Kamanza v Muunda (Environment and Land Miscellaneous Application E013 of 2021) [2023] KEELC 16113 (KLR) (8 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16113 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E013 OF 2021

TW MURIGI, J

MARCH 8, 2023

BETWEEN

NTHENYA MBEVO KAMANZA .... PLAINTIFF

AND

MAGDALINE JOSEPH MUUNDA .... DEFENDANT

(Application for leave to appeal out of time against the judgment and orders given on September 20, 2021 by Hon. Benson N. Ireri (SPM) in Makindu Law Courts MCELC No 25 of 2018.)

RULING

1. By an amended notice of motion dated December 11, 2021 brought pursuant to the provisions of order 51 rule 1 of the *Civil Procedure Rules* in addition to Sections 3A, 43 (1), 75 and 79G the *Civil Procedure Act* the Applicant seeks the following orders:-

    1. Spent.
    2. That pending *inter-partes* hearing of this application, the Honourable Court do issue an order staying the judgment, any resultant orders, decree or any further proceedings in MCELC No 25 of 2018 Makindu Law Courts.
    3. That there be an order for stay of execution as the Respondent has applied for and is in the process of executing the decree herein.
    4. That pending determination of this application, the Honourable Court does issue an order staying the Judgment, any resultant orders, decree or any further proceedings in MCELC No 25 of 2018 Makindu Law Courts.
    5. That the Applicant be granted leave to appeal out of time against the judgment and orders given on September 20, 2021 by Hon Benson N. Ireri (SPM).

6. That this Honourable Court be pleased to issue any order it deems fit and just in the circumstances.

7. That costs of and incidental to this application be costs in the intended appeal.

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 on September 20, 2021, judgment was entered against her in Makindu MCELC No 25 of 2018. That thereafter, she fell sick and the time allowed for filing an appeal ran out. She further averred that she immediately requested and obtained proceedings and a copy of the judgment to prepare the Memorandum of Appeal but her health challenges complicated her efforts.

4. The Applicant deposed that she lost track of the matter until November 18, 2021 when Counsel for the Respondent served her with a demand letter to vacate the suit property. She averred that she instructed the firm of Nzaku & Nzaku Advocates to take up the matter and added that she has made the instant application expeditiously and in good faith. The Applicant argued that it is just and equitable that the application be granted.

The Respondent's Case

5. In opposing the application, the Respondent filed grounds of opposition dated February 10, 2022. The Respondent argued that the Applicant has not provided any good reason for not filing the appeal in time. That the Applicant had not disclosed the nature and quality of the inadvertence that would enable this Court to grant the Applicant leave to file the intended appeal out of time. It was further contended that a delay of two months and twenty-five days is inordinate and inexcusable.

6. The Respondent further contended that the application is an afterthought which is meant to deny the Respondent the fruits of her judgment. It was avered that the Applicant has not annexed a draft Memorandum of Appeal to enable this Court make an assessment of whether the intended appeal is arguable. Lastly, the Respondent argued that equity does not aid the indolent and there must be an end to litigation. He urged the Court to dismiss the application with costs.

The Response

7. In her further affidavit sworn on April 19, 2022, the Applicant averred that she had acted robustly and had acquired the necessary pleadings that are to form the record of appeal. She further averred that she is ready to abide by any conditions if leave to file an appeal out of time is granted.

8. She argued that unless the application is granted, the intended appeal will be rendered nugatory since the decree is partly monetary and contains a colossal amount of money which would cause her undue hardship in the event of execution.

9. The Court directed the parties to canvass the application by way of written submissions. The Applicant did not file submissions but elected to rely on her supporting and further affidavit.

The Respondent's Submissions

10. The Respondent's submissions were filed in Court on December 3, 2022.

11. Counsel submitted that the only issue for determination is whether the Applicant has met the threshold to the grant of the ownership.

12. Counsel for the Respondent argued that appeals from the subordinate Court to the High Court are governed by Section 79G of the *Civil Procedure Act*. It was submitted that the length of delay from the delivery of judgment to the filing of the instant application was seventy-two days and that it is inexcusable. Counsel added that the reason by the Applicant that her sickness contributed to the delay is not sufficient. It was further submitted that the Applicant enjoyed the period of stay without taking any action until she realized that the Respondent wanted to enjoy the fruits of her judgment.

13. Finally, Counsel argued that the Applicant has not annexed a draft memorandum of appeal for the Court to assess the chances of success of the intended appeal. Counsel urged the Court to dismiss the application with costs to the Respondent. To buttress his submissions, Counsel relied on the following authorities:-

    i. *Thuita Mwangi Vs Kenya Airways Ltd* [2003] eKLR; and

    ii. *County Executive of Kisumu Vs County Government of Kisumu & 8 others* [2017] eKLR.

Analysis And Determination

14. Having considered the application, affidavits and the submissions by the Respondent, 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.

15. 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.

16. 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 may order for the due performance of the decree or order as may ultimately be binding on the Applicant has been given by the Applicant.

17. In considering an application for stay of execution, I am guided by the case of *Butt Vs 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."

18. The grant of an order of stay of execution is a discretionary one. In the case of *RWW Vs 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."

19. 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.

20. The purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine Vs 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."

21. This Court is called upon to determine whether the Applicant has satisfactorily discharged the conditions for the grant of stay of execution pending Appeal.

22. 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.

23. In so finding, I am persuaded by the Court of Appeal decision in the case of *Charles Wahome Gethi Vs 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."

24. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma Vs 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."

25. The Applicant averred that the Respondent has extracted the decree and is in the process of executing the same. In this regard she annexed a decree dated 19/10/2021. She averred that the appeal would be rendered nugatory if the decree is executed.

26. The Respondent on the other hand argued that the Application is an afterthought whose sole aim is intended to deny the Respondent the fruits of her judgment.

27. I have read the judgment of Hon Benson Ireri SPM in Makindu SPMCC No 25 of 2019 delivered on January 21, 2020. According to the judgment, the Plaintiff in the amended Plaint had sought the following orders :-

    a. Surrender of plot No 19A.

    b. Payment of rent from the year 1995 up to 2018.

    c. A declaration that plot No 19A located at Kibwezi market was illegally, unprocedurally and unlawfully subdivided, transferred into the names of Joseph Mutinda and Rabani W Muuo.

    d. An order of cancellation of any registration and letter of allotment in the names of Joseph Muunda and Rabani W Muuo by the 4th Defendant in respect of plot No 19A located at Kibwezi Market.

    e. Costs and interest of the suit.

28. The Court in its findings stated in part as follows:-

> " I therefore enter judgment for the Plaintiff against the 1st, 2nd and 3rd Defendants in terms of prayers a, c, d, e and f as prayed for in the amended plaint dated March 12, 2020 and filed herein in court on March 12, 2020."

29. From the judgment of Hon Benson Ireri, it is clear that the Applicant was ordered to surrender Plot 19A. The Court declared that Plot 19A was subdivided unprocedurally and unlawfully and proceeded to issue an order for the cancellation of any registration and allotment letter issued to Joseph Muunda and Rabani M Muuo. The Applicant has expressed fear that she will be evicted from the suit premises where she is in occupation.

30. Going by the judgment delivered on September 20, 2021, it is evident that the Applicant was ordered to surrender Plot No 19A.

31. That being the case, I find that the Applicant's fear that the Respondent may evict her from the suit property is not baseless. In my view the Applicant has demonstrated that she will suffer substantial loss if the orders sought are not granted. I find that the Applicant has satisfied this Court that she is likely to suffer substantial loss if she is evicted from the substratum of the appeal.

32. 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 20th of September, 2021. The present application was filed on 11th of December, 2021. Although there was delay in filing the same, the Applicant has offered a satisfactory explanation for it.

33. 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 Vs 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."

34. The Applicant has expressed her willingness to provide security as directed by the Court.

35. 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 Apply Out of Time

36. Section 79G of the *Civil Procedure Act* outlines the time within which an appeal ought to be filed to the High Court from a subordinate Court. The law 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.

37. Section 95 of the *Civil Procedure Act* goes on to state 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.

38. It is not in dispute that the Judgment in Makindu MCELC No 25 of 2018 was entered against the Applicant on September 20, 2021. The said Judgment was not appealed within the statutory period. Nonetheless, this Court has unfettered discretion under the proviso to Section 79G to admit an appeal which has been filed out of time provided that sufficient cause has been demonstrated.

39. The considerations to be made when deciding upon such an application were set out by the Court of Appeal in E*dith Gichugu Koine Vs Stephen Njagi Thoithi* [2014] eKLR:-

> " There can be no doubt that the discretion I have to exercise under rule 4 is unfettered and does not require establishment of "sufficient reasons". Nevertheless, it ought to be guided

by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others – See FAKIR MOHAMED V JOSEPH MUGAMBI & 2 OTHERS, Civil Application Nai. 332 of 2004 (unreported). There is also a duty now imposed on the Court under sections 3A and 3B of the *Appellate Jurisdiction Act* to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court."

40. This was the same view expressed by the Court of Appeal earlier in the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR where the Court held as follows: -

> "Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance in Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:
>
> > "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 reason 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."

41. In this matter, the Appeal ought to have been filed before the expiry of thirty days which means as at 20th October, 2021. The application herein is dated 11th December, 2021 which is slightly less than two months since the last date when the appeal should have been filed. The stated length of delay is not inordinate.

42. Secondly, the Applicant averred that the delay in filing the appeal was occasioned by her illness. In this regard, she annexed a signed and stamped treatment summary dated 10/11/2021 from Makindu Hospital (annexure "MJM1") in her supporting affidavit. The Applicant's explanation that she was receiving medical attention during the delay period is reasonable and plausible.

43. Thirdly, the Applicant has annexed a draft memorandum of appeal in her supporting affidavit to demonstrate her willingness and intention of appealing the impugned judgment. The Applicant averred that she has accomplished to get the necessary documents that will form the record of appeal. In *Samuel Mwaura Muthumbi Vs Josephine Wanjiru Ngugi & Another* [2018] eKLR, the Court held as flows: -

> "Lastly, looking at the Draft Memorandum of Appeal filed, I am unable to say that the intended appeal is in-arguable. Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is not required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden."

44. Lastly, on the prejudice that is likely to be suffered by the Respondent if an appeal is filed out of time, there has been no demonstration that it cannot be adequately compensated by costs. The Court in *George Kianda & another vs Judith Katumbi Kathenge & another* (2018) eKLR aptly held as follows: -

> "The Respondent has not stated that she cannot be adequately compensated in costs for any prejudice that she may suffer as a result of a favourable exercise of discretion in favour of the applicant. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See Waljee's (Uganda) Ltd Vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188."

45. Going by the above considerations, it is clear that the Applicant has sufficiently demonstrated merit in the application for enlargement of time for filing an appeal.

46. The upshot of the foregoing is that the application dated December 11, 2021 is allowed in the following terms:-

    1. The Applicant is hereby granted leave to appeal out of time against the Judgment and decree issued on September 20, 2021 by Hon Benson N. Ireri (SPM) in Makindu MCELC No 25 of 2018.

    2. The Memorandum of Appeal and the Record of Appeal shall be filed within a period of Twenty One (21) Days from the date hereof.

    3. Pending determination of the intended appeal, this Court issues an order stay of execution of the Judgment, any resultant orders, decree or any further proceedings in Makindu MCELC No 25 of 2018.

    4. The Applicant shall deposit in Court the sum of Kshs 100,000/= as security for the due performance of the final decree within a period of Twenty One (21) Days from the date hereof.

    5. Default of any of the above conditions shall automatically lapse the orders hereby granted.

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 8TH DAY OF MARCH, 2023.

...

Hon T. MURIGI

JUDGE

In The Presence Of: -

Court Assistant – Mr. Kwemboi.

Abongo for the Respondent.

Wasolo for the Applicant.