



REPUBLIC OF KENYA



**Kikwa v Muli & another (Environment and Land Miscellaneous
Application E060 of 2021) [2022] KEELC 23 (KLR) (4 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 23 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E060 OF 2021**

A NYUKURI, J

MAY 4, 2022

BETWEEN

MUTISYA KIKWA APPLICANT

AND

JOSEPH MUNYAO MULI 1ST RESPONDENT

DAVID MUSOYA KIKWA 2ND RESPONDENT

RULING

1. Vide a Notice of Motion dated 17th September 2021, the Applicant sought for the following orders;
 - a. Spent
 - b. The Applicant be granted leave to appeal out of time against the judgment delivered by Hon. E. M. Keago (Mr.) CM on 22nd July 2021 in Machakos Civil Suit No. 871 of 2012.
 - c. In the alternative to prayer 2 hereof, the annexed Memorandum of Appeal be deemed to have been filed properly and within time.
 - d. This Honourable Court do issue an order of stay of execution of the judgment delivered by Hon. E. M. Keago (Mr.) CM on 22nd July 2021 in Machakos Civil Suit No. 871 of 2012 pending the hearing and determination of this application interpartes.
 - e. This Honourable Court do issue an order of stay of execution of the judgment delivered by Hon. E.M. Keago (Mr) on 22nd July 2021 in Machakos Civil Suit No. 871 of 2012 pending the hearing and determination of the intended appeal.
 - f. This Honourable court be pleased to grant any other orders it deems just and expedient in the circumstances.
 - g. The costs of this application be in the appeal.



2. The application is supported by the affidavit sworn by the applicant on 17th September 2021, where he deposed that the lower court entered judgment in Machakos Civil Suit No. 871 of 2012 on 22nd July 2021, which judgment rendered the Applicant homeless and destitute; that the Applicant being aggrieved with the said judgment instructed his advocate to institute an appeal thereto; that on 19th August 2021, the Applicant's advocate filed the appeal in the wrong court and that the application has been brought without delay.
3. The application is opposed. The 1st Respondent filed a replying affidavit sworn on 4th October 2021 and averred that the application is an afterthought, and the delay is inordinate; that the applicant has not demonstrated arguability of his intended appeal; that the applicant has not shown that the 1st Respondent will suffer substantial loss if stay is not granted; that no security has been offered; that it is not true the applicant will be rendered homeless as the entire land is 9 acres whereas the Respondent's claim is only for 1.5 acres; that the orders sought will interfere with the Respondent's enjoyment of the fruits of his judgment; that if stay is granted, the Respondent will suffer prejudice as the applicant is cutting down trees in his portion of one and half acres and that the applicant has not attached the judgment he intends to appeal against.
4. In a rejoinder, the Applicant filed a supplementary affidavit on 7th October 2021 and averred that the one and half acres that the Respondent alleges to be entitled to is the source of his livelihood and that failure to annex the judgment is because they have not been supplied with certified copies thereof despite request to that effect.
5. The application was canvassed by way of written submissions. On record are the applicant's submissions filed on 7th October 2021 and the 1st Respondent's submissions filed on 8th October 2021.

Submission

6. Counsel for the Applicant submitted that the applicant had satisfied the provisions of *sections 79G and 95* of the [Civil Procedure Act](#) in providing an explanation for delay in filing the appeal; being that his advocate filed the appeal in the wrong court and he had come to court within 60 days which was according to him, a reasonable time. Counsel relied on the cases of [Maureen Agutu v Paul Mboya](#) [2019] eKLR and [Vishva Stone Suppliers Company Ltd v RSR Stone \(2006\) Limited](#) [2020] eKLR for the proposition that mistakes on the part of counsel should not be visited on the innocent client.
7. Further, counsel argued that the applicant had satisfied the court on the prayer for grant of stay of execution. Counsel contended that *Order 42 Rule 6* granted this court discretion to stay execution of a judgment pending appeal where it is shown that the applicant stands to suffer substantial loss as was the case with the applicant. Counsel relied on the case of [Victory Construction v BM \(a minor suing through next friend on PMM\)](#) [2019] eKLR.
8. On his part, the Respondent submitted that although this court has the power to enlarge time under sections 79G and 95 of the [Civil Procedure Act](#), and grant stay pending appeal, the same is discretionary and ought not be exercised in favour of undeserving party. Counsel argued that the delay on the part of the applicant was inordinate and hence inexcusable. Counsel placed reliance on the cases of [Christopher Muriithi Ngugi v Eliud Ngugu Evans](#) [2016] eKLR, [Tobias O. See v Maseno University & 3 Others](#) [2016] eKLR, and [SS Sehmi General Building & Civil Contractors Limited v CJ Securities Limited](#) [2021] eKLR.



Analysis and determination

9. I have considered that application, the affidavit in support, the response and the parties' submissions. The issues that arise for determination are whether the applicant the applicant has met the threshold for grant of the orders sought.
10. Section 79G of the *Civil Procedure Act* 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.
11. In the case of *County Executive of Kisumu v County Government of Kisumu & Others* [2017] eKLR, the Supreme Court cited with approval its own decision in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2014] eKLR, where it was held as follows;
1. 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;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court;
 5. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
12. Essentially, therefore, the power of the court to extend time for filing an appeal out of time is discretionary, and the court ought to consider all the circumstances of the case including the reason for the delay, the length of the delay and the prejudice to be caused by the delay.
13. In the instant case, it is not disputed that judgment in Machakos Civil Suit No. 871 of 2012 was delivered on 22nd July 2021. The application herein was filed on 27th September 2021. Therefore, the delay was by 35 days. The reason given by the Applicant for the delay is that although the advocate for the Applicant was instructed on time, and acted promptly in filing the appeal, they filed the appeal in the wrong court. I note that counsel for the Applicants has exhibited a notice of withdrawal of appeal No. 140 of 2021 from the High court at Machakos. It is clear that the delay in filing the appeal was occasioned by mistake of counsel, which he has taken full responsibility. It will militate against the tenets of fairness to deny the Applicant the right of appeal on account of his counsel's mistake. In the case of *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* [2020] eKLR, the Court of Appeal held that where the delay in filing an appeal in time is occasioned by the mistake of counsel, and such counsel has taken full responsibility, it would be unfair and unjust to pin the responsibility



on the client for noncompliance and base the decision to decline exercise of discretion in favour of extending time on counsel's mistake. It is my finding therefore that in the instant case, the delay is not inordinate and that the same has been satisfactorily explained by the applicant.

14. The Applicant has sought for stay of execution pending intended appeal, based on the provisions of Order 42 of the *Civil procedure Rules*. My understanding of that Order is that the court has discretion to grant stay where an appeal has been filed. As the appeal is yet to be filed, it is only fair that such application is considered upon filing of the appeal. Besides, the applicant did not attach a copy of the lower court judgment, which denies this court opportunity to appreciate what ought to be stayed and the extent of the stay. I therefore decline to grant stay of execution at this point.
15. In the circumstances, the Applicant's application dated 17th September 2021, partially succeeds and I make the following orders;
 - a. Leave to appeal out of time is granted to the applicant. The appeal shall be filed in 14 days of the date hereof.
 - b. The prayer for stay of execution pending intended appeal is declined.
 - c. Each party shall bear their own costs.
16. Orders accordingly.

CONCLUSIONS

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 4TH DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Mukula for 1st Respondent

Ms Madowo holding brief for Mr. Ochieng for Appellant/Applicant

No appearance for 2nd Respondent

