



**Adongo v Adongo & another (Miscellaneous Application
E013 of 2022) [2023] KEELC 15968 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15968 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
MISCELLANEOUS APPLICATION E013 OF 2022
GMA ONGONDO, J
MARCH 2, 2023**

BETWEEN

BENSON OTIENO ADONGO APPLICANT

AND

GEORGE ADHA ADONGO 1ST RESPONDENT

PHILIP JUMA OJIJO 2ND RESPONDENT

(Being an application for stay of execution and leave of court to file the appeal out of time from the judgment and orders of the trial court, Hon T. M. Olando (Principal Magistrate) in Homa Bay Chief Magistrate's Court Environment and Land Case No. 33 of 2019 dated 10th November 2021)

RULING

1. On 17th October 2022, the applicant, Benson Otieno Adongo through Onyango Owaka & Associates Advocates mounted an application by way of a Notice of Motion dated 16th October 2022 pursuant to, *inter alia*, Article 159 of the [Constitution](#) of Kenya, 2010, Sections 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya, Order 9 Rule 9, Order 42 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules](#), 2010. He is seeking the orders as follows;
 - a) Spent
 - b) Spent
 - c) Spent
 - d) That the Honourable Court do grant leave to the applicant to appeal the judgment in Homa Bay Chief Magistrate's Court Environment and Land Case No. 33 of 2019 out of time.



- e) That upon grant of prayer (d) above, the Honourable Court be pleased to stay execution of decree dated 9th February 2022 pending determination of the intended appeal.
- f) That costs of this Application be in the cause.
2. The application is anchored on the applicant's supporting affidavit, filed on even date, and annexed documents, namely: a copy of the decree dated 9th February 2022 (JS-001) and a copy of a draft memorandum of appeal dated 16th October 2022.
3. Briefly, the applicant deponed that the delay in filing the memorandum of appeal was occasioned by financial difficulty on his part, which resulted into failure to clear his legal fees on time. That he has therefore, been forced to instruct a different counsel. That being aggrieved by the said judgment, the applicant wishes to lodge an appeal against the same out of time, thereby necessitating the instant application.
4. Moreover, the applicant stated that the respondent is at the verge of executing the decree against him and has started issuing verbal notices to himself and his tenants to vacate the suit property, Kanyada/Kotieno Katuma B/751. That the respondents have also filed a bill of costs which was coming up for assessment on 17th October 2022. Further, the applicant contends that the intended appeal has high chances of success and is not an afterthought.
5. The respondents did not file a Replying Affidavit herein.
6. On 17th October 2022, this court ordered and directed that the instant application be argued by way of written submissions pursuant to Order 51 Rule 16 of the *Civil Procedure Rules*, 2010 and Practice Direction No. 33 of the *Environment and Land Court (ELC) Practice Directions*, 2014.
7. Accordingly, learned counsel for the applicant filed submissions dated 7th January 2023 on even date giving the background of the matter. Counsel identified one issue for determination thus: whether the applicant has satisfied the conditions for grant of stay of execution set out under Order 42 Rule 6 of the *Civil Procedure Rules*, 2010? Counsel urged the court to allow the instant application in the interest of justice and relied on the case of *James Wangalwa & Anor v Agnes Naliaka Cheseto* [2012] eKLR among other authoritative pronouncements, to fortify the submissions.
8. Learned counsel for the respondents, Moriasi Osoro & Company Advocates, filed their submissions dated 15th February 2023 on 17th February 2023. Counsel identified twin issues for determination, to wit, whether the appellant is entitled to the suit property as a trustee as he alleges and whether the appellant's application is fit for the sought stay herein. Counsel submitted that the appellant has no legal claim against the respondents and ought not to be granted stay orders as the suit property belongs to the 2nd respondent who purchased the same for value from the 1st respondent. That the application has not met the conditions for grant of order of stay. Thus, counsel urged the court to dismiss the application with costs. Counsel relied on the case of *Mbira v Gachubi* [2002] IEALR 137, to buttress the submissions.
9. In the foregone, the following issues fall for determination:
- Whether the applicant has availed good and sufficient cause for grant of leave to file an appeal out of time;
 - Whether the applicant has proved the conditions set for grant of orders of stay of execution; and
 - Who should bear the costs of the instant application?



10. On the first issue, Section 75 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya sets out the orders from which appeal lies. Section 79 G of the same Act stipulates the time for filing of appeals from subordinate courts. Order 50 Rules 6, 7 and 8 of the [Civil Procedure Rules](#), 2010 provides for power to enlarge time, enlargement of time and computation of days respectively.
11. The applicant contends that the delay in filing the memorandum of appeal was occasioned by financial difficulty on his part, which resulted into failure to clear his legal fees on time. That he has therefore, had to instruct new counsel.
12. This court is conscious of the rights of the applicant under Articles 48 and 50 (1) as read with Article 25 (c) of the [Constitution](#) of Kenya, 2010. So, it is not the intention of this court to deprive the appellant his right of appeal as enshrined in the said Constitutional provisions.
13. Clearly, the applicant is entitled to appeal herein as per the view held in *Palata Investment Limited v Butt & Sinfield Ltd* [1985] 2 ALL E.R 517 (CA) as well as the decision in *Butt v Rent Restriction Tribunal* [1979] eKLR that;

“.....The appellant has an undoubted right of appeal.”
14. Additionally, the draft memorandum of appeal contains triable issues that cry for determination on merits Thus, the applicant be let to file an appeal out of time; see *Philip Keipto Chemwolo and another v Augustine Kubende* [1986] eKLR.
15. As regards the second issue, the applicant lamented as stated in paragraph 4 herein above. The conditions concerning grant of an order for stay of execution are stipulated under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), 2010 which provides in part that:
 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 supplied)
16. In the case of *Charles Wahome Gethi v Angela Wairimu Gethi* [2008] eKLR, the court held that the applicant must demonstrate the substantial loss he is likely to suffer if the respondent executes the judgment and subsequent decree against him. Further, the court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal and the respondent who is seeking to enjoy the fruits of his judgment as held in the case of *Charles Kariuki Njeru v Francis Kimaru Rwara* [2020] eKLR and *Shahmad v Shamji Bros and Another* [1957] EA 438.
17. Since there is imminent eviction of the applicant and his tenants from the suit property, he is bound to suffer substantial loss if stay of execution sought in the application is not granted; see also *New Stanley Hotel Ltd v Arcade Tobacconist Ltd* [1980] KLR 757.
18. As regards delay, this court is guided by Order 50 Rules 1, 3 and 8 of the Rules. Bearing in mind the character of the application and the submissions, I am of the considered view that the period of delay to initiate the instant application is not inordinate in the circumstances.



19. This court has the mandate to grant interim preservation orders under Section 13 (7) (a) of the *Environment and Land Court Act*, 2015 [2011]. The same include the stay order sought in the application.
20. In the case of *Board of Governors, Moi High School, Kabarak and another v Malcolm Bell* [2013] eKLR, the Supreme Court of the Republic of Kenya held that the court can grant stay of orders of execution in the exercise of it's ancillary power;
- “.....of safeguarding the character and integrity of the subject matter of the appeal pending the resolution of the contested issues.”
21. Concerning security, nobody is exempt from providing for the same for the due performance of a decree or order as noted in *Doshi Iron Mongers Limited v Kenya Revenue Authority and another* [2020] eKLR. No security has been offered herein by the applicant who is bound to provide it within the discretion of the court.
22. To that end, I find the application dated 16th October 2022 merited. I proceed to determine the same on the terms infra;
- a) The applicant is granted leave to file appeal out of time and serve the record of appeal within thirty (30) days from this date.
 - b) That there be an order of stay of execution of the decree/judgment of Honourable T. M. Olando delivered on 10th November, 2021 and all consequential orders flowing therefrom pending the hearing and determination of this appeal.
 - c) That the applicant shall deposit in court within the next thirty (30) days from this date, the sum of Kshs 15,000/= (Kenya shillings Fifteen Thousand only) as security for the due performance of the decree as may ultimately be binding upon him, failing which the stay order shall lapse without a further order of this court.
 - d) Costs of the application to abide the prospective appeal.
23. It is so ordered.

DELIVERED, SIGNED AND DATED AT HOMA BAY THIS 2ND DAY OF MARCH 2023

G. M. A ONG'ONDO

JUDGE

PRESENT:

- a. Nyarige N. holding brief for Moriasi Osoro, learned Counsel for the respondents.
- b. Okello-Court Assistant.

