



**Ngugi v Mwangi & another (Environment & Land Case 9 of 2020)
[2023] KEELC 20467 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20467 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 9 OF 2020
LN GACHERU, J
OCTOBER 5, 2023**

BETWEEN

JOHN KAMANDE NGUGI APPLICANT

AND

PETER KARANJA MWANGI 1ST RESPONDENT

JOSEPH KAMANDE MWANGI 2ND RESPONDENT

RULING

1. Before this Court are two Applications for determination
2. The first application is by the Respondents and is dated 6th April 2023, seeking stay of execution of the judgment of this Court pending an intended appeal. The Respondents attribute the delay in filing the appeal to delay in acquiring proceedings and certification of the same.
3. The said application is opposed vide a Replying Affidavit sworn by the Applicant-- John Kamande Ngugi on the 26th June 2023, wherein the Applicant deponed that there is no evidence of any difficulty in obtaining proceedings. He further averred that the Respondents have not filed any Memorandum of Appeal and stay should only be granted where there is an appeal.
4. The second application is by the Applicant – John Kamande Ngugi dated 4th May 2023, which seeks that the production of the Original title deed be dispensed with when registering the orders of this Court. He claims that the Respondents have refused to release the title Deed for purposes of execution. The Respondents filed a Replying Affidavit sworn by the 1st Respondent and urged this Court to first determine the application for stay.
5. The application was dispensed with by way of written submissions. The Court gave directions on 20th June 2023, that all parties do file their submissions and gave a mention date for 12th July 2023, to



confirm compliance and take a ruling date. On 12th July 2023, the Respondents did not attend Court and as at the time of this Ruling only the Applicant's submissions were on record.

6. The Applicant filed his submissions on 26th June 2023, and submitted that he proved his claim for adverse possession and he should be allowed to enjoy the benefits of the judgment. He urged this Court to apply the principle of finality that was emphasized in the case of *Jasbir Singh Rai and 3 Others vs Tartocha Singh Rai & 4 Others* (2013)eKLR, and decline the order for stay. He submitted that the application for stay has not met the threshold and should be dismissed with costs.
7. This Court rendered its judgment on 8th December 2022, in favour of the Applicant against the Respondents. The Respondents filed a Notice of Appeal that was lodged on 17th January, 2023, before filing the instant application. The Applicant has been in the process of executing the Judgment of this Court, and he now wants this Court to compel the Land Registrar to dispense with the production of original title deed.
8. A perusal of both applications and the responses thereto and the Applicants submissions informs this Court that the issues for determination are; -
 - i. Whether the Notice of Appeal lodged on 17th January 2023, is competent?
 - ii. Whether the application for stay should be granted?
 - iii. Whether the Applicant's application dated 4th May, 2023, is merited?
 - iv. Who should pay for the costs of the application?

I. Whether the Notice of Appeal lodged on 17th January, 2023 is competent?

9. As pointed out above, the Notice of Appeal was lodged on 17th January 2023, this was about Thirty-nine Days after the date of judgment. Rule 77 of the *Court of Appeal Rules* makes provisions for Notices of Appeal and it requires that the Notice be lodged with the Registrar of the Superior Court. This Notice should be lodged within fourteen Days from the date of the judgement of the Court. Rule 3 of the *Court of Appeal Rules* provides for the manner in which time is computed.
10. The Respondents had a duty to file on time. The Notice of Appeal was lodged way beyond the requisite period of fourteen days and even taking into account the provisions of Order 50 Rule 4 of the *Civil Procedure Rules* time had already lapse. The same is not legally sustainable.
11. The Respondents did not see the need to remedy their failure to comply with the rules of procedure. The Supreme Court in the case of *Bookpoint Limited v Guardian Bank Limited & another* [2021] eKLR, had this to say on a Notice of Appeal that was lodged past the requisite time:

“It therefore follows that the applicant ought to have lodged its Notice of Appeal on or before the 4th of January 2021. It did not, and neither has it sought extension of time to file its Notice of Appeal out of time. Consequently, there is no valid Notice of Appeal on record”
12. This Court is alive to the provisions of Article 159 (2)(d) of the *Constitution* and appreciates the triviality that may result when there is strict observance of the procedure. As a matter of fact, this Court takes note of the pronouncement of the Court of Appeal in the case of *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] eKLR, where the Court held:

“The failure of counsel to include a prayer for validation of the incompetent notice of appeal is no justification for failure to grant the relief. The court has mandate to invoke both the inherent power of the Court enshrined in Rule 1(2) of the Court of Appeal Rules and



Article 159 (2)(d) of the Constitution to cure that default for ends of justice to be met in the matter. In the case of *Jaldesa Tuke Dabelo vs. IEBC & Another* [2015] eKLR; *Raila Odinga and 5 Others vs. IEBC & 3 Others* [2013] eKLR; *Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others* eKLR; *Patricia Cherotich Sawe vs. IEBC & 4 Others* [2015] eKLR, the Court held inter alia that:

- (i) Rules of procedure are handmaidens of justice;
- (ii) A court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case;
- (iii) The exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice;

13. Unlike in the aforementioned case, the Applicant made no stride to seek to validate the Notice of Appeal. While this Court was inclined to validate the Notice of Appeal, the Respondents did not see the need to address this Court on the default. This Court is thus persuaded by the case of *Bookpoint Limited v Guardian Bank Limited & another*, supra, and proceeds to find that the Notice of Appeal lodged on 17th January, 2023 is invalid.

II. Whether the application for stay should be granted?

14. The Respondent seeks to stay the Judgment of this Court pending the intended appeal. The principles of Stay are well set out under Order 42 Rules 6(2) of the *Civil Procedure Rules* which provides:

- (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 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.

15. Supreme Court in Application No 5 of 2014; - *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, when determining an issue of stay held:

“Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- (i) the appeal or intended appeal is arguable and not frivolous; and that
 - (ii) Unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.
- (88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution}} of Kenya, 2010, a third condition may be added, namely:
- (iii) That it is in the public interest that the order of stay be granted

16. Basing our minds on the foregoing the Respondents must demonstrate that:



- i. The application has been made without unreasonable delay
 - ii. They will suffer substantial loss
 - iii. The appeal is not frivolous
 - iv. The appeal will be rendered nugatory
 - v. Security of cost for due performance
17. The Respondents/Applicants deponed that they have an arguable appeal which will be rendered nugatory should stay not be granted. The Respondent did not bother to argue their application. The application was filed on 12th April 2023, which is Four Months from the date of judgment. It is common knowledge that once judgment is delivered, execution can issue at any time. An aggrieved party must therefore move Court at the soonest.
18. The Court in the case of *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] eKLR held;
- “There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case”
19. This is a land matter and the Respondents/Applicants ought to have been diligent enough to move Court at the soonest. In the case of *Rashid Said & 6 others Vs Stephen Kimonye Ibutu* [2019] eKLR, the Court found that a delay of four months in seeking orders for stay was inordinate late. While in *Urbanus K Wambua v Briggitta Ndila Musau* [2016] eKLR, the Court observed that four months’ delay was not inordinate based on the reasons advanced.
20. In this case there was a delay of Four months in filing the instant application, and whether the same was inordinate or not depends on the reasons advanced. The Respondents/Applicants blame the delay in filing of the application for failure to obtain proceedings on time. As per the attached letter dated 15th March, 2023, the Respondents/Applicants sought a copy of certified proceedings. There is nothing on the record to show that the Respondents/Applicants made attempts to acquire the proceedings.
21. This Court does not see the relationship between the proceedings and filing of the instant application. The Respondents/Applicants are simply finding a reason to justify their laxity. Even if this Court was to consider the reason advanced, there is no copy of Certificate of Delay that was attached to the application. Also this Court is alive to the pronouncement of the Supreme Court in *Hassan Nyanje Charo v Khatib Mwasetani and 3 Others*, eKLR [2014] where the Court stated:
- (27) Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail...
 - (28) Would it be in the interests of justice then to turn away an applicant who has, prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the Court’s administrative machinery? We think not.
22. While that is the position, the Respondents/Applicants seemed to have thrown this as the basis for seeking orders for stay. The Supreme Court in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR, being alive to its pronouncement in the aforementioned case expressed itself thus that “the ground for delay in obtaining proceedings should not be a *prima facie* panacea for a case of delay when its pleaded”



23. Having been well guided as above, this Court finds that the reason advanced by the Respondent for the delay in filing the application is not tenable and proceeds to find that the delay was inordinate.
24. This Court has not had the chance to peruse any copy of Memorandum of Appeal to determine the grounds upon which the appeal will be anchored on. An arguable appeal was defined in the case of *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR where the Court held:
- “An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous”
25. Without a copy of Memorandum of Appeal, it will therefore be difficult for this Court to determine whether the appeal is frivolous or not.
26. On whether the intended appeal will be rendered nugatory, this Court will seek guidance from the case of *Masai & another v Masai & another* (Civil Application 148 of 2020) [2021] KECA 170 (KLR) where the Court of Appeal held:
- “On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* (supra) this Court stated that:
- “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
- 11) In determining whether or not an appeal will be rendered nugatory the Court has to consider the conflicting claims of both parties and each case has to be considered on its merits
27. The claim before this Court was one for adverse possession, and this Court found in favour of the Applicant/Respondent. It observed that the Applicant/Respondent has been in occupation of the suit property and has even set up a permanent home. There is no evidence that he intends to sale the suit property and will thus interfere with the substratum of the appeal. There is also no evidence that the Applicant/Respondent will not be able to return the land if the Respondents/Applicants are successful in their alleged appeal. It is thus the findings of this Court that the appeal if successful will not be rendered nugatory.
28. Even so, this Court has already established hereinabove that the Notice of Appeal is not valid and as such no valid appeal can arise out of it. This Court does not need to determine the issue of security. The Respondents/Applicants have not satisfied the principles for the grant of orders for stay. The upshot of the foregoing is that the Respondents/Applicants’ application filed on 12th April 2023, is not merited and is dismissed.

III. Whether the Applicant’s application dated 4th May 2023, is merited?

29. The Applicant has sought orders that the Land Registrar be directed to dispense with the production of the title deed for purposes of execution and subsequent transfer. This he attributes to lack of willingness from the Respondents/Applicants.



30. While it is evident that the Applicant was a successful party, he has not been able to enjoy the fruits of the judgment. This Court gave orders directing that 1 acre be exercised from the suit land and given to the Applicant. It is trite law that Court orders cannot be given in vain and where there is difficulty in complying, a party can move Court. This Court associates itself with the pronouncement of the Court in the case of *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 others* [2017] eKLR where it held:
31. It cannot be disputed that an order of the court has to be respected by the parties who are bound by it. Therefore, every effort must be made to implement the order of the court and not to disobey the same. It is not up to that party to choose whether to comply or not to comply with such an order. The order must be complied with in totality, in all circumstances by the party concerned, subject to the party's right to challenge the order in issue, in such a lawful way as the law permits"
32. There is neither an appeal against the judgment of this Court that has been issued nor any order varying and/ or setting aside the judgment of this Court. It follows therefore that the same must be complied with.
33. Section 31 of the *Land Registration Act* provides that
- 31.
- (1) If a certificate of title or a certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and, if the certificate of title or the certificate of lease shows all subsisting entries in the register, a note of the registration shall be made on the certificate of title or the certificate of lease.
 - (2) Where the disposition is a transfer, the certificate shall, when produced, be cancelled, and in that case a new certificate may be issued to the new proprietor.
 - (3) Where the disposition is a charge, the certificate shall be delivered to the chargee.
34. The Land Registrar has the power to dispense with the production of title deed and may do so without an order of Court. But caution may sometime be necessary in the wake of fraudulent land transactions. It appears to this Court that the Respondents are not keen on executing the judgment of the Court. As a matter of evidence from the record it is apparent the Respondents are employing delay tactic. They have a duty to comply with the orders of this Court even if they do not agree with as long as the orders are valid and have not be varied or set aside.
35. To breathe life to the orders of this Court, it is only fair that the Land Registrar be directed to invoke her powers under Section 31 of the *Land Registration Act*. The Land Registrar should thereafter issue a title deed to the Applicant for the 1-acre piece of land upon undertaking the vital procedure as may be directed by the Land Registrar. In the interest of justice, the register should reflect the foregoing transactions.

IV. Who should pay for the costs of the application?

36. Costs shall follow the events. The Applicant has been a successful party in both applications and this Court has found no reason not to exercise its discretion in his favour. The Applicant shall have costs for both applications.



37. Having now carefully analysed the two Applications herein, the Court finds the Notice of Motion Application dated 6th April, 2023, by the Respondents/Applicants in not merited and the same is dismissed entirely with costs to the Applicant/Respondent.
38. However, the Applicant's Notice of Motion Application dated 4th May 2023, is found merited and the same is allowed entirely with costs to the Applicant.
39. It is so ordered.

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 5TH DAY OF OCTOBER,2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

Mr T M Njoroge for the Applicant/Respondent

Respondents/Applicants - Absent

