



**Kiplagat v Jerotich (Miscellaneous Application E063 of 2022)
[2023] KEELC 16092 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16092 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
MISCELLANEOUS APPLICATION E063 OF 2022**

JM ONYANGO, J

MARCH 8, 2023

BETWEEN

NICHOLAS K KIPLAGAT APPLICANT

AND

FANCY BELINDA JEROTICH RESPONDENT

RULING

1. The Applicant moved the court by way of a Notice of Motion dated 9th December, 2022 seeking leave to appeal out of time against the ruling of this court delivered on 2nd February, 2022. He also sought a temporary stay of execution pending appeal and that the order of injunction d on 9th June, 2021 be reinstated pending the hearing and determination of the intended appeal.
2. The application is anchored on the grounds set out on the face of the Notice of Motion and the Applicant's supporting affidavit sworn on the 9th December 2022. In the said affidavit the Applicant depones that he was not issued with a Notice of delivery of ruling and he was therefore not aware that it had it been delivered. He only came to learn of the ruling on 10th April, 2022 when the Respondent attempted to encroach on his property. He then filed an application before the trial court seeking leave to appeal out of time and stay of execution pending appeal but the same was dismissed. He therefore prays that his application be granted as he intends to appeal against the ruling of the trial court.
3. The application is opposed by the Respondent through her Replying affidavit sworn on 17th February 2023. In the said affidavit she depones that the application is vexatious, devoid of merit and it amounts to an abuse of the court process. She is of the view that the application has been brought after inordinate delay without any cogent explanation. She further depones that the order striking out the applicant's suit is a negative order which is incapable of execution. She adds that the Applicant has not demonstrated that he has an arguable appeal, nor has he demonstrated that if the stay is not granted, he shall suffer substantial loss.



4. The application was canvassed by way of oral submissions and both counsel relied on the affidavits filed by the parties and expounded on the same.

Issues for Determination

5. The main issues for determination are:
 - i. Whether the Applicant should be granted leave to appeal out of time
 - ii. Whether execution should be stayed pending appeal

Analysis and Determination.

6. Section 79G of the *Civil Procedure Act* 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 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.”

7. It is clear that the court has a wide discretion to extend time within which to file an appeal although the discretion must be exercised judiciously. In the case of the *County Executive of Kisumu v County Government of Kisumu and 8 Others* [2017] eKLR the Supreme Court of Kenya held as follows:

“(23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the *Nicolas Salat case* to which all the parties herein have relied upon. The Court delineated the following as the under-lying principles that a Court should consider in exercise of such discretion:

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;

- a. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- b. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- c. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- d. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- e. Whether the application has been brought without undue delay; and

Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”



8. In the instant case the Applicant intends to appeal against the ruling of the trial court delivered on 2.2.22. He has explained that after the said ruling was delivered, he made an application in the lower court for leave to appeal out of time on 12.4.22 but the same was dismissed on 26.10.22. The application for enlargement of time was not filed until 9.12.22. There is no satisfactory explanation for the delay. Although the applicant claims that he was not served with a ruling notice, it is not clear when he became aware of the ruling. In any event, the applicant ought to have been diligent enough to find out when the ruling would be delivered.
9. There is also no indication that the Applicant has taken any steps to apply for a certified copy of the ruling and order which is a critical step in preparing for an appeal. All in all, I am not persuaded that the applicant is deserving of the court's discretion and I decline to enlarge time within which to file the appeal.
10. Having arrived at the finding that the time for filing the appeal cannot be extended, there would be no basis for granting a stay of execution.
11. The upshot is that the application lacks merit and the same is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 8TH DAY OF MARCH 2023.

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J.M ONYANGO

JUDGE

In the presence of;

Mr. Mukhabani for the Applicant

Mr. Kibii for the Respondent

Court Assistant: Mr.Onila

