



Shelter And Cerdit Limited & another v Wanyee & 5 others (Environment and Land Miscellaneous Application E173 of 2022) [2023] KEELC 15982 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEELC 15982 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E173 OF 2022
AA OMOLLO, J
MARCH 9, 2023**

BETWEEN

SHELTER AND CERDIT LIMITED 1ST APPLICANT

MAKINI SECURITY SERVICES LIMITED 2ND APPLICANT

AND

KINUTHIA WANYEE 1ST RESPONDENT

**CHRIS KIAMA CHEGE T/A DAGORETTI COMPUTERS TRAINING
CENTRE 2ND RESPONDENT**

**KENNEDY ONYANGO T/A FAITH FABRICATORS AND
REMINDERS 3RD RESPONDENT**

JOSEPH WAITHAKA T/A JOSMAN KENYA HARDWARE .. 4TH RESPONDENT

JOY NYOKABI T/A JOY'S BEAUTY WORLD 5TH RESPONDENT

PAUL KEVIN KINUTHIA 6TH RESPONDENT

RULING

1. The Applicants filed a notice of motion dated September 7, 2022 pursuant to the provisions of section 79G of the [Civil Procedure Act](#), section 16A of the [ELCA](#) and Order 42 rule 6 of the [Civil Procedure Rules](#). The application seeks for the following orders;
 - a. Spent
 - b. Spent



- c. This Honourable court grant a stay of proceedings in MCELC 279 of 2021; Shelter and Credit Limited & Another vs Kinuthia Wanyee & 5 others pending hearing and determination of the intended Appeal.
 - d. The Honourable Court be pleased to grant the Applicants leave to appeal out of time against the Ruling of the court of June 24, 2022.
 - e. The costs of this application be in the cause.
2. The application was supported by an affidavit sworn by Simon Nguigi Muigai, a director of the 1st and 2nd Applicants on September 7, 2022 stating that they are desirous of appealing lower court ruling delivered on June 24, 2022 and order issued on June 30, 2022 but the 30 days' appeal period has since lapsed on August 1, 2022. The Applicants averred that they had faced difficulty in meeting with their Advocates to discuss the merits of the ruling as they were involved in the political campaigns and after elections, there was uncertainty following the announcement of the election results and fear of election violence. That they have an arguable and meritorious appeal, noting that the delay was only for a period of 1 month which cannot be termed as inordinate delay.
 3. The Applicants contended that the ruling of the subordinate court enjoining the 6th Respondent in their suit is baffling how the case should proceed since they have no cause of action against the 6th Respondent. The Applicants further stated that since the intended appeal is based on the addition of a new party to the suit, it is in the interest of justice and good order that the lower court proceedings be stayed so that the issue of whether the newly enjoined party in the proceedings can be addressed first. That the Respondents will not suffer any prejudice if the application is allowed.
 4. The 6th Respondent vehemently opposed the Application vide replying affidavit sworn on November 23rd November 2022 by Paul Kevin Kinuthia stating that the Applicant has provided unsupported allegations without any evidence to form the basis for leave to appeal out of time.
 5. The Applicants and the 6th Respondents filed submissions dated 2nd December 2022 and 23rd November 2022 respectively. The Applicants submitted that the court should grant them leave to appeal out of time and supported this submission with the case of *David Akongo Obilo v Dipen Hasmukhlal Faldu* [2022] eKLR which cited with approval *First American Kenya Ltd -vs- Gulab P. Shah & Others* HCC 2255/2000 (2000) IEA65 among others which have laid out the principles for consideration as follows;
 - “ 1) The explanation if any, for the delay;
 - 2) The merits of the contemplated action, whether the appeal is arguable;
 - 3) Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.”
 6. The Applicants submitted that they filed a suit in the lower court to stop the 1st Respondent from collecting rent and enable them collect rent from tenants, being the registered owners. It is their contention that the suit had nothing to do with ownership of the suit property, yet the lower court proceeded to enjoin the 6th Respondent thus forcing them to sue a party they have no cause of action against. Therefore, it serves the interest of justice that the orders sought for in their application be allowed.



7. The 6th Respondents submitted that the Applicants have not laid out good and sufficient cause for not filing the appeal in time noting that the ruling was delivered on June 24, 2022 and this application was filed 98 days after. The 6th Respondent submitted that the Applicant's ground of experiencing difficulty in meeting with their advocates due to the campaigns and elections does not meet the required threshold of "sufficient cause" He cited the case of *FWNM vs SMM* (2019) eKLR which adopted the definition of sufficient cause as stated by the Supreme Court of India in the case of Parimal vs Veena as follows;

"The meaning of the word "sufficient" is "adequate" or "enough" in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive."

8. The 6th Respondent submitted that the applicants have not demonstrated any good or sufficient reasons for the delay to file an appeal stating that they were spooked when he served them with his defence and counter-claim raising serious issue with the potential to invalidate their title. That should the application be allowed, there will be undue and inordinate delay to the proceedings before the trial court to the detriment of the 6th Respondent and the estate which he administers.

9. Further the 6th Respondent submitted that the Applicants have not established sufficient cause for the court to exercise its judicial discretion to grant stay of proceedings pending hearing and determination of the intended appeal relying in the decision in *Kenya Wildlife Service vs James Mutembei* (2019)eKLR which noted that, stay of proceedings should not be confused with stay of execution pending appeal, as stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation, therefore ought to be exercised sparingly and only in exceptional cases.

10. The lower court delivered a ruling dated June 24, 2022 and a subsequent order dated June 30, 2022 in which the 6th Respondent herein was enjoined as the 6th Defendant in the suit among other orders. The subject matter of the suit forms part of the estate of the late Mary Luisa Wanyee, in which the 6th Defendant is the administrator and the late was an administrator of the estate of Stephen Wanyee, the owner of the suit property.

11. Section 79G of the *Civil Procedure Act* provides:

"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 a good and sufficient cause for not filing the appeal in time."(underline for emphasis)



12. When an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek JJA in *Edith Gichungu Koine Vs Stephen Njagi Thoithi* [2014]eKLR thus:
- “Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
13. The right to appeal is guaranteed to parties by statute and under article 50 of the *Constitution* on the right to fair hearing. Section 75 of the *Civil Procedure Act* provides that an appeal shall lie as of right from the orders listed thereunder and from any other order with leave of the Court. In the instant application, it appears the right was automatic, i would hesitate to deny a party their right unless there are compelling reasons. In the instant application, no compelling reasons have been provided by the 6th Respondent. The only hindrance to the Applicants’ exercising their right to appeal is time. They were late by approximately one month which in my view is not so inordinate. The Applicants have also explained the reason for the delay and this court does note that during the electioneering period in this country comes with a lot of tension. I am inclined to grant them opportunity to challenge the decision by extending the time.
14. The second limb of the application sought an order to stay the proceedings in the lower court pending hearing and determination of the intended appeal. In the case of *Global Tours & Travels Limited v Five Continents Travel Limited* [2015] eKLR Ringera, J (as he then was) held that:
- “...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”
15. The intention and purpose of stay of proceedings pending appeal is to ensure that an applicant does not suffer any substantial loss and that the subject matter of the Appeal is not rendered nugatory. This court is not persuaded how the participation of the 6th Respondents in the proceedings before the subordinate court will cause substantial loss to the Applicant. Similarly, if the appeal is successful, the proceedings as against the impugned party can always be struck out. Consequently, there is want of merit in the prayer for the order for stay of proceedings of the trial court. The request is declined.
16. In summary, the application is allowed in terms of prayer (d) granting the Applicants leave to appeal. The time to appeal is extended by a period of 14 days from the date of this ruling wherefore the Applicants shall file and serve their memo of appeal within the period. Prayer (c) that sought stay of proceedings is dismissed. The costs of this application is awarded to the 6th Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MARCH, 2023

A. OMOLLO

JUDGE

