 14th December 2023, in favour of the Respondents.
3. That though Applicant was dissatisfied with the said Judgment, he failed to file an Appeal within the prescribed time, and now seeks this Court’s leave to file an appeal against the said Judgement of the trial court out of time.
4. Further, that the Applicant has changed his Advocates for purposes of the Intended Appeal from the Law Firm of J. NGUMO & Co Advocates, who were on record in the proceedings before the trial Court to the Law Firm of Kanyi Kiruchi & Co Advocates.
5. It was the Appellant/ Applicant’s contention that following the delivery of the Judgment of the trial Court on 14th December 2023, the Law Firm of J. NGUMO & Co Advocates, which was representing him, closed their offices for Christmas vacation and resumed work on or about 15th January, 2024, which closure caused delay in terms of obtaining a copy of the Judgment of the trial Court for purposes of preparing an appeal against the said Judgement.
6. It is the Applicant’s further contention that he resides on land parcel Loc. 6/Gikarangu/1418, now sub-divided to Loc. 6/Gikarangu/4505 and Loc. 6/Gikarangu/4504 (the suit property), and the same is his ancestral/family land. He alleged that the 1st Respondent who is his elder brother illegally sub-divided the suit land, and sold it to the 2nd Respondent with the connivance of the 3rd Respondent.
7. The Applicant alleged that the delay in filing the intended appeal was occasioned by the time spent in tracing a new Law Firm that would represent him in the said intended Appeal, as well as the time expended by his current Advocates in familiarizing themselves with the proceedings before the trial Court, in order to prepare the instant application as well as the Intended Appeal.

The 1st and 2nd Respondents’ Response

8. The 1st and 2nd Respondents opposed the instant Application through the Replying Affidavit sworn by J.N. KIRUBI Advocate on 12th March, 2024, in his capacity as the Advocate on record for the two Respondents. He averred that the instant Application as frivolous, vexatious and an abuse of the due process of the Court.
9. With respect to the Applicant’s prayers NO. 2 and 3, he averred that this Court has unfettered discretion in regard to the two prayers, and he left it to the Court to rule on the same. However, the deponent opposed the Applicant’s prayer No.4, which seeks for stay of execution of the trial Court’s Judgment on grounds that land parcel number Loc. 6/Gikarangu/1418, has now been sub-divided to Loc. 6/Gikarangu/4505 and Loc. 6/Gikarangu/4504.
10. He argued that the 1st and 2nd Respondents did not file a Counter-Claim to the Applicant’s suit before the trial Court, and no execution can arise from a dismissed suit. He characterized the Applicant’s prayer for stay of execution as misadvised and an abuse of the process of the Court, because the 1st and 2nd Respondents did not obtain any decree from the trial Court to be executed against the Applicant.



11. The instant Application was canvassed by way of written submissions. The Appellant/ Applicant filed his submissions on 6th May 2024, through Kanyi Kiruchi & Co Advocates. The 1st and 2nd Respondents filed their submissions dated 16th May 2024, through the Law Firm of Kirubi Mwangi Ben & Co Advocates. The 3rd Respondents did not participate in this Application, and thus did not file any submissions.

The Applicant/intended Appellant's Submissions

12. In his Submissions, the Intended Appellant/ Applicant submitted that Land parcel No Loc. 6/ Gikarangu/1418, was originally owned by his father now deceased (Titus Ngugi), and was registered in the 1st Respondent's name being the eldest son of their father following the demise of the latter to hold the same in trust for himself and the Applicant.
13. He further submitted that on or about year 2015, the 1st Respondent, without informing the Applicant, subdivided land parcel number Loc. 6/Gikarangu/1418, to form land parcel numbers Loc. 6/Gikarangu/4505 and Loc. 6/Gikarangu/ 4504, using fake or inauthentic Letters of Administration in respect of their late father's estate.
14. The Applicant isolated two issues for determination by this Court namely:
- i. Whether the Court should allow the appeal to be filed out of time?
 - ii. Costs of the suit.
15. It was the Applicant's further submission that the delay of 62 days in initiating the instant Appeal against the decision of the trial Court dated 14th December, 2024, was caused by his Advocates on record at the trial Court, who were away for Christmas holidays from late December 2023 until 15th January 2024 therein, occasioning a delay in requesting for and the supply of a copy of the Judgment of the trial Court. That his Advocates on record at the trial Court did not advise him as to the timelines for the filing of an appeal.
16. Citing the provisions of Section 79G of the *Civil Procedure Act*, the Applicant submitted that the Court's discretion to extend the time for filing an appeal out of time needs to be exercised within the principles of the law, while considering all the relevant factors in the Application before the Court.
17. Reliance was placed in the holding of the court in the case of *Omar Surie V Marian Rasbe Yafar (Civil Application Number 107 of 2020)*, where the court held that;
- “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.”
18. Further reliance was sought in the holding of the Court in the case of *Butt v Rent Restriction Tribunal [1982] KLR 417*, where the court 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.”
19. On the issue of costs, the Applicant relied on the decision of the Court in the case of DGM V EWG [2021] eKLR, whereby, the Court referred to the reasoning in the case of Party of Independent Candidates of Kenya & Another V Mutula Kilonzo & 2 Others (2013) eKLR.

The 1st and 2nd Respondents' Submissions

20. The 1st and 2nd Respondents filed their written submissions dated 16th May, 2024, through the Law Firm of Kirubi, Mwangi Ben & Co Advocates, and submitted that while they were not opposed to the Applicant's prayer No 1, it was the duty of the Applicant's new advocates to ensure that the instant Application is served on the Advocates sought to be replaced.
21. They also submitted that they are not opposed to the Applicant's prayer No 3, and left it to this Court to exercise its discretion with regard to the said prayers, as it may deem fit. However, they submitted that the Applicant's prayer No 4, is not capable of being allowed by the Court because they did not file a Counter-Claim against the Applicant's suit at the trial Court.
22. It was their further submission that the Applicant's suit having been dismissed by the trial Court, no resultant Decree can arise from a dismissed suit which Decree the 1st and 2nd Respondents could then execute as against the Applicant.
23. Further, they submitted that following the dismissal of the Applicant's suit with costs to the 1st and 2nd Respondents, the Court became *functus officio* with respect to the suit before it; therefore, the Applicant's prayer for stay of execution was without merit.
24. The court has considered the instant Notice of Motion, the relevant provisions of law, the rival written submissions and cited authorities and finds the issues for determination are;-
 - I. Whether the Applicant/Intended Appellant is entitled to the Orders sought?
 - II. Who shall bear the costs of the suit?
 - i). Whether the Applicant/Intended Appellant is entitled to the Orders sought?



25. In determining this issues, the court will rely on various decided cases, and then juxtapose the findings thereon with the circumstances of this case, and then arrive at its own finding. In the case of *Portreizt Maternity Vs James Karanga Kabia Civil Appeal No. 63 of 1997* the Court held that:

“That right of Appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right...”

26. Further, Section 79G of the *Civil Procedure Act* states as follows:

“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 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.”

27. This court will refer too to the case of *Githau v Kagiri & another (Civil Appeal 314 of 2023)* [2024] KEHC 6320 (KLR) (30 May 2024) (Ruling), where the Court declared as follows:

“It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicants must satisfy the court that that they have good and sufficient cause for filing the appeal out of time.”

28. The Supreme Court of Kenya in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR, reasoned as follows:

“The underlying principles a court should consider in exercise of such discretion should include:

- a. Extension of time is not a right of any 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 by 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 respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.”

29. With regard to the Court’s power to grant an Applicant a stay of execution, in the case of *Butt vs Rent Restriction Tribunal* [1982] KLR 417, the Court declared inter alia that:

- a. The power of the court to grant or refuse an Application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.



- b. The general principle in granting or refusing a stay is: if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory...”
30. This Court has considered the pleadings and rival submissions of the parties filed in the instant suit and with respect to the Applicant’s prayer No 2, the Court notes that the Applicant changed his Advocates and appointed the Law Firm of Kanyi Kiruchi & Co Advocates for purposes of the instant Application and the Intended Appeal whereas, at the trial Court he was represented by the Law Firm of J. NGUMO and Co Advocates.
31. The provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that a change of Advocates after judgment has been entered must be through an Order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate.
32. Order 9 Rule 9 of the Civil Procedure Rules provides as follows:
- “When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
- a. upon an application with notice to all the parties; or
- b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
33. The Applicant/Intended Appellant has not placed any evidence before the Court showing that his Advocates on record at the trial Court were served with the instant Application through which they are sought to be replaced, as per his prayer No 2; or, that a consent was executed between his previous Advocates on record and the Law Firm of Kanyi Kiruchi & Co Advocates.
34. Though, this Court is persuaded that the explanation offered by the Applicant for the delay in initiating the Intended Appeal is satisfactory, however, the requirements of Order 9 Rule 9 of the Civil Procedure Rules are mandatory requirements meant to protect the legal profession or outgoing advocates from being short-changed by clients who may elect to act in person or instruct a new Firm of Advocates for purposes of an appeal without first settling their accounts with their advocates on record in the proceedings before the trial Court.
35. In the case of James Ndonyu Njogu v Muriuki Macharia [2020] eKLR, the court held as follows;
- “Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be
- termed as a mere technicality.
- Having found that these procedure was not followed by M/S Nyiha, Mukoma & Company Advocates, the said firm is not properly on record, and has no legal standing to move the Court on behalf of the Applicant and therefore all pleadings filed by it ought to be struck out.
- Consequently, and in the absence of such leave of court as provided by the law, the application by Notice of motion under certificate of urgency dated the December 13, 2019



filed by the firm of M/S Nyiha, Mukoma & Company Advocates is hereby struck out with costs to the Respondent”.

36. Accordingly, the Court holds and finds that the Applicant/Intended Appellant’s prayer NO 2 has not satisfied the mandatory requirements of Order 9 Rule 9 of the Civil Procedure Rules. In view of the above findings of the court that the Applicant herein flouted the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules, the court finds that its instant application cannot stand, and thus prayers No. 3 and 4 cannot be allowed.

ii. Who should bear costs of this Application?

37. This court will be guided by the Provisions of section 27 of the *Civil Procedure Act*, where costs is granted at the discretion of the court. However, costs follow the event and is granted to the successful litigant, unless there exist circumstances that would warrant the court to depart from that position. This court finds no such circumstances, and therefore finds and holds that since the Applicant’s Application has been dismissed, the 1st and 2nd Respondents are the successful litigants and are entitled to costs.

36. Further, this court finds and holds that the instant Notice of Motion Application having been filed by an advocate who is not properly on record is found not merited. Consequently, the said Application is hereby dismissed entirely with costs to the 1st and 2nd Respondents. The 3rd Respondent did not enter appear for purposes of this Application, and therefore, it is not entitled to costs.

It is so delivered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 9TH DAY OF OCTOBER, 2024.

L. GACHERU

JUDGE

09/10/2024

Delivered online in the presence of:

Joel Njonjo – Court Assistant.

Mr Wachira H/B for Mr Kanyi Kiruchi for the Applicant

Mr Kirubi for 1st & 2nd Respondents

N/A for the 3rd Respondent

L. GACHERU

JUDGE

09/10/2024

TABLE

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