



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC NO. 71 OF 2017

MBUGUA MUNGAI KIARIE.....PLAINTIFF/APPLICANT

VERSUS

MBURU KIHARA.....DEFENDANT/RESPONDENT

RULING

1. On the 4/11/2021 the parties appeared before me for the hearing of the Notice of Motion dated the 2/8/2019 and agreed to canvass the application by way of written submissions whereupon the Court directed them to file and exchange written submissions within 30 days. By the time of writing this Ruling none of the parties had complied. I shall therefore be guided by the pleadings on record in determining this ruling.
2. This Court delivered Judgement in this suit on the 2/5/2019 as follows;
 - a. **The land Githunguri/Ikinu/527 – is to be subdivided and separately registered for the defendant Mbugua Mungai Kiarie to get 2 acres while the Plaintiff Mburu Kihara is to get 2.5 acres.**
 - b. **The County Land Registrar and the County Surveyor, Kiambu are directed to ensure compliance with point number 1 herein.**
 - c. **A permanent injunction is hereby issued restraining defendant by himself, his servants and or agents from interfering with Plaintiff's enjoyment and possession in Plaintiff's portion of the land.**
 - d. **The Deputy Registrar of this Court is hereby authorized to sign all the requisite documents to facilitate the implementation of this judgment.**
 - e. **The consent of land control board is hereby dispensed with in the implementation of this judgment.**
 - f. **Each party to bear their own costs of the suit.**
3. The Plaintiff being aggrieved by the said judgement filed an application fashioned as follows; That the judgement aforementioned be stayed and or set aside pending the hearing and determination of the application/ appeal of the judgement; that the Applicant be granted leave to lodge the memorandum of appeal out of time and the draft memorandum of appeal annexed to the application be admitted upon payment of the requisite Court fees.
4. The grounds supporting the application are set out in the affidavit sworn by the Applicant. That the Respondent has commenced the process of subdivision of the land and if stay is not granted his appeal which has a high chance of success shall be rendered nugatory. On the reason for not filing the application on time, the Applicant explained that it took time before being supplied with the copies of the proceedings which he only got in July 2019. He has annexed a draft memorandum of appeal impugning the judgment.
5. The record shows that the Applicant took over 2 years to prosecute his application and it is only on the 5/10/2021 that the same came up in Court. Even then the Applicant was yet to serve the application 2 years down the line despite the orders of the Court issued on the 26/8/19. It must have been the execution of the judgement that woke him from slumber.
6. Upon service the Respondent opposed the application vide his grounds of opposition filed on the 3/11/2021. The grounds of opposition are summed up as; the application is an abuse of the process of the Court; application is inordinate with no valid reasons for the delay; the application is baseless.
7. The key issues for determination are; whether the Applicant is deserving of stay of execution and or setting aside of the judgment;

whether the Applicant is deserving of leave to file an appeal out of time.

8. I shall start with the first issue. Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 (CPR) is clear that the filing of an appeal does not act as stay of execution pending appeal. Stay of execution is not automatic as the same is granted at the discretion of the Court, of course acting judiciously. The Rules direct this Court that stay shall be premised on the conditions enunciated by Sub-Rule (2) of the said Rule which states:

“No order of 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.”

9. For an Applicant to earn a stay of execution of a decree it must bring the application for stay without unreasonable delay and must demonstrate that it will suffer substantial loss if the order of stay is not granted. It should also be willing to provide security which will cushion the other party were the appeal to fail.

10. In the case of **Machira T.A Machira & Co. Advocates vs. East African Standard (No.2) (2002) KLR 63** the Court stated: -

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars.....where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay.”

11. In this case and going by the decision in **Machira** above the Applicant has not proven the loss that he stands to suffer if the Court does not grant stay of execution orders. In the case of **James Wangalwa & Anor Vs Agnes Naliaka Cheseto (2012) eKLR**, Justice Gikonyo when confronted with a similar application stated as follows;

“No doubt in law the act that the process of execution has been put in motion, or is likely to be put in motion, by itself does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 Rule (6) of the Civil Procedure Rules. This is because execution is a lawful process. The Applicant must establish other factors which show the execution will create a state of the affairs that will irreparably affect or negate the very core of the Applicant as the successful party in the appeal”.

12. In this case the judgement being sought to be stayed was rendered on the 2/5/19 and the application was filed on the 7/8/19 a period of 90 days, therefore filed with some delay, which delay has not been explained. That said after filing the application and despite orders of the Court issued on the 26/8/19 to serve the application upon the Respondent for interpartes hearing, the Applicant failed to do so until the Court directed service for the second time on the 5/10/2021, a period of over 2 years. It is my finding that there has been delay in filing / prosecuting the application. No reasons were advanced for this state of affairs.

13. Will the Applicant suffer substantial loss if the application is not granted? The Applicant has explained that he has knowledge that the Respondent was commencing execution by way of subdivision of the suit land in pursuance to the judgement of the Court.

14. In my view subdivision of the title is valid execution. The Respondent has explained in his affidavit that the titles have already been subdivided and two copies of the same in the names of the two parties were annexed. Execution therefore is complete and there would be nothing for this Court to stay in the circumstances.

15. At this stage, there is no need to delve into the other two conditions with respect to security for the performance of the orders of the Court. In any event the Applicant did not offer any.

16. It is the finding of the Court that the application for stay of execution is overtaken by events. It is dismissed.

17. The next issue is whether the Applicant is deserving of the extension of time to lodge the appeal out of time. A notice of appeal from this Court to the Court of appeal should be filed within 14 days 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.

18. Section 95 of Civil Procedure Act states that where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by the 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.

19. Therefore, in considering an application for enlargement of time, the Court exercises discretionary power. The governing principles have been laid out in a number of judicial decisions as discussed below.

20. The Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** stipulated the following principles to guide Courts in determining exercising such discretion;

- a. 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;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
- c. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- e. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
- f. Whether the application has been brought without undue delay; and
- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

21. The Court of Appeal in **Karny Zahrya & another v Shalom Levi [2018] eKLR**, Koome JA (as she was then) affirmed the said principles and stated that some of the considerations to be borne in mind while dealing with an application for extension of time include;

- a. the length of the delay involved, the reason(s) for the delay;
- b. the possible prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion;
- c. the conduct of the parties;
- d. the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes;
- e. the public interest issues implicated in the appeal or intended appeal; and
- f. whether, prima facie, the intended appeal has chances of success or is a mere frivolity.

22. The Court in the case of **Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR** in striking out an appeal filed out of time without leave of Court cited with approval the Court of Appeal holding in **Alibhhai Musajee vs. Shariff Mohammed Al-Bet Civil Appeal No. 283 of 1998**, that whereas the Civil Procedure Act allows for extension of time for filing appeal, where if good and sufficient cause is shown, failure to act does not constitute a good or sufficient cause.

23. The Applicant herein has not offered a satisfactory explanation as to why the appeal was not lodged on time. From the record the judgement was delivered in the presence of his advocates on record. The claim that he was waiting for typed proceedings does not hold water as one does not require proceedings before filing a notice of intention to appeal.

24. In the end I hold that the application is not merited and I proceed to dismiss it with costs to the Applicant.

25. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 8TH DAY OF FEBRUARY 2022 VIA MICROSOFT TEAMS PLATFORM.

J. G. KEMEI

JUDGE

DELIVERED ONLINE IN THE PRESENCE OF;

PLAINTIFF/APPLICANT - ABSENT

MWARIRI FOR RESPONDENT

MS. PHYLLIS MWANGI – COURT ASSISTANT