Ring Road Developers Ltd v Papello Investments & 10 others (Environment & Land Case 93 of 2022) [2023] KEELC 18548 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18548 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 93 OF 2022

EK MAKORI, J

JULY 5, 2023

BETWEEN

RING ROAD DEVELOPERS LTD ..... PLAINTIFF

AND

PAPELLO INVESTMENTS ..... 1ST DEFENDANT

RIDGE CREST INVESTMENT LIMITED ..... 2ND DEFENDANT

LUKAS CHIMERA KENGA ..... 3RD DEFENDANT

JAMBO C. MKANDARANGA ..... 4TH DEFENDANT

KULOLA DZENGO ..... 5TH DEFENDANT

KALUMA MWANDAGU ..... 6TH DEFENDANT

CHIROMO SINDA ..... 7TH DEFENDANT

JOSEPH MWATEBE SAA ..... 8TH DEFENDANT

KENGA WESA ..... 9TH DEFENDANT

THE COMMISSIONER OF LANDS ..... 10TH DEFENDANT

THE ATTORNEY GENERAL ..... 11TH DEFENDANT

RULING

1. The Applicants filed the instant Application by way of a Notice of Motion dated September 11, 2020 in which they sought the following orders:

    i. Interim stay of execution of judgment delivered on November 22, 2019.

    ii. Extension of time for filing the Appeal.

iii. Stay of execution of the judgment delivered on November 22, 2020.

2. The Respondent filed a Replying Affidavit in opposition to the said application; the same was sworn on January 18, 2021. In the said Replying Affidavit sworn by Anthony Kamuiru Gitau and filed on January 28, 2021, it is alleged that the court issued a notice dated November 14, 2019 to the effect that certain judgments, including the judgment in this matter, were to be delivered by Olola J on November 22, 2019. However, the Applicants averred that the notice of delivery of judgment was never brought to their attention nor that of their advocate.

3. The Applicants have further sworn that their advocate learnt of the existence of the judgment on December 13, 2019 and as a result of the Christmas Holiday, the matter was thereafter overlooked until September 2020 when the Applicants managed to contact him.

4. According to the Applicant, the crucial point to note is that by December 13, 2019, the time of filing the Notice of Appeal had already expired since the Notice of Appeal should have been filed within 14 days running from November 22, 2019. It is submitted that the Applicants cannot be blamed for the said error because it was caused by the trial court.

5. The Applicants have stated that they have a constitutional right to file an appeal, as per Article 164 (3) of the *Constitution* of Kenya, 2010 and that right should not be watered down as a result of the error made by the trial court in failing to notify the Applicants the date of the said judgment. The decisions in *Pithon Waweru Maina V Thuku Mugiria* [1983] eKLR and in *Belinda Murai & 9 others v Amos Wainaina* [1978] eKLR are cited to support the averment by the Applicants for the following propositions:

    i. In Pithon Waweru Maina it was held that a party should not be punished due to his advocate's mistakes and that, a litigant should not be punished due to a mistake made by the court.

    ii. In Belinda Murai the holding is to the effect that all human beings make mistakes (it is said that to err is human) and that a mistake is a mistake and when one occurs, the matter should be looked at with great understanding so that a litigant's rights are not compromised on account of the mistake.

    iii. In Belinda Murai it was emphasized that the power to enlarge time to enable a litigant to file an appeal is exercised by the court to ensure that a litigant's right to appeal is not watered down capriciously. Belinda Murai a party was allowed to file an appeal on the 24th year of delay. Comparatively, in this case, the delay herein is for a very short period.

6. The Applicant stated that furthermore, just as the Belinda Murai case (*supra*) was about land ownership, the claim in this case is about land ownership. That land is very emotional, and claims based on it should be given a full hearing, including appeals so that the affected parties can leave the court knowing that their grievances have been fully heard by a court of law. In other words, when it comes to land claims, any short-circuiting of the legal process would be counter-productive because when citizens perceive that such disputes are not being addressed properly, they resort to self-help, resulting in chaos and anarchy to the great detriment of law and order in the society.

7. The Applicants further submitted that the court should apply the law as laid out in Sections 1A, 1B, and 3A of the *Civil Procedure Act* and as articulated in Article 159 of the *Constitution* of Kenya, 2010. In doing so, the court should not allow technicalities to outrun substantive justice. iI is urged that

the Applicants' right of appeal be dearly protected by the court. This shall be well achieved if this application is granted.

8. If the application is allowed, the Applicants contended that it would be fair and just to grant a stay of execution of the judgment dated November 22, 2019. Reliance is placed on the decision in *RWW v EKW* [2019] eKLR where the court held that the essence of an order of execution is to ensure that an appeal is not rendered nugatory. That if the execution were to be carried out, then should the Applicants ever win the appeal, the land, which is the subject matter of this appeal, would then have been alienated and the appeal would be rendered trifling. Additionally, on page 4 of the documents in support of the application, it is shown that the Applicants have at all material times been in occupation of the suit property if evicted from the suit property, the Applicants would suffer irreparable losses.

9. The Respondent submitted that the principles guiding the grant of stay of execution pending appeal are well settled. These principles are provided for under Order 42 Rule 6(2) of the *Civil Procedure Rules*, which provides:

> " ...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 Applicants unless the order is made and that the application has been made without unreasonable delay;
>
> b. such security as the court orders for the due performance of such decree or order s may ultimately be binding on him has been given by the Applicants."

10. The respondent stated that the Applicants have not satisfied any of the said conditions for the grant of the orders craved. They have not demonstrated the nature of loss that may result to them. The court issued sufficient notice for delivery of judgment in this matter and the Applicants' ignorance of the same cannot be used as an excuse to seek the orders. Further, the judgment was delivered on November 22, 2022 and the same has already been executed in the form it was delivered. The instant application has already been overtaken and a stay of execution at this point cannot issue on what has already been achieved.

11. The respondent further stated that there has been an inordinate delay in filing the instant application because the application was filed on September 11, 2020, almost a whole year after the judgment was delivered on November 22, 2019. It is averred that it is evident the instant application was an afterthought and no sufficient explanation was made by the Applicants as to why the same was filed almost a year after the delivery of judgment. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundary Commission & 7 Others* [2014] eKLR the Supreme Court pointed out that, it is up to a party in litigation to demonstrate reasons for being late in bringing up an appeal. The court exercises discretion to enlarge time to a deserving party.

12. What falls for the determination of this court is whether this court should enlarge the time within which to appeal and whether arising from the foregoing a stay of execution should be granted pending the outcome of the intended appeal to the Court of Appeal.

13. I have gone through the submissions and materials placed before me. Olola J. delivered judgment in this matter on November 22, 2019 allowing the plaintiff's claim but granting a 60 days moratorium against eviction and for the defendant to move out of the suit property voluntarily. A notice of the delivery of the judgment was issued as shown by the notice of motion dated November 14, 2019.

14. From the record, that judgment had been reserved. Counsel for the Applicants seems not to have been attending court even as of the 24th of January 2019 when judgment was reserved. It is the averment of counsel that he came to learn of the judgment on December 13, 2019 and due to charismas vacation, the time within which to appeal had lapsed. It took up to September 4, 2020 to file the current application.

15. Whereas the Applicants contended that, the judgment was delivered in their absentia and shifted the blame to the court – which issued a notice of delivery in any event when counsel for the Applicants became seized of the information of the existence of the judgment, no action was taken to bring up the current application within a reasonable time thereafter.

16. I have considered the authorities quoted by the parties, the principles governing enlargement of time within which to appeal is as laid in the cases *Belinda Murai & 9 others v Amos Wainaina* [1978] eKLR, where Madan JA. held:

> " The learned Judge of Appeal said he accepted the dicta as I do also in *Shah H Bharmal and Brothers v Kumari* [1961] EA 679 and also as endorsed by Spry VP in *Hamam Singh and Others v Mistri* [1971] EA 122 that the mistake of a legal advisor may amount to sufficient reason and he held that he had jurisdiction to entertain the application for the extension of time, but he thought it incumbent upon him before exercising his discretion to extend the time to consider various other matters, such as delay, the public importance of the matter and the prospects of success of the intended appeal. To these matters mentioned by the learned Judge of Appeal, I would add the requirements expressly of the interests of justice though the same may be said to be implicit in what has already been included."

17. Much coinage has been placed in the argument that the court did not give notice of the delivery of judgment and the absence of counsel during the delivery of the same prejudiced the Applicants' chances of appeal. However, the record shows there was a notice of the delivery of the judgment dated November 14, 2019. Then after the discovery, it took from December 13, 2019 to September 7, 2020 to bring up the current application. During this period, the matter had taken a different dimension. The Deputy Registrar of this court allowed eviction and police assistance to effect the same as ordered by Olola J in his judgment dated November 22, 2019. The eviction took place as can be appreciated from the proceedings before the Deputy Registrar of this court.

18. Whereas a party has a right to be heard on appeal, a vigilant and cognizant, one needs to move with speed knowing the dangers of failure to adhere to timelines impose by statute to do certain things. In this case, immediately the Applicants became aware of the judgment in place, even if late, an application of the current nature ought to have been filed immediately without further delay. As stated in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundary Commission & 7 Others* [2014] eKLR the Supreme Court pointed out that:

> " Extension of time is not a right of a party; it's an equitable remedy that is only available to a deserving party at the discretion of the Court"

19. Such a deserving party acts immediately to forestall the dangers of the change of the substratum of the subject matter in a suit. As held in *R W W v E K W* [2019] eKLR:

> " 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.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the Appellant with those of the Respondent. In that regard what is at stake in this cause is that if the stay herein is not granted the Respondent would be at liberty to sell the immovable property and the proceeds thereof distributed or distribute the property 50:50."

20. Land dealings for instance take a turn quite fast; the delay in bringing up the application is not excusable. The Applicants became aware of the judgment and failed to act leading to further proceedings including eviction. The horse already left the barn. I cannot recall it. Even if I were to grant a stay, it will be an exercise in futility because the judgment in place has long been executed.

21. On the other grounds for grant of the orders sought as to whether the appeal has prospects of success, no material was placed before me to warrant my consideration, nor is this a matter of public importance.

22. The preservation of the substratum of the subject matter could have been appropriate if the application was brought timeously before execution in the form of an eviction set in. This seems not to have been the case.

23. Therefore, the instant application is dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 5TH DAY OF JULY 2023

E.K. MAKORI

JUDGE

In the presence of :

Ms Randa for the Applicants

Court Clerk: Happy

In the Absence of;-

Mr. Nyongesa for the Respondent

A-G