



Ngonde & 2 others (Suing as Officials and on Behalf of Members of Juja Nurseries Self Help Group) v Jomo Kenyatta University of Agriculture and Technology (Environment and Land Case Civil Suit 226 of 2013) [2023] KEELC 20696 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20696 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 226 OF 2013
J OMANGE, J
OCTOBER 12, 2023**

BETWEEN

**SAMUEUL NJENGA NGONDE 1ST PLAINTIFF
COSMAS NJOROGI KIBUE 2ND PLAINTIFF
ANNE WARURIE NJENGA 3RD PLAINTIFF
SUING AS OFFICIALS AND ON BEHALF OF MEMBERS OF JUJA NURSERIES
SELF HELP GROUP**

AND

**JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND
TECHNOLOGY DEFENDANT**

RULING

1. In the Notice of Motion application dated the 13th January, 2022 the Applicants sought the following orders:
 - a. Spent.
 - b. Spent.
 - c. That the Honourable court be pleased to grant a stay of execution on Judgement and decree and all consequential orders arising therefrom issued by Lady Justice L. Komingoi delivered on the 18th November 2021 pending hearing and determination of this application inter parties.
 - d. That the Honourable court be pleased to grant leave to the Applicants and the intended Appellants to appeal out of time against Judgement by lady Justice L. Komingoi delivered on the 18th November 2021.



- e. Any other orders that the court may deem fit and expedient pending hearing and determination of the application and intended appeal.
 - f. That costs of the application abide the outcome of the intended appeal.
2. The Application was supported by an Affidavit sworn by the 1st Plaintiff who deponed that he had the authority of his co-plaintiffs to swear the affidavit.
 3. The Applicants case is that Judgment was entered against them on the 18th November 2021 in the absence of all the Plaintiffs and their advocate on record. He avers that their advocate on record did not notify them of the Judgement immediately. They only learned of the Judgement later after which they instructed a new counsel who initiated the appeal process. The Plaintiffs contend that the delay in filing the appeal is not inordinate. Further, that the Plaintiffs will suffer substantial loss and their appeal rendered nugatory, if stay of execution is not granted.
 4. The Respondent filed a replying affidavit dated 15th February 2023 sworn by one Richard Wokabi Kariuki. The Respondent avers that the Applicants are guilty of inordinate delay considering that they knew of the Judgement on 12th January 2022 but only filed the application on 27th September 2022.
 5. It was further the Respondents case that the application has been overtaken by event as the Judgement had already been effected as evidenced by a letter by the Plaintiffs confirming they had vacated the suit premises.
 6. In their submissions Counsel for the Respondent reiterated the contents of their Replying affidavit and submitted that the Applicants knew of the Judgement date and should have been vigilant. Filing the application 8 months later amounted to inordinate delay. Counsel referred the court to the cases of *Joel Tirop Businei Vs David Randichi* (2026) eKLR and *shah vs Mbogo & another*. They also submitted extension to file out of time is an equitable remedy and not a matter of right and a party seeking to have the discretion exercised in his favour should give good reason for not filing the appeal in good time which in this case the applicant had not proved. To buttress this point counsel relied on the case of *Nicholas kiptoo Arap Korir Salat Vs Independent Electoral and boundaries commission & 7 others*
 7. Counsel further argued that the Applicants had not demonstrated how they would suffer substantial loss if the stay of execution orders were not granted. As at the date of writing the Ruling counsel for Applicants had not filed submissions.
 8. Having considered the foregoing, the following are issues for the court's determination; Whether the court should grant leave to the Applicants to file the appeal out of time? Whether the court should stay execution of the order and judgement issued on the 18th November 2021.
 9. The courts have had occasion to address the principles that ought to guide a court in extension of time. In the case of *Edith Gichungu Koine Vs Stephen Njagi Thoitithi* [2014] eKLR Odek JJA stated:

“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 Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
 10. The Applicants state that the failure to file the appeal in good time was occasioned by negligence on the part of their advocate who failed to attend court the day the Judgement was being delivered and as a result they were not aware of the Judgement themselves as they were also absent. They aver that



after searching for their advocate who was evasive for a while, they eventually changed advocates and it is only then that they became aware of the Judgement.

11. The courts have long held that mistakes of counsel should not be visited upon litigants. In the case of *Philip Chemwolo & another vs Augustine Kubende* (1986) eKLR the Court of Appeal held that: -

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having this case heard on merits.”

This was further restated in the case of *Gideon Mose Onchwati Vs Kenya Oil Company limited and another* (2017) in which it was posited:

“Although it is an elementary principle of our legal system that a litigant who is represented by an Advocate, is bound by the acts and omissions of the advocates in the course of representation, in applying that principle, Courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default unless the litigant is privy to the default or the default results from failure, on the part of the litigant, to give the advocate due instructions.”

12. I ascribe to the above school of thought that mistakes of counsel ought not to be visited upon litigants. However, in this instance I am not satisfied that the applicants herein were vigilant in the pursuit of their right to appeal. Even after they became aware of the Judgement they did not file this application for 8 months. In the absence of a cogent explanation for this failure, I find that this delay has not been properly explained. Hence there are no grounds upon which the court can exercise discretion on behalf on their behalf.

13. On stay of execution, the Courts Jurisdiction is derived from of Order 42 rule 6 (1) of the *Civil Procedure Rules* which provides;

No order for stay of execution shall be made under subrule (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.

14. Substantial loss has been defined in several judicial pronouncements. In the case of *Francis K. Chabari & another vs Mwarania Gaichura Kairubi* [2022] eKL Justice C. K. Yano quoted *Geoffery Muriungi & another v John Rukunga M'imonyoso* substantial loss was defined as follows;

“the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal”



15. In this case the Applicants have not proved substantial loss. In the supporting affidavit the 1st Applicant states that the loss suffered would be irreparable but does not demonstrate that the loss would be so grave as not to be compensated by way of monetary damages. In the case of *Machira T/A Machira & Co. Advocates vs East Africa Standard* [2002] eKLR Kuloba J. as he then was held that an applicant's ground for substantial loss must be specific and detailed as it is not enough merely stating that substantial loss will result or that if the appeal is successful it will be rendered nugatory.
16. The Applicants situation is further compounded by the fact that the Respondent has stated that the Applicants have already vacated the suit property. As such the application for stay of execution has already been overtaken by events.
17. In the end, I find that the application has no merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 12TH DAY OF OCTOBER 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Oluoch Olunya for the Defendant

No appearance for the Applicants

Steve - Court Assistant

