Oduori v Nagemi (Environment and Land Appeal E013 of 2024)
[2024] KEELC 13542 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13542 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND APPEAL E013 OF 2024

BN OLAO, J

DECEMBER 4, 2024

BETWEEN

ERNEST OUMA ODUORI ..... APPLICANT

AND

HESBON BARASA NAGEMI ..... RESPONDENT

(Arising from the Judgment and Decree delivered by HON. P. OLENGO SENIOR PRINCIPAL MAGISTRATE in BUSIA CMC ELC CASE NO 177 of 2021 dated 22nd February 2024)

RULING

1. The dispute between Ernest Ouma Oduori (the Appellant) and Hesbon Barasa Nagemi (the Respondent) over the ownership of the land parcel NO Samia/Luchululo-Bukhulungu/2665 (the suit land) was heard and determined in favour of the Respondent vide a judgment delivered by HON. P. Olengo Senior Principal Magistrate on 22nd February 2024.
2. The Appellant has now approached this Court vide his Notice of Motion date 14th August 2024 in which he seeks the following orders:
    1. That leave be granted to the Appellant to file his memorandum of appeal out of time.
    2. The memorandum of appeal herein be deemed to have been filed and served within time.
    3. Spent.
    4. That this Honourable Court be pleased to issue an order of stay of execution of the orders issued herein on 22nd February 2024 and all consequential decrees/orders issued pursuant thereto pending the hearing and determination of Busia ELCA No E013 of 2024.
    5. Spent.

6. That costs of this application be in the cause.

3. The application is premised under the provisions of Order 42 Rules 2 and 6 of the Civil Procedure Rules and Sections 79G and 3A of the Civil Procedure Act. It is supported on the grounds set out therein and also by the Appellant's affidavit and also that of his counsel Mr J. V. Juma Advocate.

4. The gravamen of the application is that the Appellant being aggrieved by the judgment of the trial magistrate erroneously filed a memorandum of appeal in the High Court as HCCA NO E013 of 2024 (it strikes me as curious that both the Memorandum of Appeal in the High Court and in this Court bear the same number being E013 of 2024). Upon realizing that error, the appeal in the High Court was withdrawn and the Appellant filed this appeal. Counsel for the Appellant immediately wrote to the Court requesting for a copy of the typed proceedings on the same day that the said judgment was delivered but the same have not been supplied. The Respondent is meanwhile carrying out activities on the suit land and has threatened the Appellant with evictions therefrom yet that is his home and he has no other home to go to if evicted. Unless the order of stay is granted, the Respondent may proceed and evict him.

5. Annexed to the application are the following documents:

    1. Copy of the letters by the Appellant's counsel addressed to the Chief Magistrate Busia and seeking copies of proceedings and judgment.

    2. Copy of Memorandum of Appeal filed in Busia High Court Civil Appeal No E013 of 2024.

    3. Copy of Memorandum of Appeal filed in Busia ELC Appeal No E013 of 2024.

6. The application is opposed and the Respondent acting in person filed a replying affidavit dated 2nd September 2024. He has deposed, inter alia, that the Appellant has not demonstrated sufficient delay in filing an appeal. He too, like this Court, finds it curious that the first Memorandum of Appeal filed in the High Court as well as the Memorandum of Appeal filed herein both bear the same number E013 of 2024 and considers them to be fictitious, fabricated and an attempt to mislead the Court. That the Appellant has not shown that the appeal has any chances of succeeding nor pointed out any loopholes in the Judgment sought to be appealed as there is no reason to challenge the registration of the land parcel number Samia/Luchululo-Bukhulungu/2665. That this application has been brought through unclean hands, is incompetent frivolous, vexatious and should be struck out with costs.

7. When the application was placed before me for directions during the vacation on 19th August 2024, I did not certify it as urgent. I directed that it be canvassed by way of written submissions. The submissions were subsequently filed both by Mr J. V. Juma instructed by the firm of J. V. Juma & Company Advocates for the Appellant and by the Respondent in person.

8. I have considered the application, the rival affidavits and annexures as well as the submissions filed.

9. The Appellant seeks two substantive orders. These are:

    1. Extension of time to appeal and the Memorandum of Appeal herein be deemed to have been filed within time.

    2. Stay of execution of the Judgment of the Subordinate Court delivered on 22nd February 2024 pending the hearing and determination of the appeal.

    I shall consider those prayers in that sequence:

10. Before I do so, however, I am just as curious as the Respondent to understand how the Memorandum of Appeal filed in the High Court and dated 19th March 2024 and the one dated 14th August 2024 and filed in this Court both bear the same number i.e. E013 of 2024. The Respondent describes them as "fictitious and / or fabricated" and aimed at swindling this Court. This is what the Respondent has deposed in paragraph 5 of his replying affidavit:

    5: "That both the memorandum of appeal annexed in the pleadings hereto and stated as erroneously filed in the High Court of Busia dated 19th March 2024 as Civil Appeal No E013 of 2024 then later as ELC Appeal No E013 of 2024 filed on 24th April 2024 are both fictious and/ or fabricated for they do not bear any official stamp of the Court to portray the date of filing."

    6: "That if at all the memorandum of appeals above were filed, then there is no way they could fetch the same numbers as the two registries are distinct and apart. Unless there was some false (sic) play in between. The Applicant is therefore swindling the Court on the fact that one was filed one month afterwards."

    Of course the Court cannot be swindled. Unless someone is stealing the files or other properties. But it cannot be misled. If the Appellant is trying to do so, the truth will soon become obvious. I shall now delve into the two prayers sought.

1. Extension Of Time To Appeal:

11. Section 79G of the Civil Procedure Act states:

> " 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." Emphasis mine.

    Section 16A (1) and (2) of the Environment and Land Court Act is couched in similar terms. It reads:

    (1) "All appeals from Subordinate Courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the Environment and Land Court Act, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate Court or tribunal may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order."

    (2) "An appeal may be admitted out of time if the Appellant satisfies the Court that he had a good and sufficient cause for not filing the appeal in time."

    On the other hand, Section 95 of the Civil Procedure Act empowers this Court to enlarge, at it's discretion, any time fixed by the law. Similarly, Order 50 Rule 6 of the Civil Procedure Rules provides that any time limited for doing any act may be extended by the Court.

12. It is clear therefore that whereas the law provides that an appeal from a decree or order of the subordinate Court to this Court must be filed within thirty (30) days of delivery of judgment, such period may be enlarged by the Court. In doing so, the Court exercises it's discretion which must be based on good grounds but not capriciously or as a matter of course.

13. The principles which guide a Court considering such an application were set out in the case of Nicholas Kiptoo Arap Korir Salat -v- Independent Electoral And Boundaries Commission & 7 Others Supreme Court Application No 16 of 2014 [2014 eKLR]. In that case, the apex Court rendered itself 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 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 Respondent if 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.

    As to what constitutes "sufficient cause" or "good cause", this was defined in the case of Attorney General -v- Law Society Of Kenya & Another C.A. Civil Appeal No 133 of 2011 to mean:

    > "... the burden placed on a litigant (usually by Court rule or order) to show why a request should be granted or an action excused ... sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

    The judgment sought to be appealed having been delivered by the Subordinate Court on 22nd February 2024, the Appellant ought to have filed his appeal within 30 days. That means that he should have filed his memorandum of appeal on or before 22nd March 2024. In the supporting affidavit of his counsel MR J. V. JUMA it is deposed that the memorandum of appeal was filed on 19th March 2024 but in the High Court by error. This is what is deposed in paragraphs 6 and 7 of that affidavit:

    6: "That I filed a Memorandum of Appeal on 19th March 2024 which memorandum was erroneously filed in the High Court as HCCA NO E013 of 2024. Attached and marked E002 is a copy for the Memorandum".

    7: "That I withdrew the said memorandum and had it filed in this Honourable Court on 24th April 2024 as ELCA NO E013 of 2024. Attached and marked E003 is a copy of the said Memorandum."

    That brings us back to the issue raised by the Respondent with regard to the memorandum of appeal filed in the High Court and in this Court. If indeed the Appellant had first filed his appeal erroneously in the High Court on 19th March 2024 before withdrawing it and filing it in this Court on 24th April 2024, that would have been a good reason to explain the delay herein.

14. However, upon perusal of the Memorandum or Appeal filed in the High Court and annexed to this Application, it is noted that though dated 19th March 2024, it was actually filed on 16th August 2024 at 11.10. The Respondent says the Memorandum of Appeal does not bear any official stamp. The

practice nowadays is that the date of filing is printed in the margin of the pleadings and the date of 16th August 2024 and time of 11.10 are clearly visible as the date when the Appellant first moved to the High Court to lode his appeal. That was already five (5) months late even if the Memorandum of Appeal was filed in the wrong Court. And that delay has not been satisfactorily explained.

15. In paragraph 7 of the supporting affidavit, it is deposed that the Memorandum of Appeal in the High Court was withdrawn and filed in this Court on 24th April 2024. That is not factually correct because the memorandum of appeal in this Court is dated 24th April 2024 but it was filed on 15th July 2024 at 14.29 as is clearly visible from the stamp on the edge which also shows that the sum of Kshs.1,550 was paid. That is also clear from the sleave of the file which shows that the memorandum of appeal was lodged on 15th July 2024 in this Court. There is yet another copy of Memorandum of Appeal dated 24th April 2024 which shows that it was lodged in this Court on 16th August 2024. There is more than meets the eye in the Appellant's explanation as to why he did not lodge his Memorandum of Appeal within 30 days as is required in law. As is now obvious from the annextures produced by the Appellant himself, no Memorandum of Appeal was filed in the High Court or this Court on 19th March 2024. The first Memorandum of Appeal was dated 19th March 2024 and was lodged in the High Court on 16th August 2024 at 11.10 a whole five (5) months late. No explanation for that delay has been proffered. That can only mean that there is no good explanation for that inordinate delay. In the absence of any "good and sufficient cause for not filing the appeal in time", there is no reason why this Court should exercise it's discretion in favour of the Appellant who is clearly being economical with the truth.

16. As is also clear from the case of Nicholas Kiptoo Arap Korir Salat -v- Independent Electoral And Boundaries Commission & 7 Others (supra), extension of time is not a right. It is an equitable remedy granted at the discretion of the Court. It is said that he who comes to equity must do so with clean hands. The Appellant has clearly not approached this Court with clean hands as stated above. The explanation proffered is neither "rational, plausible, logical, convincing, reasonable and truthful" – Attorney General -v- Law Society Of Kenya & Another (supra). Rather, it "leaves doubt" in my mind as well as "unexplained gaps in the sequence of events."

17. I am not persuaded that the prayer for extension of time to appeal is merited. I therefore decline it.

2. Stay Of Execution Pending Appeal

18. Having declined the prayer for extension of time to appeal, it must be obvious that there can be no basis upon which this Court can grant the prayer for stay of execution pending appeal. This is because, Order 42 Rule 6(1) and (2) upon which such a remedy can be grounded provides that:

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(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.

(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 mine.

It is clear from the above that in order to be entitled to the prayer for stay of execution pending appeal, the Appellant has to satisfy the following:

1. Show sufficient cause.
2. Demonstrate that unless the order is granted, he will suffer substantial loss.
3. File the application without unreasonable delay.
4. Offer security.

The above was reiterated by the Court of Appeal in the case of Vishram Ravji Halai & Another -v- Thornton & Turpin (1963) LTD 1990 KLR 365 (1990 eKLR), where it said:

> " Thus the Superior Court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay."

This Court has already declined leave to appeal out of time principally because, although the Appellant and counsel can be excused for initially moving to the wrong Court, there was unreasonable delay in doing so and which has not been satisfactorily explained. Therefore, no good or sufficient cause was explained to warrant the extension. It follows therefore that since there is no appeal, there can be no basis for an order of stay. The marginal note in Order 42 Rule 6 of the Civil Procedure Rules reads:

> " Stay in case of appeal".

On that ground alone, the prayer for stay of execution pending appeal is not available to the Appellant.

19. On the issue of substantial loss, Platt Ag. J.A (as he then was) expressed himself as follows in Kenya Shell Ltd - V- Kibiru 1986 KLR 410 at page 416:

> " It is usually a good rule to see if order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money".

The Appellant has deposed in paragraph 5 of his supporting affidavit that the Respondent is threatening to evict him from the suit land which is his only home. I am satisfied that if that happens, it will amount to substantial loss. That ground has been satisfied.

20. On the issue of unreasonable delay, this application was filed on 16th August 2024 while the Judgment sought to be appealed was delivered on 22nd February 2024. That is a delay of six (6) months which is unreasonable and therefore the Appellant has not satisfied that ground.

21. Finally, no offer of security has been made by the Appellant nor any undertaking that he is ready and willing to abide by any terms which this Court may impose for the due performance of any decree or order which may ultimately be binding on him. That ground has also not been satisfied.

22. It is clear therefore that even if the prayer for stay of execution were to be considered on it's own merits, it would still collapse.

23. The up-shot of all the above is that having considered the Notice of Motion dated 14th August 2024, this Court makes the following disposal orders:

    1. The Notice of Motion dated 14th August 2024 is dismissed.

    2. Costs to the Respondent.

BOAZ N. OLAO

JUDGE

4TH DECEMBER 2024

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 4TH DAY OF DECEMBER 2024 WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

4TH DECEMBER 2024