



REPUBLIC OF KENYA



**Mwololo v Ngului (Miscellaneous Civil Appeal E011 of 2020)  
[2023] KEELC 661 (KLR) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 661 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
MISCELLANEOUS CIVIL APPEAL E011 OF 2020  
TW MURIGI, J  
FEBRUARY 8, 2023**

**BETWEEN**

**WILLIAM MATHEKA MWOLOLO ..... APPLICANT**

**AND**

**JAMES IKUMBU NGULUI ..... RESPONDENT**

*(Being an application for stay of execution of the judgment delivered on January 21, 2020 at the Senior Principal Magistrate's Court Makindu in Makindu SPMCC No 262 of 2013 James Ikumbu Ngului v William Matheka Mwoilolo.)*

**RULING**

1. By a notice of motion dated October 5, 2020 brought pursuant to the provisions of sections 1A, 1B, 79G and 95 of the *Civil Procedure Act* cap 21 and order 42 of the *Civil Procedure Rules* and all other enabling provisions of the law the applicant seeks the following orders:-
  1. Spent.
  2. This Honourable Court be pleased to grant a stay of execution of the judgment delivered on January 21, 2020 at the Senior Principal Magistrate's Court Makindu in Makindu SPMCC No 262 of 2013 James Ikumbu Ngului v William Matheka Mwoilolo and any decree arising from it pending inter parties hearing of this application.
  3. This Honourable Court be pleased to grant stay of execution of the judgment delivered on January 21, 2020 at the Senior Principal Magistrate's Court Makindu in Makindu SPMCC No 262 of 2013, James Ikumbu Ngului v William Matheka Mwololo and any decree arising from it pending the hearing and determination of the intended appeal.
  4. The Appellant /Applicant be granted leave to file an appeal out of time against the judgment of the lower court delivered on January 21, 2020 at the Senior Principal Magistrate's Court



at Makindu in Makindu SPMCC No 362 of 2013, James Ikumbungului v William Matheka Mwololo.

5. The annexed draft memorandum of appeal be deemed as duly filed.
6. The cost of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Applicant sworn on even date.

### **The Applicant's Case**

3. The Applicant averred that vide the judgment delivered on January 21, 2020 in Makindu SPMCC No 562 of 2013, the Plaintiff was granted eviction orders against the Defendant/Applicant. The Applicant further averred that his former Advocate was indisposed for some time which led to the closure of his office for a while and thus he was unable to retrieve his file. He further averred that although his current Advocate requested for certified copies of the proceedings and judgment from the lower Court, he was unable to obtain the same due to the onset of the Covid19 pandemic. He argued that the delay in filing the appeal was not deliberate but due to circumstances beyond his control. He urged the Court to allow the application.

### **The Respondent's Case**

4. Opposing the application, the Respondent vide his replying affidavit averred that the application is frivolous, vexatious and devoid of merit since the Applicant did not file his appeal within 30 days from the date of the judgment.
5. He further averred that the Applicant has not explained the inordinate delay nor presented a certificate of delay from the lower Court.
6. In addition, the Respondent argued that other than the letter dated January 31, 2020 the Applicant has not demonstrated the efforts that he took to obtain the certified copies of the proceedings or judgment.
7. Finally, Counsel contended that though the Applicant's Counsel was indisposed, his office was not closed prior to March 16, 2020. He argued that he stands to suffer loss and damage if this application is allowed and urged the court to dismiss it with costs.
8. The application was canvassed by way of written submissions.

### **The Applicant's Submissions**

9. The Applicant's submissions were filed in Court on March 10, 2021.
10. Counsel submitted that the Applicant has met the threshold for the grant of the orders sought. Counsel further submitted that the Applicant has an arguable appeal with high chances of success as demonstrated by the draft memorandum of appeal.
11. Counsel went on to submit that the delay in filing the appeal was not inordinate but was occasioned by the closure of Counsel's offices due to his hospitalization. He maintains that the Applicant should not be punished for circumstances which were beyond his control.
12. Counsel contended that the Respondent has not demonstrated that he will suffer any prejudice if the orders sought are granted.



## **The Respondent's Submissions**

13. The Respondent's submissions were filed in Court on April 15, 2021.
14. In his submissions, learned Counsel reiterated the contents of the Respondent's replying affidavit.
15. In addition, Counsel submitted that the Applicant has not demonstrated that he stands to suffer substantial loss if the orders sought are not granted. Counsel argued that the execution process has not been initiated since the Respondent has not extracted a decree for the purposes of execution.
16. On delay, Counsel submitted that there was a delay of 280 days which has not been explained.
17. That the Applicant has failed to adhere with the requirements and time lines set out in sections 79G and 95 of the *Civil Procedure Act*.
18. Counsel submitted that the intended appeal has no chances of success as it does not raise any arguable issues.
19. Finally, it was submitted that the Respondent would suffer substantial loss if the orders sought are granted.

## **Analysis and Determination**

20. Having considered the application, affidavits and the rival submissions, I find that the issue that arises for determination is whether the Applicant has met the required principles for the grant of;
  1. Stay of execution pending appeal.
  2. Leave to Appeal out of time.
21. I will first determine whether the Applicant has met the threshold for the grant of an order stay of execution pending appeal.
22. Order 42 rule 6 (1) and (2) of the *Civil Procedure Rules* outlines the guiding principles to be met for the grant of stay and provides that;
  - 6(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.
  - 6(2) No order for stay of execution shall be made under sub-rule (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 of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.
23. Going by the above provisions of the law, it is clear that in an application for stay of execution pending appeal, the applicant must satisfy the following three conditions: -



1. The Court is satisfied that substantial loss may result to the Applicant unless the order is made.
  2. The application has been made without unreasonable delay.
  3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the Applicant has been given by the Applicant.
24. In considering an application for stay of execution, I am guided by the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal gave the following guidelines;
- “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. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”
25. The grant of an order of stay of execution is a discretionary one. In the case of *RWW v EKW* (2019) eKLR the Court held that;
- “...the purpose of an application for stay of execution pending an appeal is to preserve the subject in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. However, in doing so the court should weigh the right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of damages.”
26. The Court is therefore called upon to balance both the rights of the successful party so as not to hinder him from his fruits of judgment and those of the Appellant whose Appeal may succeed and be rendered nugatory if stay of execution is not granted.
27. The purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine v Nampijja & another* Civil App No 93 of 1989 (Nairobi) the Court held that;
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”
28. The issue for determination is whether the Applicant has satisfactorily discharged the conditions for the grant of stay of execution pending Appeal.
29. The Applicant is seeking for a stay of execution of the judgment delivered on February 15, 2022 in Makindu SPMCC No 1 of 2018 pending the hearing and determination of the Appeal.
30. The Court will now determine whether the Applicant has satisfied the conditions upon which the orders can be granted.



31. On the first condition of proving that substantial loss may result unless stay orders are granted, the Applicant should not only state that he is likely to suffer substantial loss, he must prove that he will suffer substantial loss if stay orders are not granted.
32. In so finding, I am persuaded by the Court of Appeal decision in the case of *Charles Wabome Gethi v Angela Wairimu Gethi* (2008) eKLR where the Court held that;
- “...it is not enough for the applicants to say that they live or reside on the suit land and they will suffer substantial loss. The applicants must go further and show the substantial loss that the applicants stand to suffer if the respondent execute the decree in this suit against them.”
33. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma v Abuoga* (1988) KLR where the Court held that;
- “Substantial loss is what has to be prevented by preserving the *status quo* because such loss would render the Appeal nugatory.
34. In *Tropical Commodities Suppliers Ltd and others v International Credit Bank Ltd (In liquidation)* (2004) 2 EA 331 the court defined substantial loss as follows;
- “substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”
35. The Applicant averred that the trial Court in its judgment issued eviction orders against him. He argued that this would render the appeal nugatory.
36. The Respondent on the other hand argued that the Applicant has not demonstrated that there is imminent danger of execution since he has not extracted or served the decree upon the Applicant.
37. I have read the judgment of Hon Zachariah Joseph Nyakundi SPM in Makindu SPMCC No 362 of 2020 delivered on January 21, 2020. The court in its findings stated in part as follows:-
1. That the Plaintiff herein is the lawful, *bona fide* and rightful owner of the property known as Makueni/nguu Ranch/669.
  2. That a permanent order of injunction does issue restraining the defendant by himself, agents and servants or through persons acting under his authority from entering, interfering, disposing, constructing, developing, grazing and acting in any manner that may interfere with the Plaintiff's quiet possession and enjoyment of all that property known as Makueni/Nguu Ranch/669.
  3. That the defendant be evicted from all that parcel of land known as Makuni/Nguu Ranch/669.
  4. Costs and interest of the suit.
38. From the judgment of Hon Zachariah Joseph Nyakundi, it is clear that the Applicant was to be evicted from land parcel number Makueni/Nguu Ranch/669. The Applicant has expressed the fear that he will be evicted from the suit premises where he is in occupation.
39. The Applicant averred that he solely depends on the suit property as his source of livelihood and that he will suffer immensely if he is evicted from the suit premises.



40. Going by the judgment delivered on January 21, 2021, it is evident that the Respondent was ordered to evict the Applicant from the suit property. That being the case, I find that the Applicant's fear that the Respondent may evict him from the suit property is not baseless. In my view since the Applicant was in possession of the suit property and can be evicted, he has demonstrated that he will suffer substantial loss if the orders sought are not granted. I find that the Applicant has satisfied this Court that he is likely to suffer substantial loss if she is evicted from the substratum of the appeal.
41. As regards the second requirement which requires that the application be made without unreasonable delay, it is not in dispute that the judgment was delivered on January 21, 2020. The present application was filed on October 9, 2020. Although the delay is inordinate, the Applicant offered a satisfactory explanation for it.
42. On the last condition as to the provision of security for costs, order 42 rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms to the effect that the applicant must furnish security for the performance of the order or decree. In the case of Arun C Sharma v Ashana Rakundalia T/A Raikundalia & Co Advocates & 2 others (2014) eKLR, the court held that;
- “The purpose of the security under order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor....civil process is quite different because in civil process the judgment is like a debt hence the applicant become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the civil procedure rules acts as a security for the performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”
43. The applicant has expressed his willingness to provide security as directed by the court.
44. In the end I find that the applicant has satisfied the conditions required for the grant of an order of stay of execution pending appeal.

### **Leave to Appeal Out of Time**

45. The statutory provisions that deal with the requisite period for filing of appeals from the Subordinate Courts to the High Court is Section 79G of the Civil Procedure Act which provides that;
- 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 the lower court may certify as having been requisite for the preparation and delivery to the Appellant 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.
46. In First American Bank of Kenya Ltd v Gulab P Shah & 2 others, Nairobi (Milimani) HCCC No 2255 of 2000 (2002) I EA 65 the court set out the factors to be considered in deciding whether or not to grant such an application and these are;
- i. The explanation if any for the delay;
  - ii. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is frivolous one which would only result in the delay of the course of justice;



- iii. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the Applicant.
47. The Court has wide unfettered discretion in granting leave to file appeal out of time. However, in exercising its discretion to grant extension of time, the Court must consider the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the Respondent if the application is granted. This was the holding in the case of *Omar Shurie v Marian Rashe Yafar* Civil Application No 107 of 2020 where the Court of Appeal discussed the conditions as follows:-
- i. The length of the delay.
  - ii. The reason for the delay.
  - iii. The chances of the appeal succeeding if the application is granted.
  - iv. the degree of prejudice the respondent if the application is granted.
48. In considering whether the Applicant has met the requirements for the grant of leave to appeal out of time, the Applicant avers that the delay was occasioned by the ill health on the part of his former Advocate and on the Covid 19 pandemic.
49. The judgment sought to be challenged was delivered on the January 21, 2020. Any Appeal in respect to the said judgment ought to have been filed on or before February 21, 2020. The instant application was filed on the October 9, 2020.
50. I have looked at the letter dated January 31, 2020 by the firm of Kasyoka and Associates addressed to the Executive Officer Makindu Law Courts annexure CKM2 requesting for copies of the proceedings and judgment. It is clear from the letter that the request was made ten days after the judgment was delivered.
51. The Applicant annexed a receipt of payment towards the Appeal dated the May 29, 2020. It is crystal clear that the Applicant had an express intention of appealing against the Judgement.
52. I have considered the circumstances of this case and I find that even though the delay is inordinate, the Applicant has given reasonable and plausible reasons for the same.
53. The upshot of the foregoing is that the application dated October 5, 2020 is allowed in the following terms;
- i. Leave is granted to the applicant to file appeal out of time against the judgment delivered in Makindu SPMCC No 262 of 2013, James Ikumbu Ngului v William Matheka Mwoilolo .
  - ii. The applicant to file and serve his memorandum of appeal within twenty one days from the date hereof.
  - iii. Stay of execution of the judgment/decree herein is granted pending the hearing and determination of the applicant's appeal.
  - iv. The applicant shall deposit Kshs 200,000/= as security for costs in court within 30 days from the date of delivery of this ruling in default the stay orders shall automatically lapse.
  - v. Each party to bear its own costs.

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2023.**



**HON T MURIGI**

**JUDGE**

**In the Presence of: -**

Court Assistant – Mr Kwemboi

Kasyoka for the Applicant

Makau for the Respondent

