Kisusya v Kisusya (Environment and Land Miscellaneous Application 1 of 2021) [2022] KEELC 2792 (KLR) (5 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2792 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 1 OF 2021

LG KIMANI, J

JULY 5, 2022

BETWEEN

NGUI KISUSYA ..... APPLICANT

AND

NDAVI KISUSYA ..... RESPONDENT

(Application for extension of time to file and serve the memorandum of appeal and record of the intended appeal from the ruling of the Senior Resident Magistrate's Court at Mwingi delivered by Hon. Onkoba P.M on the 26th May 2020 in ELC No.6 of 2018.)

RULING

1. The Application before court is dated 15th of December 2021 brought under section 7 of the *Appellate Jurisdiction Act*, order 22 of the Civil Procedure Rules and article 159 (2) (d) of *the Constitution* of Kenya 2010 seeking the following Orders:

    1. Spent

    2. That pending the hearing and determination of this application, a stay of execution and the Notice to show cause proceedings against the Applicant in Chief Magistrate Court Case No 6 of 2018, filed at Mwingi Law Courts do issue.

    3. That this Honourable Court be pleased to order for an extension of time to file and serve the Memorandum of Appeal.

    4. That the costs of this application be in the cause.

2. In his supporting affidavit, the Applicant avers that he was the 2nd defendant in Senior Resident Magistrate's Court at Mwingi ELC No. 6 of 2018 and was represented by the law firm of M/S Nyamu and Nyamu Advocates. He avers that he filed an application dated May 10, 2019 to set aside exparte judgment entered against him and prayed to be allowed to defend the suit for the reason that he had

not been served with summons and the plaint. A ruling on the application was delivered on the May 26, 2020 in the absence of his counsel.

3. Subsequent to the ruling date the applicant states that he visited his advocate's offices but found the same closed and did not receive any update on the case. Being dissatisfied with the way the matter was being handled, the Applicant engaged the services of his current advocate. He states that when the new advocate procured a copy of the ruling, they informed him that his application had been dismissed and that he could appeal the same.

4. The applicant now seeks for extension of time within which to file and serve the memorandum of appeal. He has attached a draft memorandum of appeal and states that the appeal has merit and is notfrivolous. The applicant avers that he only came to learn of the existence of the suit when they were to bury the deceased 1st defendant and were served with a court order stopping his burial on Mwingi/Mwingi/2878 and they found that the ex parte judgment had already been entered.

5. In thetrial court's ruling, the learned trial magistrate found that there was no triable defence or issue between the plaintiff and the 2nd defendant (the applicant herein), due to the fact that the suit property was registered in the 1st defendant's name. The magistrate also found that the applicant had no personal interest vested in the suit land from his defence and had not demonstrated that he has locus standi to represent the interest of the estate of the deceased.

6. The applicant submitted that the principles that guide the courts in an application of this nature are that the Court exercises its untested discretion and in so doing, it considers the period of delay, the reason for the delay, the chances of success of the intended appeal if the application is granted and the degree of prejudice that the respondent is likely to suffer if the application is allowed as they cited the case of *Stanley Kahoro Mwangi & 2 others vs Kayamwi Trading Company Ltd* (2015) eKLR.

7. His submission was that he should not be faulted for his former advocates' mistake in failing to attend the ruling of the matter, failing to follow up for the same and updating the Applicant.

8. It is the applicant's contention that the period of delay was not inordinate as once the applicant became aware of the lower court's ruling, he immediately filed this application. The applicant concluded by stating that nothing has been placed before the court to show that the respondent will be prejudiced in any way of the application is allowed.

The Respondent's Case

9. The respondent filed a replying affidavit stating that the ex-parte judgment was entered procedurally and the matter was set down for formal proof and the defendants elected not to participate in the matter consequently judgment was entered.

10. The Respondent also noted that the Trial Court stated that the counsels had filed a consent to have their ruling delivered in their absence in line with covid 19 pandemic mitigation and guidelines. The Respondent pointed out that it has been one and a half years since the ruling was delivered and this application is therefore an afterthought.

11. According to the Respondent, the trial court's decree has been executed. The suit land Mwingi/Mwingi/2879 has been transferred to him and a copy of the title deed in his name is attached. It is his averment that the present application has been overtaken by events and the only thing that remains is for the Applicant to pay costs of the suit.

12. In his written submissions, the Respondent reiterated that the decree in the trial court has been executed and the suit property has already been transferred to his name, therefore the court cannot

grant orders to act in a vacuum or in vain. He submitted further that the prayers sought are ambiguous, unmeritorious as framed for the reason that the applicant seeks time to file and serve the notice of appeal and record of appeal instead of seeking leave to appeal out of time. He also added that the Applicant is seeking extension of time as if it had already been granted in the first place.

13. The Respondent submitted that the factors and issues to be considered in an application of extension of time include the length of the delay, reasons for the delay, the possible prejudice if any that each party stands to suffer, the conduct of the parties and the need to balance the interests of the parties who has a decision in his favour as they relied on the cases of *Karny Zaharya & another versus Shallon Levi* Court of Appeal Case No.80 of 2018 and the case of *Abdul Azizi Ngome versus Mungai Mathayo* (1976)KLR.

14. It is therespondent's submission that the applicant has no locus standi to follow the claim herein as the property was initially registered to the deceased person and the applicant has no lettersof administration to claim the deceased property.

15. In urging the court to find that the application is premature, misplaced and untenable, therespondentsubmitted that extension of time is not a right of a party but a party who seeks for extension of time has the burden of laying basis to the satisfaction of the court which the applicant has not done and that there is no good reason for the extension of time sought. The respondent prays for the application to be dismissed with costs to the respondent.

Analysis and Determination

16. Having considered the application herein, the replying affidavit and all attached documents and the written submissions by counsel for both parties, I am of the opinion that the following issues arise for determination: -

    A) Whether the court should grant a stay of execution of the notice to show cause proceedings?

    B) Whether the court should grant an order of extension of time to file and serve the memorandum of appeal.

17. The Applicant seeks stay of execution and the Notice to show cause proceedings against him in Chief Magistrate Court Case No 6 of 2018, filed at Mwingi Law Courts. To the extent that the applicant has brought the application under section 7 of the *Appellate Jurisdiction Act*, I find that the said section does not apply to the proceedings herein since the *Appellate Jurisdiction Act* applies to appeals to the Court of Appeal.

18. The applicant also relies on order 22 of the Civil Procedure Rules and Article 159(2)(d) of *the Constitution* of Kenya. Order 22 rule 22 of the Civil Procedure Rules which provides that:3-

> " The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto."

I find that the above order and rule of the Civil Procedure Rules is not applicable to the circumstances of this case since the decree has not been sent to this court for execution.

19. It is noted that prayer 2 of the application herein only seeks an order of stay of execution and the notice to show cause proceedings pending hearing and determination of the current application. There is no prayer for stay of execution of the trial courts decree pending hearing and determination of the intended appeal.

20. Regarding stay of execution pending appeal, order 42 rule 6(2) provides that:

> " No order for stay of execution shall be made under subrule (1) unless—
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> (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
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> (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.
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> (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application."

21. The case of *HGE v SM* [2020] eKLR quoted several authorities comprehensively regarding the principles governing grant or refusal of stay of execution:

> " An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in order 42 rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See Antoine Ndiaye vs. African Virtual University [2015] eKLR.
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> In Butt vs. Rent Restriction Tribunal [1979], the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements."
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> As to what substantial loss is, it was observed in James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, that:
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> > "No doubt, in law, the fact 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 CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the

very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

22. The purpose of stay orders is to preserve the subject matter of the appeal so as to not render it nugatory. This position was reiterated by the court in *RWW vs. EKW* [2019] eKLR, where the court stated the purpose of stay of execution order pending appeal, in the following words:

> " The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."

23. In this suit however, according to the Respondents and the evidence on record, the Decree has already been executed and a title deed to the suit land issued in the name of the Respondent. The prayer for stay of execution of the decree has thus been overtaken by events and cannot in the present circumstances be granted as it would serve no useful purpose. The only remaining bit is for the Applicant to pay costs of the suit. Looking at the principles for grant or refusal of stay of execution, I am unable to see how refusal of the order would render the intended appeal nugatory. Substantial loss in the words of the above precedents has also not been demonstrated. Further, I find that the Applicant has not shown that the Respondent is not capable of refunding costs paid if the orders of the trial court are reversed by a successful appeal after the costs have been paid.

24. In dismissing the application for stay before it due to the suit property having already been sold, the Court of Appeal at Kisumu in *Kaushik Panchamatia & 3 others v Prime Bank Limited & another* [2020] eKLR had this to say:

> " The applicants have argued that the proprietary interest of the 1st and 2nd applicants in the suit property will not only be threatened but also extinguished contrary to their right to property as protected for under article 40 of *the Constitution*. Second, that the applicant and his family reside on one of the charged properties while the other is used as business premises. The applicants did not however allege or demonstrate that the respondents would be unable to adequately pay them any damages as may be ordered should the intended appeal ultimately succeed. In light of the above assessment and reasoning, it is our finding that the applicants have not satisfied us that the intended appeal shall be rendered nugatory if the stay order is not granted. Additionally, it is apparent in the further affidavit of George Mathui sworn on 1July 7, 2020 that the suit property known as Kisumu Municipality/Block 12/310 was sold to Pasaka Ventures Limited at the price of Kenya Shillings Twenty-four Million, one Hundred Thousand only and a deposit of Eight Million paid to the 2nd Respondent. The 1st respondent has therefore demonstrated that what the applicants seek to restrain has been overtaken by events. Any order made with regard thereto would therefore be an order granted not only in vain but also in the exercise of the courts mandate in futility. For those reasons this application fails and it is accordingly dismissed with costs to the 1st respondent."

25. The finding of the Court of Appeal in the above case is applicable to the circumstances of this present case and I am bound by it. I therefore find any order of stay of executing in this case will be an order granted not only in vain but also in the exercise of the courts mandate in futility.

b) Whether the Court should grant an order of extension of time to file and serve the Memorandum of Appeal.

26. Section 79G of the Civil Procedure Act cap 21 laws of Kenya provides that the period allowed for filing an appeal from a subordinate court to the High Court is 30 days. The provision is 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 a good and sufficient cause for not filing the appeal in time"

27. The ruling in the lower court was delivered on May 26, 2020. The reason for the delay given by the Applicant is that the ruling was delivered in his absence at the height of the COVID 19 pandemic and that his then advocate failed to update him on the outcome.

28. In an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek, JJ.A in *Edith Gichugu Koine vs. Stephen Njagi Thoithi* [2014] eKLR as

> " 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..."

29. In *Charles Karanja Kiiru v Charles Githinji Muigwa* [2017] eKLR the Court of Appeal held that:

> " There is also a duty now imposed on courts 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."

30. The period of delay has been one and a half years since May 26, 2020 when the ruling in the Trial court was delivered. The applicant has given his reasons for the delay and states that the respondent will not suffer any prejudice if the extension of time is granted. I do find that on the face of it the delay of one and a half year is long and can under normal circumstances be said to be unreasonable. However, I am inclined to allow the application for extention of time for filing the appeal for the reason that the time under review was the height of Covid 19 pandemic and the said pandemic came with hitherto unexpected and unknown challenges to most people some of which may be the challenges said to have been encountered by the applicant. I am persuaded that it is in the interests of justice that the applicant be given an opportunity to ventilate his case and be heard on merit.

31. In *Kamlesh Mansukhalal Damji Pattni vs. Director of Public Prosecutions & 3 others* [2015] eKLR the court articulated that-

> " It must be realized that courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as we are wont to say in Kenya, from Wanjiku,

by dint of Article 159 (1) of *the Constitution* which succinctly states that "judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution." Judicial Officers are also State officers, and consequently are enjoined by Article 10 of *the Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting *the Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity are upheld. For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. .....It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint. So far the applicant did not have a chance to file a defence. He sought to set aside that default judgment and that application was dismissed on a date he contends the same was not due for hearing and when he had no notice.

Those complaints, coupled with the fact that the applicant has paid the ultimate price by loosing his liberty when he was committed to civil jail lead me to view the application with some favour, while considering that the very purpose of a justice system is to hear and determine disputes... I am inclined to find and do find that he has made out a case for extension of time. I therefore extend time within which to file the appeal."

32. Article 159(2) (d) of *the Constitution* of Kenya (2010) which the Applicant has brought his application under provides that ".....justice shall be administered without undue regard to procedural technicalities." Further, the overriding objective of the court established by sections 1A of the *Civil Procedure Act* that the plaintiff/applicant has also relied on provides that:

> " The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. (2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1)."
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> Section 3A provides that: "Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

33. In conclusion I find as follows:-

a) Prayer 2 of the application dated December 15, 2021 is spent since it seeks stay of execution pending hearing and determination of the said application. I further find that even if the said prayer was for stay of execution pending the hearing of the intended appeal the decree herein has already been executed and a title deed to the suit land issued in the name of the respondent. The prayer for stay of execution of the decree has thus been overtaken by events and cannot in the present circumstances be granted. With regard to stay of execution for costs of the suit, I find that no substantial loss has been shown will be suffered by the applicant if the order is not granted. I therefore find that prayer 2 has no merit and the same is dismissed.

b) With regard to prayer 3 of the same application, I am persuaded that it is in the interests of justice that the applicant be given an opportunity to ventilate his appeal and be heard on merit. I allow the said prayer and grant leave to the applicant to file an appeal out of time against the ruling of the Senior Resident Magistrate's Court at Mwingi delivered by Hon. Onkoba P.M. on the May 26, 2020 in ELC No. 6 of 2018.

c) The appeal shall be filed within 14 days from the date of this ruling.

d) Costs of this application shall abide the outcome of the intended appeal

DELIVERED, DATED AND SIGNED AT KITUI THIS 5TH DAY OF JULY 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE KITUI

Ruling read in open court in the presence of-

Musyoki Court Assistant

No attendance for the Applicant

No attendance for the Respondent