



**Nzomo (Suing as the Legal Representative of the Estate of Daniel Nzomo Wambua - Deceased) v Makueni County Government (Environment & Land Case 355 of 2017) [2023] KEELC 17418 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17418 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 355 OF 2017**

**TW MURIGI, J**

**MAY 3, 2023**

**BETWEEN**

**THOMAS MATEE NZOMO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DANIEL NZOMO WAMBUA - DECEASED) ..... PLAINTIFF**

**AND**

**MAKUENI COUNTY GOVERNMENT ..... DEFENDANT**

**RULING**

1. Before me for determination is a Notice of Motion dated 26<sup>th</sup> June, 2022, brought under sections 1A, 1B, 3A & 95 of the *Civil Procedure Act*, order 42 rule 6(1), order 51 rule 1 of the *Civil Procedure Rules* and all other enabling laws in which the applicant seeks the following orders:-
  1. Spent.
  2. The honourable court be pleased to extend the time within which the defendant/applicant should have lodged the notice of appeal pending the hearing and determination of this application.
  3. The honourable court be pleased to admit the notice of appeal exhibited to this application duly on record upon payment of the requisite Court filing fees pending the hearing and determination of this application.
  4. The honourable court does direct the court deputy registrar to endorse the copies of the notice of appeal to be provided by the defendant/applicant as soon as possible and pending the hearing and determination of this application.
  5. The honourable court be pleased to grant stay of execution of the judgment delivered on May 31, 2022 pending the hearing and determination of this application.



6. The honourable court be pleased to grant stay of execution of the Judgment delivered on May 31, 2022 pending the hearing and determination of the intended appeal to be registered by the defendant/applicant.
7. The costs be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Dr. Benjamin Munywoki Musau Advocate sworn on even date.

### **The applicant's Case**

3. The applicant averred that vide the judgment delivered on May 31, 2022, the Court directed the defendant/applicant to pay Kshs. 40,000,000/- to the plaintiff/respondent within 120 days as compensation for land acquired from the plaintiffs. That in addition, the plaintiff was awarded Kshs. 2,000,000/- for trespass if compensation for the acquisition is not paid within the specified time.
4. That being aggrieved, the defendant/applicant wishes to appeal against the judgment on points of law. He further averred that the applicant was unable to file the notice of appeal on time as the Court file was not available at the ELC registry at Makueni.
5. The applicant further averred that the delay was occasioned by the ministries and departments of the applicant who took some time to meet and discuss the implication of the judgment.
6. He went on to state that they received instructions to file an appeal against the judgment on June 17, 2022. He contended that unless the orders sought are granted, the appeal will be rendered nugatory as the respondent will execute the judgment. He averred that the application has been brought without inordinate delay. In addition, he contended that the respondent will not suffer any prejudice if the orders sought are granted.

### **The respondent's Case**

7. Opposing the application, the respondent *vide* his replying affidavit sworn on July 7, 2022 averred that the application is an abuse of the Court process as the court file has always been available in Makueni Law Courts. He further averred that the applicant has not annexed a letter addressed to the deputy registrar to demonstrate that he had requested for the file or that he had made any attempt to have the file brought back to Makueni from Narok Law Courts.
8. He further averred that the applicant misled the court by failing to demonstrate that he had attempted to file the notice of appeal or that the same was declined for the reasons that the Court file was not available.
9. He further averred that the applicant failed to demonstrate that he received instructions on June 17, 2022. He contended that the application is dated 4 days after the notice of appeal was prepared. He argued that the ministries and the applicant ought to have adhered to the rules as they are not made in vain.
10. He contended that the applicant has the option of vacating the suit property if it does not want to pay the decretal sum. He urged the Court to dismiss the application.
11. The application was canvassed by way of written submissions.

### **The Defendant/applicant's Submissions**

12. The applicant's submissions were filed on December 29, 2022.



13. Counsel for the applicant identified the following issues for the Court's determination: -
  - i. Whether the honourable court can enlarge the time within which the notice of appeal should have been lodged for endorsement by the deputy registrar.
  - ii. Whether this honourable court can stay execution of the judgment and decree pending the hearing and determination of the intended appeal.
  - iii. Whether this honourable court can stay execution of the judgment and decree pending the hearing and determination of the intended appeal.
  - iv. Who bears the costs.
14. On the issue of whether the Court can enlarge time for filing the Notice of Appeal, Counsel submitted that article 159(2)(d) of the Constitution enjoins the Court to dispense justice without undue regard to technicalities of procedure while rule 75(2) of the Court of Appeal Rules provides that the notice of appeal should be lodged within 14 days from the date of delivery of the judgment.
15. Counsel submitted that the delay in filing the Intended appeal was occasioned by the belated receipt of instructions from his client.
16. It was submitted that the defendant's officers took time to interrogate the implications of the impugned judgment before arriving at the decision to appeal against the same. Counsel contended that the Court should exercise its inherent powers and allow the application as prayed.
17. On whether the court can stay execution of the judgment and decree pending the hearing and determination of the intended appeal, counsel submitted that the applicant has satisfied the conditions set out in order 42 rule 6 of the Civil Procedure Rules.
18. It was submitted that the applicant has demonstrated that it will suffer substantial loss if the orders sought are not granted as the suit property hosts Wote bus park and other business operations which will be adversely affected in the event the defendant is evicted from the suit premises.
19. In addition, counsel submitted that the application has been made without unreasonable delay as it was filed in less than a month from the date of delivery of the judgment. It was further submitted that the draft memorandum of appeal demonstrates that the Intended Appeal has high chances of success.
20. Finally, Counsel submitted that costs should abide with the outcome of the Intended Appeal. To buttress his submissions Counsel relied on the bundle of authorities annexed to the submissions.

### **The Plaintiff's/Respondent's Submissions**

21. The respondent's submissions were filed on February 7, 2023.
22. Counsel for the respondent raised the following issues for the Court's determination:-
  - i. Whether this court should enlarge the statutory timelines for filing of the notice of appeal.
  - ii. Whether this court should grant stay of execution of judgment and decree pending hearing and determination of the intended appeal.
  - iii. Who bears costs of the application.
23. On whether the Court should extend time for filing the notice of appeal, Counsel submitted that the applicant has not demonstrated that it attempted to file the Notice of Appeal or that the same was rejected for reason that the file was not available.



24. It was further submitted that the applicant has not presented a letter addressed to the Deputy Registrar to demonstrate that they had made efforts to call for the file from Narok Law Courts. Counsel further submitted that the Notice of Appeal dated 16/06/2022 was prepared without instructions since the applicant deposed that he received instructions on June 17, 2022.
25. Counsel further submitted that the applicant is asking the Court to rubber stamp what is a nullity ab initio as the instant application is dated 20/06/2022 while the Notice of Appeal is dated 16/06/2022. Counsel went on to submit that article 159 of the Constitution was not designed to cure or white wash procedural wrongs. It was submitted that the applicant has not laid any basis to warrant the Court to exercise its discretion.
26. On whether the Court should grant stay of execution of the judgment and decree pending the hearing and determination of the Intended Appeal, Counsel submitted that the Court should be guided by the provisions laid down in order 42 rule 6(2) of the Civil Procedure Rules.
27. Counsel submitted that the suit property is private property and that the respondent has been deprived of his property since 1990 when the applicant occupied and started utilising the same.
28. Counsel submitted that the applicant has not demonstrated that it will suffer loss or that the appeal will be rendered nugatory if the orders sought are not granted. Counsel argued that pursuant to the judgment delivered on 31<sup>st</sup> May 2022, the applicant was given the option of reimbursing the Plaintiff or vacating the suit property.
29. Counsel argued that the applicant has continued to benefit from the suit property while the respondent continues to suffer as he cannot use his property.
30. Finally, Counsel submitted that the applicant has not offered security for costs for the performance of the Decree. It was submitted that in the event the Court is inclined to allow the application, the applicant should be directed to deposit half the decretal amount pending the hearing and determination of the Intended Appeal.

### **Analysis And Determination**

31. Having considered the application, affidavits and the rival submissions, the following issues arise for determination:-
  - i. Whether the applicant should be granted leave to file the Notice of Appeal out of time.
  - ii. Whether stay of execution should be granted.

### **Whether The applicant Can Be Granted Leave To File The Notice Of Appeal Out Of Time**

32. The power to enlarge time for filing the Notice of Appeal is granted by section 7 of the Appellate Jurisdiction Act (cap 9) of the Laws of Kenya provides as follows;

Section 7 Power of High Court to extend time;

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired;

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.



33. From the reading of section 7, it is clear that the High Court (which now in light of the *Constitution* of Kenya, 2010 includes the Environment and Land Court and the Employment and Labour Relations Court), may extend time for giving notice of intention to appeal from a judgment of the High Court.
34. Rule 4 of the *Court of Appeal Rules* also gives the Court of Appeal power to extend time and provides as follows;
- The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or a superior court, for the doing of any act authorized or required by the Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.
35. From the reading of the above provisions, it is clear that the power to extend time for filing a notice of appeal is vested in both the High Court and courts of equal status and the Court of Appeal.
36. In the instant case, in explaining the delay in filing the Notice of Appeal within time, the applicant averred that the delay was occasioned by the non availability of the Court file in Makueni registry as the judgment was delivered from the Environment and Land Court at Narok. He further averred that the delay was occasioned by the belated receipt of instructions from his client.
37. The respondent on the other hand averred that the applicant has not demonstrated that he attempted to file the Notice of Appeal or the same was rejected at the registry on the grounds of non-availability of the Court file.
38. The Judgment sought to be challenged was delivered on 31<sup>st</sup> May 1, 2022. It is not in dispute that the judgment was delivered from the Environment and Land Court at Narok. Any Notice of Appeal in respect to the said judgment ought to have been filed within 14 days from the date of the judgment. The instant application was filed on 20<sup>th</sup> June, 2022 which is slightly less than a month since the last date when the appeal ought to have been filed.
39. I have considered the circumstances of this case and I find that even though the applicant delayed in filing the Notice of appeal within the stipulated period, the applicant has given reasonable and plausible reasons for the same.

### **Stay Of Execution**

40. The applicant is seeking to stay the judgment delivered on 31<sup>st</sup> May, 2022 pending the hearing and determination of the Intended Appeal.
41. 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.
42. In considering an application for stay of execution, I am guided by the case of *Butt v 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.
43. The applicant in an application for stay must satisfy the Court that he/she/it stands to suffer substantial loss if stay is not granted.
44. On the issue of substantial loss, the applicant should not only state that it is likely to suffer substantial loss, it must prove that it will suffer substantial loss if stay orders are not granted.
45. In so finding, I am persuaded by the Court of Appeal decision in the case of *Charles Wabome Getbi v Angela Wairimu Getbi* (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.”
46. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma v 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.
47. The applicant averred that it will suffer irreparable loss if the respondent executes the judgment as the suit property is utilized for public utility purposes and for other business operations. In addition, the applicant contended that if the orders sought are not granted the respondent may execute the judgment and as a consequence, the Intended Appeal will be rendered nugatory.
48. The respondent on the other hand averred that the applicant has not demonstrated that it will suffer any loss or that the Intended Appeal will be rendered nugatory if the orders sought are not granted. He argued that he has suffered loss as the applicant has since the year 1990 deprived him from enjoying his property.
49. It is not in dispute that the respondent has extracted the decree from the judgment. The applicant’s fear that the respondent may execute the judgment before the Intended Appeal is heard and determined is therefore not baseless.



50. Taking into account that the respondent has already extracted the decree and the fact that the suit property hosts a public utility, this Court is satisfied that the applicant has demonstrated that it will suffer irreparable loss if the execution of the judgment were to proceed.
51. I find that the applicant has demonstrated that it will suffer substantial loss as the suit property is utilised for public utility purposes.
52. In an application for stay of execution pending Appeal, an applicant must also satisfy the Court that the application has been made without unreasonable delay.
53. On whether the application has been brought without unreasonable delay, it is not in dispute that the judgment was delivered on 31<sup>st</sup> May, 2022. The present application was filed in Court on 20<sup>th</sup> June, 2022. Although there was delay in presenting the instant application, the applicant has given plausible reasons for the same.
54. On the last condition as to the provision of security for costs, Counsel for the respondent submitted that in the event the Court allows the application, the applicant should be directed to deposit half the decretal amount in court.
55. Order 42 rule 8 of the *Civil Procedure Rules* provides as follows:-
- No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.
56. It is clear from the above provision that no orders for deposit of security of costs shall issue against the Government and this includes the County Government. The county government is therefore protected from the requirements of order 42 rule 6 and 7 of the *Civil Procedure Rules*.
57. In light of the foregoing the application dated 26<sup>th</sup> June, 2022 is allowed in the following terms;
1. The application to extend time for the defendant to lodge its notice of appeal out of time is hereby allowed as prayed.
  2. The notice of appeal shall be filed and served within the next 14 days.
  3. Stay of execution is granted pending the hearing and determination of the intended appeal.
  4. Costs shall abide with the outcome of the intended appeal.

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 3<sup>RD</sup> DAY OF MAY, 2023.**

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**HON. T. MURIGI**

**JUDGE**

In the presence of: -

Court Assistant – Mr. Kwemboi

