



Makori v Barasa; Faulu Microfinance Bank Limited (Third party) (Environment and Land Appeal E017 of 2023) [2023] KEELC 18633 (KLR) (4 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18633 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E017 OF 2023
EC CHERONO, J
JULY 4, 2023**

BETWEEN

JANE KERUBO MAKORI APPELLANT

AND

REHEMA ADHIAMBO BARASA RESPONDENT

AND

FAULU MICROFINANCE BANK LIMITED THIRD PARTY

RULING

1. The Appellant/Applicant, vide a Notice of Motion dated March 22, 2023 seeks the following orders;
 1. (Spent)
 2. That there be a stay of execution of the decree delivered on the February 27, 2023 in Bungoma Chief Magistrate’s Court ELC Case No E014 of 2020 Pending the hearing and determination of this application inter-parte
 3. That this Honourable Court be pleased to enlarge time to enable the Applicant file her appeal out of time.
 4. That there be a stay of execution of the decree/Ruling delivered on the February 27, 2023 in Bungoma Chief Magistrate’s Court ELC Case number E014 OF 2020 pending the hearing and determination of the appeal.
 5. That costs of this application be provided for.
2. The application is premised on grounds apparent on the face of the said application and the affidavit of the applicant sworn the same date.



3. The application is opposed by the 1st Respondent vide a replying affidavit sworn on April 17, 2023. The 2nd respondent also filed grounds of opposition dated May 20, 2023.
4. When the said application came up for directions on April 25, 2023, the parties agreed to canvass the same by way of written submissions.

Applicants Summary of Facts

5. The applicant in her supporting affidavit deposed that she was aggrieved by the judgment/decree of the trial court and intends to prefer an appeal against the same. The applicant further deposed that her intended appeal has overwhelming chances of success and is apprehensive that she would be evicted from the suit land any time unless the orders sought are granted.
6. The applicant also stated that this application has been brought without unreasonable delay and that the orders sought will not prejudice the respondents in any way. She stated that unless the application is allowed, her intended appeal will be rendered nugatory.

1st Respondent Summary of Facts

7. In her replying affidavit, the 1st respondent deposed that the application is full of misinformation and half-truths calculated to deceive the court into granting the orders of stay to her prejudice. She deposed that the applicant's counterclaim was dismissed with costs and judgment was entered in her favour thereby confirming her proprietary rights as enshrined under Article 40 of the Constitution and section 24 of the Land Registration Act. The applicant further deposed that she is the registered proprietor of the suit property after she purchased through a public auction by the 2nd respondent in exercise of its statutory power of sale. She stated that the applicant has not demonstrated that she will suffer substantial loss nor furnished security for the due performance of the decree as may ultimately be binding on her unless the application is granted.

The 2nd Respondents Summary Of Facts

8. The 2nd respondent filed grounds of opposition and averred that the appellant has not advanced any reasons to justify filing the appeal out of time and that she has not outlined what substantial loss she will suffer unless the application is granted.

Applicant's Written Submissions

9. The applicant submitted that after the impugned judgment was delivered on February 27, 2023, she preferred an appeal to the High Court on March 23, 2023 which is 24 days after the judgment. She argued that the law requires her to lodge appeal within 45 days from the date judgment is delivered and therefore, she filed the appeal on time
10. The applicant also submitted that she has demonstrated in her Memorandum of Appeal that she has overwhelming chances of success. She averred that the purpose for stay of execution pending appeal is to preserve the subject matter of the appeal so that the appeal is not rendered nugatory.

Analysis and Determination

11. I have considered the Notice of Motion application dated March 22, 2023 and the supporting affidavit of the applicant. I have also considered the replying affidavit by the 1st respondent and grounds of opposition by the 2nd respondent as well as the submissions by the applicant. For the avoidance of doubt, the respondents did not file submissions as directed by this Honourable court.



12. Order 42 Rule 6(2) CPR which is the applicable sets out three conditions a party must satisfy before grant for stay of execution of a judgment/decree or order pending appeal as follows;
- a. The application must be made without unreasonable delay;
 - b. The applicant must show that he will suffer substantial loss unless the stay orders are granted; and
 - c. The applicant has given security for the due performance of the decree/order as may ultimately be binding on him.

13. Section 79G of the *Civil Procedure Act* provides as follows;

‘79G. Every appeal from a subordinate court to the High 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.

Section 95 of the same Act provides thus;

‘95. 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.’

14. It is admitted by the parties that the impugned judgment/Decree by the trial court was delivered on February 27, 2023. It is expressly provided under the *Civil Procedure Act* that every appeal from the subordinate courts to the high Court or any of the Courts of equal status shall be filed within thirty(30) days from the date of the decree or order appealed against. From the date of delivery of the impugned judgment/decree (February 27, 2023) until the filing of the present application is about 23 days. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral Commission & 7 Others (2015) eKLR*, the Supreme Court of Kenya identified salient Principles to be considered in an application for extension of time as follows;

‘This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a court should consider in exercise of such discretion that;

1. 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;
2. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. (where) there is a reasonable (cause) for the delay, the delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;



6. Whether the application has been brought without undue delay; and.
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.'
15. Since the applicant took 23 days from the date judgment was delivered and the filing of this application, I find that the application has been brought without unreasonable delay.
 16. Regarding the second condition, the applicant has not shown to the satisfaction of this court that she will suffer substantial loss unless the orders for stay are granted. Substantial loss has been described in numerous decisions by the superior Courts to include factors which would create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal (see *James wangalwa v Agnes Naliaka Cheseto (2020) eKLR*). The burden of proof lies with the applicant to show to the satisfaction of the court that unless the stay of execution orders are granted, he will reap a barren judgment as a successful party. In my view, the applicant has not demonstrated that he will suffer substantial loss unless the application is granted.
 17. The third and final condition is that the applicant must give security as this court may require for the due performance of the decree/order as may ultimately be binding on her. I have looked at the supporting affidavit by the applicant and find that she has not given any security or undertaking to abide by any terms or conditions this Court may give for the grant of the orders sought pending appeal.
 18. The last prayer in the application is for leave to enlarge time to file appeal out of time. Since the impugned judgment was delivered on February 27, 2023 and the current application was filed before the expiry of the thirty days under Section 79G CPR, the order for extension in my view is superfluous and an abuse of the court process.
 19. The upshot of my finding is that the Notice of Motion application dated March 22, 2023 is without merit and the same is hereby dismissed with costs.

Orders accordingly.

READ, SIGNED AND DELIVERED IN THE OPEN COURT AT BUNGOMA THIS 4TH JULY, 2023.

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Wagonda for the 2nd Respondent
2. Mr Murunga H/B for Otsula for Applicant/Appellant
3. Mr Wamalwa H/B for Mr. Anwar for 1st Respondent
4. Joy C/A

