



Wanjiru & 4 others v Igamba (Sued as the administrator of the Estate of the Late Peter Igamba Njoroge) & another (Environment and Land Appeal 279 of 2016) [2023] KEELC 16076 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16076 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 279 OF 2016**

**LA OMOLLO, J
MARCH 2, 2023**

BETWEEN

**MARY WANJIRU 1ST PLAINTIFF
JULIA WANGECI NJIRI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE MONICA WANGARI NJIRI) 2ND PLAINTIFF
PAULINE NJOKI KUNGU 3RD PLAINTIFF
GLADYS WAMBUI THUKU 4TH PLAINTIFF
NYAMBURA NJOROGE 5TH PLAINTIFF**

AND

**EUNICE WANJIRU IGAMBA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE PETER IGAMBA NJOROGE) 1ST DEFENDANT
JOHN NJOROGE IGAMBA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE PETER IGAMBA NJOROGE) 2ND DEFENDANT**

(Appeal against the judgment of Honourable Justice D.O OHUNGO delivered on 27th April 2022 in Nakuru ELC No. 279 of 2016)

RULING

Introduction.

1. This ruling is in respect to the Applicants Notice of Motion application dated 4th July, 2022. The said application is expressed to be brought under Sections 3A, Section 79G and 95 of the [Civil Procedure Act](#) and Order 42 Rule 6 & Order 50 Rule 1 of the [Civil Procedure Rules](#), 2010.
2. The application is filed under Certificate of Urgency and seeks the following orders:



- i. Spent
 - ii. That this Honourable court be pleased to grant an order of stay of execution of the Judgement/ Decree in Nakuru ELC No. 279 of 2016
 - iii. That this Honourable Court be Pleased to extend time and/ or enlarge time within which to file an appeal against the judgment of Honourable Justice D.O Ohungo delivered on 27th april 2022 in Nakuru ELC No. 279 of 2016.
 - iv. That the Applicant be granted leave to appeal out of time against the whole judgment of Honourable Justice D.O Ohungo delivered on 27th April, 2022 in Nakuru ELC No. 279 of 2016.
 - v. That the draft notice of Appeal annexed hereto be deemed as properly filed and served.
 - vi. That costs of this application be provides for.
3. The application is based on the grounds on its face and supported by the affidavit sworn by the applicant, one Eunice Wanjiru Igamba. The Supporting affidavit is sworn on the 4th of July, 2022.

Factual Background

4. This suit was instituted vide a plaint dated 26th July, 2016. The Plaintiffs sought the following orders:
- a. A declaration that the deceased Peter Njoroge Igamba was registered as the owner of parcels number Shawa/Rongai Block 1/220 Elburgon/Elburgon Block 3/163 and Elburgon/Elburgonblock 1/21 (Kamirithu) in trust for himself and the plaintiffs.
 - b. An order of permanent injunction restraining the Defendants herein by themselves, their agents and/or servants from dealing, disposing off, charging, alienating or in any way interfering with parcels Shawa/Rongai Block 1/220 Elburgon/Elburgon Block 3/163 and Elburgon/Elburgon Block1/21 (Kamirithu) respectively.
 - c. Cost of the suit.
5. Judgment was delivered in favour of the plaintiffs on 27th April, 2022.
6. The 1st Defendant/Applicant being aggrieved and dissatisfied with the said judgment has filed the instant application.

Applicant's Contention.

7. The Applicant deposes that she has been advised by her advocate that the statutory period within which to file an appeal has since lapsed.
8. It is her deposition that the delay in filing the appeal was occasioned by the fact that judgment was delivered without notice to parties following transfer of Honourable Justice D.O. Ohungo.
9. It is her further deposition that her advocate advised her that she could not prefer an appeal within the prescribed time without notice of delivery of the judgement and that the time to do so expires on 27th June, 2022.
10. She contends that the delay in filing the appeal is not inordinate but excusable.
11. The Applicant further contends that she is exposed to execution by the Respondents as they have extracted the decree. She adds that execution shall occasion her irreparable loss and damage.



12. She deposes that she is amenable to deposit any such security as this court may order.
13. The Applicant further deposes that no prejudice shall be suffered by the Respondents in the event that this court grants the orders sought.
14. She contends that her Appeal is arguable and this will be demonstrated once she files her memorandum of Appeal.
15. The Applicant ends her deposition by stating that it is in the interest of justice that leave is granted to her to file her Appeal out of time.

Respondents' Response.

16. In response to the application, the Respondents filed a replying affidavit sworn by the 1st Plaintiff/Respondent with the authority of the other Respondents. The Authority is annexed.
17. The 1st Plaintiff/Respondent describes the application as a non-starter, frivolous, vexatious and an abuse of the court process.
18. She deposes that it is not in dispute that the judgement was delivered on 27th April, 2022 adding that it is not true that it was delivered without notice to the parties.
19. She deposes that the notice was sent out on the 8th March, 2022, six weeks prior to the delivery of the judgment. The notice is attached to the replying affidavit
20. It is her deposition that the delay in making this application is inordinate and inexcusable for the reason that the 1st Defendant/ Applicant and her counsel failed to exercise due diligence and follow up on the delivery of the said judgment
21. She further deposes that the 1st Defendant/Applicant has failed to disclose how she knew of the delivery of the judgment and adds that she was served with the decree on 14th June, 2022. A copy of the decree bearing the stamp of the 1st Defendant/Applicant's Counsel is annexed.
22. The Respondents further contend that orders issued by the court were declaratory and preservatory in nature and as such incapable of execution.
23. The Respondents contend that the Applicant herein has only exhibited the notice of appeal and therefore failed to prove that the Appeal is arguable.
24. It is the Respondents contention that save for the Applicant purporting that she will suffer irreparable loss, they have not sated the nature of loss not demonstrated the particulars of loss they will suffer.
25. The Respondents further deposes that proceedings in respect of distribution of assets of the estate of Peter Igamba Njoroge are pending in Nakuru High Court Succession No. 432 of 2009 wherein the Defendants and Applicant herein are administrators and that as a result, the Applicants herein would not suffer any irreparable loss if the prayer for stay of execution pending Appeal is not granted by this Honourable Court.
26. The Respondents further depose that while the court has power to grant orders of stay pending Appeal, the same is fettered when the minimum threshold under Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) are not met.
27. The Respondents depose that this suit was filed in 2016 while the related succession case was filed in 2009 adding that litigation must come to an end.



28. The Respondents end their deposition by praying that the application be dismissed.

Issues For Determination.

29. The Plaintiff/Respondent filed submissions on 4th October, 2022. In their submissions, they give the background of this suit and identify the following issues for determination;
- a. Whether the 1st Defendant/Applicant is entitled to a stay of execution of the judgment/decree in Nakuru No. 279 of 2016.
 - b. Whether the 1st Defendant/ Applicant is entitled to extension of time to file her appeal out of time.
 - c. Who shall pay the costs of this application?
30. On the first issue, they categorically state that the 1st Defendant/ Applicant is not entitled to an order of stay of execution for the reason that the 1st Defendant/ Applicant has not proved she will suffer irreparable loss. They support this position by citing the decision in *Masisi Mwita v Damaris Wanjiku Njeri* (2016)eKLR.
31. In further support of this first question, the Respondents submit that the orders issued by the Learned Judge are negative orders incapable of execution and/or stay. In support of this, they rely on the decision in *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Milliomu Muthomi and Co. Advocates & 2 others* and *Kaushik Panchamatia & 3 others v Prime Bank Limited & another*.
32. On the second question, they state that the 1st Defendant/Applicant is not entitled to orders for extension of time to file her appeal out of time. They submit that while the court has discretion to extend time, this discretion should be exercised judiciously. They submit that the applicant is not deserving of the orders.
33. They further submit that the 1st Defendant/Applicant received notice of judgment as this was sent to all parties six weeks before the date of judgment. They submit that the delay is therefore inordinate and inexcusable. They further submit that they served the decree on the 1st Defendant/Applicant's counsel on 14th June, 2022.
34. The Plaintiff's/Respondents also submit that the 1st Defendant/Applicant have failed to attach the draft memorandum of Appeal and as such, it is not possible to establish whether the Appeal is arguable. On account of this, they pray that the application be dismissed.
35. Finally, the Plaintiffs/Respondents submit that no prejudice will be suffered by the 1st Defendant/ Applicant if the orders of stay are not granted. They explain that the orders issued in the judgment are negative in nature and are incapable of execution. They end their submissions by praying for dismissal of the present application and award of costs to them.
36. The 1st Defendant/Applicant did not file submissions.

Analysis And Determination.

37. I have considered the application, the affidavits in support of the application, the replying affidavit and submissions filed.
38. In my view, the questions that arise for determination are



- a. Whether this Honourable court should grant orders of stay of execution of the Judgment and decree in Nakuru ELC 279 of 2016.
- b. Whether this Honourable court should enlarge time within which to file an Appeal against the Judgment and decree in Nakuru Elc 279 of 2016
- c. Who shall bear costs of this application?

A. Whether this Court should grant orders of stay of execution of the Judgment and decree in Nakuru ELC 279 of 2016.

39. The decision in *RWW v EKW* [2019] eKLR is insightful in reminding us of the purpose of an order of stay of execution pending Appeal. It is stated that:

“The purpose of an application for stay of execution pending an 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.

40. Another decision that speaks to the purpose for grant of an order of stay pending appeal is Cotton L J in *Wilson v Church (No 2)* (1879) 12ChD 454 at page 458. Hancox JA stated,

“I will state my opinion that when a party is appealing, exercising his undoubted right of Appeal, this court ought to see that the Appeal, if successful, is not rendered nugatory.

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed Appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

41. In *Absalom Dova v Tarbo Transporters* [2013] eKLR it was stated:

“The discretionary relief of stay of execution pending Appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

42. In *Butt v Rent Restriction Tribunal* [1979], the Court of Appeal gave pointers on what ought to be considered in determining whether to grant or refuse stay of execution pending Appeal. The court stated thus:

- i. The power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.
- ii. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an Appeal may not be rendered nugatory should the Appeal court reverse the judge’s discretion.



- iii. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
 - iv. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
43. The principles guiding the grant of a stay of execution pending Appeal are well settled. These principles are provided under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which states as follows:
- 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.
44. In [Victory Construction v BM \(a minor suing through next friend one PMM\)](#) [2019] eKLR , the Learned Judge stated that the Court in deciding whether or not to grant a stay of execution, the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), should also be taken into consideration. He stated that the Court is no longer limited to the provisions of Order 42 Rule 6 adding that the courts are now enjoined to give effect to the overriding objectives of the Act and Rules in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.
45. Section 1A of the [Civil Procedure Act](#) provides that
1. The overriding objective of the Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of Civil Disputes governed by this Act
 2. The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub section (1).
46. Section 1B of the [Civil Procedure Act](#) explains some of the aims of the overriding objectives as:
- a. the just determination of the proceedings;
 - b. the efficient disposal of the business of the Court;
 - c. the efficient use of the available judicial and administrative resources;
 - d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties and
 - e. the use of suitable technology.
47. On the first criterion as set out in Order 42 Rule 6 (2) i.e. the Applicant/Appellant should bring his application without unreasonable delay. Judgment in this matter was rendered on 27th April, 2022. This application was filed on 12th July, 2022.
48. It is not in dispute that this application was filed about 10 weeks after judgment. It is also not in dispute that counsel for the 1st Defendant/Applicant was served with the copy of the decree of 14th June, 2022. For purposes of the orders of stay pending appeal and taking into account the explanation by the 1st



Defendant/ Applicant that she had no notice of the delivery of judgment in this matter, I am satisfied that although there was delay, it has been satisfactorily explained.

49. The second criterion is that the Applicant/Appellant must demonstrate that he is bound to suffer substantial loss if orders of stay of execution are not granted. The question that follows is what comprises substantial loss. In *Silverstein v Chesoni* (2002)1 KLR 867 it was held that;

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the *status quo* because such loss would render the Appeal nugatory.”

50. The 1st Defendant/Applicant has not demonstrated what loss will be occasioned to her if orders of stay are not granted. It is not enough to merely state that loss will be occasioned. An applicant must detail the loss and extent of it.

51. A scrutiny of these orders reveals that one is declaratory, while the other is preservatory in nature i.e

- a. It is hereby declared as between the parties to this case, that Peter Njoroge Igamba (deceased) was registered as the owner of the parcels of land known as Shawa/Rongai Block 1/220, Elburgon/Elburgon Block 3/163 and Elburgon/Elburgon Block 1/21 (Kamirithu) in trust for himself and the Plaintiff
- b. Pending distribution of the estate of Peter Igamba Njoroge (deceased) in High Court Succession Cause No. 432 of 2009 (Nakuru), an injunction is hereby issued restraining the Defendants herein by themselves, their agents and/Or servants from disposing off, charging or Alienating the parcels of land known as Shawa/Rongai Block 1/220, Elburgon/Elburgon Block 3/163 and Elburgon/Elburgon Block 1/21 (Kamirithu).
- c. In view of the close family relationship between the parties, I make no order as to costs of the suit.

52. A declaration is a formal statement, proclamation or announcement especially one embodied in an instrument (*Blacks Law Dictionary* 11th Edition). In its judgment, this court has made a declaration that Peter Njoroge Igamba is the registered owner of the suit parcels and that he holds them in trust for himself and the Plaintiffs. The whole world is now aware of it. There is no way to stay it, the only option available is to Appeal against it.

53. In *Kaushik Panchamatia & 3 others v Prime Bank Limited & Another*. (2020) eKLR, the Learned Judge held as follows;

“We reiterate the position taken by the Court in the above case that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by Applicants.”

54. What is a Negative order? I find the decision by the Supreme Court of the United States of America in *Rochester Telephone Corporation v United States* (1939), 307 U. S. 125, 59 S. Ct. 754. insightful. This was an Appeal from a decree by a District Court of three Judges. The said decree dismissed, on merits, a bill to review an order of the Federal Communications Commission. The Learned Judge dealt with the doctrine of negative orders and classified them as follows;



- a. Negative orders of the first type include cases wherein the administrative body merely assumes jurisdiction of a party, or issues a finding of fact. This type of order does not compel or forbid any certain conduct, but may be used as a basis for future actions by the administrative body.
 - b. Negative orders of the second type include cases wherein the administrative body refuses to grant relief from a statutory command forbidding or compelling conduct on the part of the complainant.
 - c. Negative orders of the third type include cases wherein the administrative body refuses to forbid or compel conduct by a third person in respect to the complainant.
55. A reading of judicial decisions from Kenya and the one from the supreme court of the United States of America, it is logical to deduce that negative orders comprise of declarations, dismissals on merit and refusal to grant temporary or mandatory injunctions.
 56. I find and agree with the submissions of the Plaintiffs/Respondents that the orders that negative orders are incapable of being stayed. The judgement in this matter comprises of negative orders. There is nothing to be stayed.
 57. The third criterion is that the Applicant must furnish security for the due performance of the decree. The Applicant concedes on the question of security for costs and states that she is amenable to deposit any such security as this Honourable Court may order.
 58. I decline to grant an order of stay pending Appeal for the reason that it will serve no useful purpose. Court orders should not and shall not be granted in vain.

B. Whether the 1st Defendant/ Applicant is entitled to orders of extension of time within which to file her Appeal.

59. 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.

60. From reading of Section 79G it is evident that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is a matter that calls for exercise of discretion. Judicial discretion must be exercised judiciously. This means that the discretion must be based on legal principles and not, by way of example, on the whims and other non-legal considerations.
61. One of those judicial principles is that the Applicant must satisfy the court that he/she has good and sufficient cause for not filing the appeal in time. In *Mbukoni Services Limited & another v Mutinda Reuben Nzili & 2 others* [2021] eKLR, the Learned Judge cited with approval the decision in *Daphne Parry v Murray Alexander Carson* [1963] EA 546 where it was held that 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.

62. The principles to be taken into consideration in exercising the discretion on whether or not to enlarge time were enumerated in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No. Nai. 255 of 1997) (unreported), the Court expressed the following view:

“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.” (Emphasis is mine)

63. On the question of length of delay and prejudice to the Respondent, there is delay, no doubt, in filing the appeal. The 1st Defendant/Applicant filed this application four weeks after she became aware of the judgment in this matter, by which time, the statutory period for filing the appeal had lapsed. Further, this application was brought one and a half months after expiry of the 30-day period within which to file an Appeal. In all consideration, a period of one and a half months does not prejudice the Plaintiffs/ Respondents in any way.
64. On the reason for the delay, the 1st Defendant/Applicant contended that the delay in filing the Appeal was due to the fact that judgement was delivered without any notice to the parties, a position that the Respondents deny. The Respondents further state that they served the decree on the 1st Defendant Applicant on 14th June, 2022. It is reasonable to conclude that 14th June, 2022 is the date that the Applicant came to know about the judgment and by this time, the time for filing the appeal had lapsed.
65. On the question of the chances of the appeal succeeding if the application is granted, regrettably the 1st Defendant/Applicant only attached the notice of appeal and not the memorandum of appeal. Nevertheless, I am of the view that a party should not be denied a right to ventilate his claim and by extension to exhaust all the legal avenues available to him/her. The overriding objective of the *Civil Procedure Act* is to Facilitate a just resolution of civil disputes. I am also reminded that under the not so new constitutional dispensation, courts should be concerned with substantive justice rather than procedural technicalities.
66. In *Samvir Trustee Limited v. Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997, The learned Judge held as follows;
- “Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the Defendant...”
67. Taking all these into consideration, I find that the 1st Defendant/Applicant has satisfied this court that she is deserving of this court’s discretion in extending time within which to file the Appeal.

C. Who should bear the cost of this application?

68. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party



should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. This was the holding in *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287.

Disposition.

69. In the result, the application dated 4th July, 2022 is allowed in the following terms;
- a. Leave is hereby granted to the 1st Defendant/Applicant to file an Appeal out of time.
 - b. The Memorandum of Appeal shall be filed and served within 10 days from the date hereof.
 - c. In default of (b) above, the orders for leave in (a) shall stand vacated.
 - d. The costs of this application shall be in cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 2ND DAY OF MARCH, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Ouma for Plaintiff/Respondents

No appearance for Applicant

Court Assistant; Lotkomoi

