



**Mutisya v Mwololo (Miscellaneous Application E001 of 2023)  
[2023] KEELC 20805 (KLR) (11 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20805 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
MISCELLANEOUS APPLICATION E001 OF 2023  
TW MURIGI, J  
OCTOBER 11, 2023**

**BETWEEN**

**BENJAMIN KYALO MUTISYA ..... APPLICANT**

**AND**

**JOSEPHAT NZIKA MWOLOLO ..... RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 10<sup>th</sup> January, 2023, brought under Articles 48, 50 and 150 of *the Constitution* of Kenya, Order 50 Rule 6, Order 42 Rule 6(2) of the Civil Procedure Rules, Rules 3(1) & 2 of the High Court Practice and Procedure Rules and Sections 65, 79G, 95 & 3A of the *Civil Procedure Act* and all other enabling provisions of the law in which the Applicant seeks the following orders:-
  1. Spent.
  2. That pending the hearing and determination of the application, this Honourable Court be pleased to issue an order of stay of execution of the judgement, order and Decree of the trial court dated 24<sup>th</sup> December, 2021 in Makindu SRMC 239 of 2014.
  3. That pending the hearing and determination of the intended Appeal, this Honourable Court be pleased to issue an order of stay of execution of the judgement, order and Decree of the trial Court dated 24<sup>th</sup> December, 2021 in Makindu SRMC 239 of 2014.
  4. That this Honourable Court be pleased to grant the Applicant leave to file the Intended Appeal out of time.
  5. That the annexed Memorandum of Appeal be deemed duly filed and served upon payment of the requisite Court fees.
  6. That the costs of the application be in the cause.



2. The application is based on the grounds appearing on its face together with the supporting affidavit of Benjamin Kyalo Mutisya sworn on even date.

### **The Applicant's Case**

3. The Applicant averred that he became aware of the judgement when he was served with the application for contempt dated 20<sup>th</sup> October, 2022. He went on to state that at the time when the judgement was being delivered, his Advocate Mr Kasyoka was unable to communicate with him because he was hospitalised after suffering from a stroke.
4. He argued that unless an order of stay of execution is granted, the Respondent will execute the judgement because he has already extracted the decree of the court. In addition, he argued that his appeal will be rendered nugatory if an order of stay is not granted.

### **The Respondent's Case**

5. In opposing the application, the Respondent filed a replying affidavit sworn on 7<sup>th</sup> February, 2023. He averred that the application is bad in law, lacks merit and is an abuse of the Court's process. He further averred that there has been inordinate delay in filing the present application which is intended to deny him the fruits of his judgement.
6. He averred that the Applicant has continued to interfere with the suit property to his detriment despite having being served with the judgement,. He maintains that there is nothing to be stayed and that litigation must come to an end. He contended that he has suffered irreparable loss and damage due to the continued pendency of this matter.

### **The Response**

7. In a supplementary affidavit sworn on 5<sup>th</sup> April 2023, the Applicant averred that the Notice to Show Cause was served upon his daughter on 23<sup>rd</sup> September, 2022 by which time the period to lodge the Appeal had already lapsed. He reiterated that the delay in lodging the appeal on time was occasioned by circumstances beyond his control. He maintains that the mistakes of his Advocate should not be visited upon him.
8. The parties were directed to canvass the application by way of written submissions.

### **The Applicant's Submissions**

9. The Applicant's submissions were filed on 6<sup>th</sup> April, 2023.
10. Counsel submitted that the Applicant has been in peaceful occupation of the suit property for over thirty years and risks being deprived of the property if the order of stay is not granted. It was submitted that the Respondent has not indicated the prejudice that he will suffer if the order of stay is granted.
11. Counsel further submitted that the Applicant is willing to deposit security for costs as directed by the court.
12. Counsel submitted that the Applicant has sufficiently explained the reason for not filing the appeal within the time stipulated. To buttress this point, Counsel relied on Section 95 of the [Civil Procedure Act](#) and Order 50 Rule 6 and 8 of the Civil Procedure Rules.
13. To buttress his submissions, Counsel relied on the case of Elisha Jaboya Vs Kennedy Odthiambo Nyaoro (2021) eKLR.



## **The Respondent's Submissions**

14. The Respondent's submissions were filed on 2<sup>nd</sup> May, 2023.
15. In his submissions, Counsel for the Respondent reiterated the contents of the Respondent's replying affidavit.

## **Analysis And Determination**

16. Having considered the application, the affidavits and the rival submissions the following issues arise for determination:-
  - i. Whether the Applicant has met the requisite conditions for the grant of stay of execution pending appeal.
  - ii. Whether the Applicant can be granted leave to file his appeal out of time.

## **Whether The Applicant Has Met The Requisite Conditions For The Grant Of Stay Of Execution Pending Appeal**

17. Order 42 Rule 6 (1) and (2) of the Civil Procedure rules outlines the guiding principles to be met for the grant of stay of execution pending appeal 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.
18. In considering an application for stay of execution, I am guided by the case of Butt Vs 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.

19. The Applicant in an application for stay must satisfy the Court that he/she stands to suffer substantial loss if stay is not granted.
20. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma Vs 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.”
21. On the issue of substantial loss, the Applicant averred that he is apprehensive that the Respondent will execute the judgement if the order of stay is not granted. He argued that he will suffer irreparable loss if the order of stay is not granted because he will not be able to recover the suit property in the event that it is sold to third parties.
22. The Respondent on the other hand stated that the application is intended to deny him the fruits of his judgement. He asserted that there is nothing to be stayed because the suit was determined in his favour.
23. I have read the judgement delivered by Hon. J.O. Magori on 21<sup>st</sup> December, 2021. The court in its findings stated as follows;  

“The Plaintiff has proved his claim on a balance of probabilities as required against the Defendants.

Accordingly I enter judgment in favour of the Plaintiff against both Defendants jointly and severally as follows:-

  1. The Plaintiff is awarded special damages of Kshs 75,000/=.
  2. A permanent injunction is issued restraining the Defendants, their servants, agents and/or whomsoever from entering trespassing fencing and/or undertaking any developments or activities on the Plaintiff's Plot No. 3822 Mangelete Settlement Scheme.
  3. The Plaintiff is awarded costs of the suit and interest.
24. It is not in dispute that the Plaintiff has extracted the decree of the court dated 21<sup>st</sup> September 2022 which he is seeking to execute. Having extracted the decree, the Applicant's fears that the Respondent may execute the judgement are not baseless as the subject matter of the appeal can be interfered with. It is the duty of this court to preserve the subject property of this Appeal.
25. I find that the Applicant has satisfied this court that he is likely to suffer substantial loss if the substratum of the appeal is sold or transferred to third parties.
26. As regards the second requirement which requires that the application be made without unreasonable delay, it is not in dispute that the judgement was delivered on 21<sup>st</sup> December, 2021. The present application was filed on 11<sup>th</sup> of January, 2023. Although there has been inordinate delay in presenting the instant application, the Applicant has given a reasonable explanation for not filing the application in good time.
27. On the last condition as to the provision of security for costs, Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms to the effect that the Applicant must furnish security



for the performance of the order or decree. In the case of Arun C Sharma Vs Ashana Raikundalia T/ A Raikundalia & Co. Advocates (2014) eKLR, the court held that;

“The purpose of the security under Order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor....civil process is quite different because in civil process the judgment is like a debt hence the applicant become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the civil procedure rules acts as a security for the performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

28. The issue of security is discretionary and it is up to the court to determine it. In the present case, the Applicant has expressed his willingness to provide security for the due performance of the decree as directed by the court.
29. In the end I find that the Applicant has satisfied the conditions required for the grant of an order of stay of execution pending appeal.

### **Whether The Applicant Can Be Granted Leave To File His Appeal Out Of Time**

30. Section 79G of the *Civil Procedure Act* outlines the time within which an appeal ought to be filed to the High Court from a subordinate Court. The law provides as follows: -

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.

31. Section 95 of the *Civil Procedure Act* goes on to state as follows: -

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.

32. It is not in dispute that the Judgement in Makindu Case No. 239 of 2014 was entered against the Applicant on 21<sup>st</sup> December, 2021. The said Judgement was not appealed within the statutory period. Nonetheless, this Court has unfettered discretion under the proviso to Section 79G to admit an appeal which has been filed out of time provided that sufficient cause has been demonstrated.
33. The considerations to be made when deciding upon such an application were set out by the Court of Appeal in Edith Gichugu Koine Vs Stephen Njagi Thoithi [2014] eKLR:-

“There can be no doubt that the discretion I have to exercise under rule 4 is unfettered and does not require establishment of “sufficient reasons”. Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others –See Fakir Mohamed Vs Joseph Mugambi & 2 Others, Civil Application Nai. 332 of 2004 (unreported). There is also a duty now imposed on the



Court under sections 3A and 3B of the [Appellate Jurisdiction Act](#) to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.”

34. This was the same view expressed by the Court of Appeal earlier in the case of *Thuita Mwangi Vs Kenya Airways Ltd* [2003] eKLR where the Court held as follows: -

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in *Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:

“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.”

35. In this matter, the Appeal ought to have been filed before the expiry of thirty days which means as at 21<sup>st</sup> January, 2022. The application herein was filed on 11<sup>th</sup> January, 2023.

36. The Applicant averred that the delay in filing the appeal on time was occasioned by circumstances beyond his control. He averred that his Advocate was admitted in hospital at the time when the judgment was being delivered. I find that the Applicant has given a reasonable explanation for the delay in lodging the appeal on time.

37. The Applicant has annexed a draft memorandum of appeal in his supporting affidavit to demonstrate his willingness and intention of appealing the impugned judgement. In the case of *Samuel Mwaura Muthumbi Vs Josephine Wanjiru Ngugi & Another* [2018] eKLR, the Court held as follows: -

“Lastly, looking at the Draft Memorandum of Appeal filed, I am unable to say that the intended appeal is in-arguable. Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is not required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden.”

38. Lastly, on the prejudice that is likely to be suffered by the Respondent if an appeal is filed out of time, there has been no demonstration that it cannot be adequately compensated by costs. The Court in *George Kianda & Another Vs Judith Katumbi Kathenge & Another* (2018) eKLR aptly held as follows: -

“The Respondent has not stated that she cannot be adequately compensated in costs for any prejudice that she may suffer as a result of a favourable exercise of discretion in favour of the applicant. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by



the application of that healing medicine. See *Waljee's (Uganda) Ltd Vs. Ramji Punjabhai Bugerere Tea Estates Ltd* [1971] EA 188.”

39. Going by the above considerations, it is clear that the Applicant has sufficiently demonstrated merit in the application for enlargement of time for filing an appeal.
40. The upshot of the foregoing is that the application dated 10<sup>th</sup> January, 2023 is merited and is consequently allowed in the following terms:-
1. The Applicant is hereby granted leave to appeal out of time against the Judgement order and decree issued on 21<sup>st</sup> December, 2021 by Hon. J.O. Magori (SPM) in Makindu Case No. 239 of 2014.
  2. The Memorandum of Appeal and the Record of Appeal shall be filed within a period of Twenty One (21) Days from the date hereof.
  3. Pending determination of the intended appeal, this Court issues an order stay of execution of the Judgement, any resultant orders, decree or any further proceedings in Makindu Case No. 239 of 2014.
  4. The Applicant shall deposit Kshs. 200,000/= as security for costs in court within 21 days from the date of delivery of this ruling in default the stay orders shall lapse automatically.

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**HON. T. MURIGI**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 11<sup>TH</sup> DAY OF OCTOBER, 2023.**

IN THE PRESENCE OF:-

Court assistant - Mr. Kwemboi.

Mr. Hassan for the Applicant

