



Macharia & another v Macharia & 2 others (Environment and Land Miscellaneous Application E027 of 2022) [2023] KEELC 499 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELC 499 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E027 OF 2022
LN GACHERU, J
FEBRUARY 2, 2023

BETWEEN

GRACE WANGARI MACHARIA 1ST APPLICANT

STEVEN GACHIRA CHEGE 2ND APPLICANT

AND

EVAN MWANGI MACHARIA 1ST RESPONDENT

SIMON WAITHAKA MACHARIA 2ND RESPONDENT

HEBRON IRUNGU MACHARIA 3RD RESPONDENT

RULING

1. By a Notice of Motion Application dated 2nd November 2022, brought under Sections 1A, 1B, & 3A of the *Civil Procedure Act*, Order 22 Rule 22, and Order 51 Rules 1 & 15 of the *Civil Procedure Rules* 2010, the Applicants herein sought for orders that:
 1. That this Honourable Court be pleased to grant them leave to file the intended appeal out of time.
 2. That an order for stay of execution of the trial Court's judgement dated 19th July 2022, be granted, pending the hearing and determination of this application.
 3. That an order for stay of execution of the trial Court's judgement dated 19th July 2022, be granted pending the hearing and determination of the Appeal.
 4. Costs of the Application be provided for.
2. The application was premised on the grounds set out on the face of application and the 1st Applicant's Supporting Affidavit sworn on 2nd November 2022, wherein she averred that the Judgement dated 19th July 2022, was delivered in favour of the Respondents and that the Respondents have extracted



- the Decree dated 14th October 2022. She further deponed that the Applicants did not participate in the trial proceedings due to lack of service of the Summons to Enter Appearance and neither were the proceedings and hearing Notices served on them. The Applicants further averred that they became aware of the Judgement delivered on 19th July 2022, when they saw the Respondents on the suit property, and were informed of the said judgement.
3. The Respondents opposed the application through their Replying Affidavit dated 28th November 2022, wherein they deponed that they are siblings and joint owners of land parcel no. LOC 15/GAKUYU/247 (the suit property). That the Applicants are strangers and unrelated to them and therefore have no legal claim over the suit property, which they state is ancestral/family land. They further averred that their claim on interest and proprietary rights to the suit property, was granted by this Court's judgement of 19th July 2022. Lastly, that since there is no appeal or application for review pending, then the application is an abuse of the Court process, it lacks merit and ought to be dismissed with costs.
 4. The Applicants filed a Further Affidavit dated 7th December 2022, and deponed that they were beneficiaries of the estate of the late Lawrence Chege Mwangi, who entered into a Sale Agreement dated 14th March 1995, for purchase of 0.5 acres of the suit property with the late Benson Maina Macharia, a sibling of the Respondents herein. They also averred that they have been in possession of the said parcel of land for over 27 years peacefully and without interruption.
 5. The Application was canvassed by way of written submissions. The Applicants through the Law Firm of Ntoito & Co. Advocates, filed their written submissions on 19th January 2023, and raised two issues for determination.
 6. On whether the Court should grant the Applicants leave to file an appeal out of time, the Applicants submitted that 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 on time as illustrated under Section 79G of the *Civil Procedure Act*. They relied on the case of *Edith Gichungu Koine v. Stephen Njagi Thoithi* (2014) eKLR, wherein the Court held that it is guided by consideration of factors including but not limited to, period of delay, reason for the delay, degree of prejudice to the Respondent if the application is granted and whether the matter raises issues of public importance amongst others.
 7. There is also the duty under Section 3A and 3B of the *Appellate Jurisdiction Act*, to ensure the factors that are considered are consonant with the Overriding Objective of civil litigation.
 8. The Applicants further relied on the case of *Kamlesh Mansukhalal Damki Patni v. DPP & 3 Others* (2015) eKLR, on the issue of the Courts discretion to grant leave to file an appeal out of time for the best interest of justice for both parties. In this particular case, the Court of Appeal held that decisions of the Courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve.
 9. On the second issue of whether this Court should grant orders for stay of execution of the judgement pending the hearing and determination of the Appeal, the Applicants relied on Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules*, which provides for stay of execution.
 10. The Applicants further relied on the case of *Visbram Ravji Halai v. Thorton & Turpin* – Civil Application No. 15 of 1990 KLR 365, wherein the Court of Appeal held that a Court's power to grant stay pending appeal is fettered by 3 conditions namely, establishment of sufficient cause, satisfaction of substantial loss, furnishing of security and that the application is made without undue delay.



11. The Respondents through the Law Firm of Kirubi, Mwangi Ben & Co. Advocates, filed their written submissions dated 19th January 2023, opposing the application. It was the Respondents submissions that they had obtained valid Orders for eviction of the Applicants from the suit property. They further submitted that the Applicants were duly served with the Summons to Enter Appearance and the suit documents in order to defend the matter which they failed to do.
12. The Respondents also submitted that the Applicants' prayers are misconceived as there are no provisions for Stay of judgment or Stay of execution, rather there is Stay of a Decree, of which they submitted none had been extracted. That there being no appeal, a stay had no basis in law.
13. Lastly, the Respondents submitted that the land is registered in their names and should the Applicants decide to appeal, that no Grant of Letters of Administration were attached to the deceased purchaser's estate, and that Order 10 of Civil Procedure Rules which provides for setting aside of *Ex-parte* Orders/ Judgement was not adhered to.
14. On the issue of stay of execution pending the hearing and determination of the Appeal, the Respondents relied on the case of *Nyaigwa Farmers' Co-operative Society Limited v Ibrahim Nyambare & 3 others* [2016] eKLR, wherein the Court declined to allow an application for Stay of Execution in relation to negative orders.
15. On the issue of the fact that the Application is grossly misconceived and incompetent, the Respondents relied on the case of *Mwangi v Nyali Golf & Country Club* (Civil Application E080 of 2021) [2022] KECA 455 (KLR) (18 March 2022) (Ruling) where it was held;

The Applicant's application fails as he has not been able to demonstrate any arguability of his Intended Appeal....”

16. The Applicants filed the instant suit seeking stay of the execution of the Judgement dated 19th July 2022, and the Decree issued on 14th October 2022.
17. The Court in its Judgement of 19th July 2022, ordered that the Applicants be evicted from the suit property, issued an injunction restraining the Applicants from trespassing on the suit property, awarded the Respondents Kshs 30,000/= as General damages and costs of the suit.
18. Upon discovering that a judgement had been delivered regarding the parcel of land that they occupied and eviction orders had been issued, the Applicants filed the present application dated 2nd November 2022, for stay of execution of the Judgement dated 19th July 2022 and for leave to file an appeal out of time.
19. Having highlighted the foregoing and considering the written submissions and authorities cited by parties, the issues for determination are:
 - i. Whether to grant leave to file an appeal out of time?
 - ii. Whether the application meets the threshold for grant of stay of execution?
 - iii. Who should pay costs for the application?



i. Whether to grant leave to file an appeal out of time_?

20. Section 79G of the [Civil Procedure Act](#), provides for time for filing appeals from subordinate Courts. It 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.”

21. In the case of *Leo Sila Mutiso V. Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997, the Court stated:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.”

22. Therefore, an Applicant seeking enlargement of time to file an appeal, must show that he has a good cause for doing so. In the case of *Daphne Parry v. Murray Alexander Carson* [1963] EA 546; the Court held;

“Though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the Court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.”

23. The above principles were restated by the Supreme Court of Kenya in the case of [Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others](#) (2014) eKLR 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 of the extension is granted.
- (6) Whether the application has been brought without undue delay; and
- (7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

24. In the present case, the Applicants delayed in filing their Appeal. From the date of judgement of 19th July 2022, to the present application for leave to file an appeal out of time dated 2nd November 2022, is a delay of 106 days or 3 months and 14 days.
25. The Applicants explained the delay in filing the appeal down to lack of awareness of the ongoing trial and entry of judgement in the suit due to lack of service. The suit indeed proceeded, *ex parte* and judgement was also delivered *ex parte*. The issue that requires clarification is whether the Applicants were indeed served.
26. There is no Affidavit of Service filed to indicate that service had indeed been effected. This Court addresses its mind to the serious questions as to the lack of service of Summons to Enter Appearance, particularly because service goes to the core of fair hearing. If there is doubt on the issue of service, then the fairness of the whole proceedings will have to be interrogated. Further, a Decree has been extracted and there is possibility of the Applicants suffering substantial loss from the possible eviction from the suit property.
27. The Respondents having started the process of execution of the Judgement, extracted a Decree for the eviction of the Applicants. Under Order 22 Rule 22 of the *Civil Procedure Rules*, a party may apply to Court for stay of execution in respect to a Decree or execution thereof. Furthermore, Rule 22(2) of the Rules states where the property or person of the Judgment-Debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property.
28. Having found that it was not very clear whether the Applicants were served with Summons to Enter Appearance, as the Affidavit of Service was not attached, then the Court finds that without service, the Applicants would not have been aware of the case. Therefore, the *ex parte* Judgement may have been entered irregularly. Thus the reasons for delay has been explained to the satisfaction of this Court.

ii. Whether the application meets the threshold for grant of stay of execution?

29. The law on stay of execution pending appeal is laid down in Order 42 Rule 6 of the *Civil Procedure Rules*. It is trite that no appeal can operate as stay, and hence an application for stay shall be made to Court by the desiring parties. The principles for grant of stay of execution are well laid down in Order 42 Rule 6(ii) of the *Civil Procedure Rules* which provides:
 - ii. 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 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.
30. The three conditions to be met before a Court grants ‘stay of execution pending appeal’ were set out in the case of *D. Korir v. Kenyatta University* (2012) eKLR, wherein the Court upheld the criteria set out in the precedence and captured in the case of *Halal & another v Thorton & Turpin Ltd* (1993)eKLR



365, where the Court of Appeal held that the High Court's discretion to order stay of execution is fettered on three conditions: Sufficient cause; substantial loss; and furnishing of security.

31. It was further held in the case of *RWW v. EKW* [2019] eKLR, that the purpose of an application for stay of execution pending appeal is to preserve the subject matter 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 this 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 costs.
32. Lastly, it was held in that case of *Antoine Ndiaye v African Virtual University* (2015) eKLR, that sufficient cause to grant stay pending appeal must be shown.
33. In the present case, the Applicants stand to be evicted from the suit property, despite having a sale agreement between the Applicants deceased's husband and the deceased seller, who is a sibling to the Respondents. This Court sees no clearer indication for substantial loss than what is highlighted above. Indeed if the Applicants will be evicted from the suit property, they will suffer substantial loss and there is sufficient cause to grant the said stay of execution that has been sought.
34. Having considered the instant Notice of Motion Application dated 2nd November 2022, the attached Memorandum of Appeal, the Response to the said Application and the rival Written Submissions, the Court finds and holds that the instant Application is merited and the same is allowed entirely in terms of prayers No. 2 and 4 of the said Application. Further the Applicants are entitled to costs of the Application.
35. The Applicants to file the Intended Appeal within a period of 14 days from the date hereof. Failure to comply with the above directive, the orders issued herein will lapse automatically.
36. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 2ND DAY OF FEBRUARY, 2023.

L. GACHERU

JUDGE

In the presence of;

M/s Mumo for the Applicants

Mwangi Ben for the Respondents

