



**Kibata t/a Judika Real Estate Agency v Njuguna (Environment and Land Miscellaneous Application E39 of 2022) [2023] KEELC 527 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 527 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E39 OF 2022  
LA OMOLLO, J  
FEBRUARY 2, 2023**

**BETWEEN**

**MARGARET WANJIRU KIBATA T/A JUDIKA REAL ESTATE  
AGENCY ..... APPLICANT**

**AND**

**JOHN KAMAU NJUGUNA ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the Applicant's Notice of Motion application dated September 26, 2022 which is expressed to be brought under Section 79G of the *Civil Procedure Act*.
2. The Application seeks the following orders:
  - a. Spent
  - b. That pending the hearing and determination of the intended appeal, there be stay of execution of the judgment in Nakuru CMC No E1130 of 2021.
  - c. That the period for filing appeal against the ruling in Nakuru CMC No E1130 of 2021 be extended for a period that the court may deem fit and just.
  - d. That the costs of the application be provided for.
3. The application is based on the grounds on its face and supported by the affidavit sworn on September 26, 2022 by Nderitu Komu counsel for the Applicant.

**Factual Background**

4. The Application first came up for hearing on October 6, 2022 and the court gave directions that it be served upon the Respondent within seven days of the said date. The Respondent was directed to



file his response within fourteen days upon service. The application was rescheduled for hearing inter partes on November 8, 2022.

5. The application came up severally for hearing but there was no evidence of service upon the Respondent. On December 7, 2022, the application came up again for hearing, the Respondent's counsel was present and he sought three days to respond to the application. The application was adjourned to January 24, 2023.
6. On January 24, 2023, the Respondent was absent and had neither filed his response nor submissions. Counsel for the Applicant asked the court to grant orders as prayed. The matter was reserved for ruling.

### **The Applicant's Contention.**

7. The application is supported by an affidavit sworn by one Nderitu Komu, counsel for the Applicant.
8. He contends that he was instructed by the Applicant to file a suit being Nakuru CMCC No E1130 of 2020 against the Respondent. The suit, he deposes, arose from a dispute pertaining to non-payment of rent.
9. It is his contention that the Respondent entered appearance and filed his Statement of Defence and a Preliminary Objection.
10. It is his further contention that he was instructed to seek interim orders for payment of arrears of rent which were continuously accumulating.
11. He also contends that on March 24, 2022, the matter was mentioned before the lower court and directions were given to the effect that both the application and the Preliminary Objection were to be heard together and parties were directed to file submissions.
12. It is his contention that the matter was then fixed for mention on April 28, 2022 on which date the court confirmed that the parties had filed their respective submissions and the matter was reserved for ruling on May 26, 2022.
13. He contends that the ruling was not delivered on May 26, 2022 and that he was informed that the same would be delivered on notice.
14. He further contends that on September 14, 2022, he received a letter from the Respondent's advocates which had a tabulation of costs and the Respondent's advocate demanded that payment in respect of costs be made within 7 days.
15. He also contends that the said letter did not give reason for tabulation of costs and he opted to check the court file and found that the subordinate court had delivered its ruling on June 15, 2022 and in the said ruling dismissed the application and struck out the suit on the basis that it lacked jurisdiction.
16. It is his contention that he advised the Applicant about the said ruling and was instructed to lodge an appeal but that the time had already lapsed.
17. He concludes his deposition by seeking that the current application be allowed as the Respondent will not suffer any prejudice.

### **Issues For Determination.**

18. After considering the Application and the Supporting Affidavit the issues that arise for determination are as follows:



- a. Whether the period for filing an appeal against the ruling delivered in Nakuru CMCC No E1130 of 2021 should be extended.
- b. Whether the court should stay execution of the judgement in Nakuru CMCC No E1130 of 2021 pending the hearing and determination of the intended appeal.
- c. Who shall bear the costs of this application?

### **Analysis And Determination.**

#### **Whether the period for filing an appeal against the ruling delivered in Nakuru CMCC No E1130 of 2021 should be extended.**

19. Section 79G of the *Civil Procedure Act* provides 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 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.

20. Section 95 of the *Civil Procedure Act* provides as follows:

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

21. The Court in the case of *First American Bank of Kenya Ltd Vs Gulab P Shah & Others* HCC 2255/2000 [2002] IEA 65 set out the principles which the court must consider in exercising its discretion on whether or not to enlarge time to file as follows:

1. The explanation if any, for the delay;
- 2) The merits of the contemplated action, whether the appeal is arguable;
- 3) Whether or not the Respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant.

22. The Applicant in this matter is seeking for extension of time to file an appeal against the ruling delivered in Nakuru CMCC No E1130 of 2021.

23. The present application was filed on October 5, 2022 after the trial magistrate delivered its ruling on June 15, 2022. The Applicant contends that the reason for the delay is that he was not notified of the date of delivery of the said ruling and only became aware of the same when he was served with a letter from the Respondent's Advocates on September 14, 2022 with a tabulation of costs.

24. The time that has lapsed between delivery of the ruling in Nakuru CMCC No E1130 of 2020 and filing of this application is four months. This, in my view, does not amount to inordinate delay. Further the explanation given by the Applicant is reasonable.



25. The second principle which the court must consider in exercising its discretion is to decide whether the intended appeal is arguable. In doing so, the court has to ensure that it does not get into the merits of the case.
26. An arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before the court. (*Kenya Commercial bank Ltd Vs Nicholas Ombija* (2009) eKLR).
27. In *Stanley Kangethe Kinyanjui Vs Tony Ketter and 5 others* (2013) eKLR the court held as follows;  

“on whether the appeal is arguable, it is sufficient if a single *bonafide* arguable ground of appeal is raised ... An arguable appeal is not one which must succeed, but one which ought to be argued fully before the court”
28. From the draft Memorandum of Appeal, one of the grounds of appeal is that the learned magistrate erred in law and fact in holding that the court lacked jurisdiction to hear and determine the claim pertaining to a residential property whose monthly rent was Kshs 25,000. In my view, the intend appeal is arguable.
29. The third principle relates to compensation in costs to the Respondent, I have no reason to find that the respondent shall suffer any prejudice should I exercise discretion in favour of the Applicant.

**Whether the court should stay execution of the judgement in Nakuru CMCC No E1130 of 2021 pending the hearing and determination of the intended appeal.**

30. The Applicant is also seeking orders of stay of execution of the judgement in Nakuru CMCC No E1130 of 2021 pending the hearing and determination of the intended appeal.
31. From the draft Memorandum of Appeal, one of the grounds of appeal is that the learned magistrate erred in law and fact in holding that the court lacked jurisdiction to hear and determine the claim pertaining to a residential property whose monthly rent was Kshs 25,000.
32. The law pertaining to stay pending appeal is Order 42 Rule (6) (2). The conditions for grant of an application for stay pending appeal are that:
  - a. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
  - b. The application is brought without undue delay and
  - c. 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.
33. As things stand, there is no appeal capable of being stayed and thus a prayer for grant of orders of stay pending appeal are premature. Further, the Applicant has neither invoked the provision of the law pursuant to which she seeks this order nor has she satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
34. Importantly, the proper forum to seek such orders of stay of execution pending appeal would be in the subordinate court or in the intended appeal and not the present application.
35. As a result, I decline to grant orders of stay of execution pending appeal.



**Who shall bear the costs of this application?**

36. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of 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.

**Disposition.**

37. In the result, I find that only one limb of the application succeeds and the same is allowed in the following terms:

- a. Leave is hereby granted to the Applicant to file her appeal from the decision in Nakuru CMCC No E1130 of 2020 out of time.
- b. The Applicant shall lodge her Appeal within 14 days of the date hereof.
- c. Upon filing of the Memorandum of Appeal, the Applicant shall prepare, file and serve her record of appeal within 45 days.
- d. The Costs of this application shall be in the cause.

38. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2023.**

**L. A. OMOLLO**

**JUDGE**

**In the presence of: -**

**No appearance for the Defendants/Applicants.**

**No appearance for the Plaintiffs/Respondents.**

**No appearance for the 2<sup>nd</sup> Defendant/Respondent.**

**Court Assistant; Ms. Monica Wanjohi.**

