



Obuon v Onyango & another (Environment & Land Miscellaneous Case 17 of 2022) [2022] KEELC 2621 (KLR) (5 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2621 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND MISCELLANEOUS CASE 17 OF 2022**

A OMBWAYO, J

JULY 5, 2022

BETWEEN

CHARLES OMONDI OBUON APPLICANT

AND

MICHAEL ORWA ONYANGO 1ST RESPONDENT

SIMON OUKO 2ND RESPONDENT

RULING

Brief Facts

- 1 Charles Omondi Obuon, hereinafter referred to as the Applicant filed a Notice of Motion Application dated 4th May 2022 and filed on 9th May 2022 under section 1A, 1B (a),3A, 95 of the [Civil Procedure Act](#), Order 42 Rule 6(1),50(6),51 (1) of the [Civil Procedure Rules](#) 2020 seeking for the following orders:
 1. Spent
 2. That the Honourable Court be pleased to enlarge and extend the time within which the Applicant may file the Memorandum of Appeal.
 3. That the Honourable Court be pleased to stay the execution of the Judgment of Hon. R.K. Ondieki dated 16th December 2021 pending the hearing and determination of the Application for enlargement of time and the intended appeal.
 4. That the Honourable Court be pleased to stay taxation of the Plaintiff/Respondent's Bill of Costs dated 14th February 2022 pending the hearing and determination of this Application and the intended Appeal.
 5. That the costs of this application be costs in the appeal.



2. The Application was based on grounds that the Applicant intends to file an Appeal in the Environment and Land Court seeking an enlargement of time within which to file a Memorandum of Appeal against the Judgment and orders of this court dated 16th December 2021. That the Applicant has just learnt of the delivery of judgment in this matter through the 1st Respondent's Bill of Costs for Kshs. 243,215/= dated 14th February 2020 and served on the Applicant's Advocates on 6th April 2022.
3. It was stated that Judgment was delivered without notice to the Applicant or his Advocate who do not practice in Kisumu and had no way of knowing after the Advocate had made several attempts at the delivery of the Judgment. That the Court Administrator's letter dated 17th November 2021 indicated that Judgment would be delivered on 24th November 2021 but the same was not delivered on the said date and no further communication was made to the Applicant or his Advocate of the postponed date of delivery of the Judgment.
4. That the Applicant's Advocate through exercise of due diligence sent several letters to the Executive Officer inquiring about delivery of Judgment but received no response and upon visiting the court registry to peruse the file, she was informed that the file was missing. It was stated that the file was and has been concealed from the court registry denying the Applicant's Advocates an opportunity to peruse the file and inform themselves of the Judgment and other proceedings.
5. It was further stated that the Applicant and his Advocate was unaware of the delivery of the Judgment and the Applicant was denied the opportunity of filing an Appeal within required timelines. That unless the orders prayed are granted, the intended Appeal would be rendered nugatory and the Applicants will suffer substantial loss, despite the fact that the Judgment omitted to consider his Defence and submissions.
7. That the Applicant has moved this court immediately following the discovery of the delivery of Judgment and without unreasonable delay. That the Applicant is ready and willing to give such security as may be directed by the court for the due performance of such decree as may ultimately be binding on him and it is in the interest of justice that the execution of the Judgment and decree is stayed pending the hearing of the Application and Appeal.
8. The Application was supported by the Affidavit of Charles Omondi Obuon the Applicant herein which Affidavit relied on the grounds in the Application.
9. The Application was placed before me and I directed the Applicant to serve within 7 days and the matter to be heard on 26th July 2022. On 10th May 2022, I gave further that the matter is not certified urgent, that the Applicant to serve within 7 days of service and the Respondent to respond within 7 days of service. That the Applicant to file supplementary Affidavit within 7 days of service and the Respondent to respond within 7 days of service.
10. The 1st Respondent herein filed a Replying Affidavit in response to the Application where he deposed and stated that the said Application is misconceived, un-meritorious, mischievous and should be dismissed with costs.
11. He stated that the grounds which are being relied on by the Applicant do not hold any water and do not go into the reason which the Applicant and counsel failed to lodge an Appeal within the stipulated timelines as provided for by the *Civil Procedure Act*. That on 17th November 2021, the Executive Officer, Kisumu Law Courts issued a Judgment notice clearly stipulating that the Judgment was to be delivered on 24th November 2021.
12. That it was upon the Applicant's Advocates to follow up and ascertain whether or not the said Judgment was delivered and the allegation by the Applicant that the court file was missing is a serious



allegation which goes to the effectiveness of the court system and administration and is unsubstantiated and is merely a ploy to paint a bad picture of the effectiveness of the trial court and staff therein.

13. That the Applicant is guilty of laches and ought to be proactive and ensure that if at all they intended to Appeal then he should have done so within the stipulated time. The fact that Judgment was delivered in 2021 and the Applicant have waited 6 months down the line to bring an Application seeking to file an Appeal out of time based on a Bill of Costs is laughable.
14. He further stated that the trial court has already pronounced itself on the Bill of Costs dated 14th February which the same has been challenged by the Applicant in his submissions. That this Application is an attempt to hoodwink this Honourable Court to make a Ruling that will not only embarrass the trial court and procedures of practice pertaining appeals and it stands to deny the 1st Respondent the fruits of his Judgment.
15. That the subject dispute between the Applicant and the Respondents is a 2018 matter and the same has stayed in annals of the courts for over 4 years and there ought to be an end to litigation to allow parties move on with their respective lives. That the Applicant's Application dated 4th May 2022 does not give any compelling reason as to why the orders being sought should be allowed and therefore the Application should be dismissed with costs.
16. I have perused the file and do confirm that the 2nd Respondent did not file a response to the Application.

Analysis and Determination

17. The law that guides extension of time to file an Appeal out of time is provided for as below:

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.”

18. Section 95 provides as: -

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this 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. Section 75(1) of the *Civil Procedure Act* provides for the orders against which an appeal would lie as of right and/or with the leave of the court. It provides thus:

75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-

- (a) An order superseding an arbitration where the award has not been completed within the period allowed by the court;
- (b) An order on an award stated in the form of a special case;
- (c) An order modifying or correcting an award;



- (d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- (e) An order filing or refusing to file an award in an arbitration without the intervention of the court;
- (f) An order under section 64;
- (g) An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- (h) Any order made under rules from which an appeal is expressly allowed by rules.

20. In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231 (referred to by the Court of Appeal in *Gerald Kitbu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR) set out the guiding principles to be applied in considering an application for extension of time as;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are:

- i. first the length of the delay;
- ii. secondly, the reason for the delay;
- iii. thirdly (possibly) the chances of the appeal succeeding if the application is granted; and,
- iv. fourthly, the degree of prejudice to the respondent if the application is granted.”

Length of the delay and reasons thereof;

- 21. The Applicant in his Supporting Affidavit has stated that the Court Administrator wrote a letter on 17th November 2021 to the parties herein indicating that Judgment would be delivered on 24th November 2021, a fact that is not disputed by the 1st Respondent. Judgment was not delivered on the said date and no communication was made to the Applicant or to his Advocates. The Applicant learnt of that Judgment was delivered on 16th December 2021 upon his Advocate being served with the 1st Respondent’s Bill of Costs on 6th April 2022.
- 22. The 1st Respondent on the other hand in his Replying Affidavit has alleged that the Applicant’s Advocate ought to have followed up to ascertain whether or not the said Judgment was delivered. It is not clear whether the court Administrator issued another notice informing parties herein that Judgment would be delivered on 16th December 2021.
- 23. The Applicant’s Advocate had written letters to the Executive Officer inquiring about the delivery of the Judgment but the said letters were not responded to. It should be noted that the Applicant failed to annex the said letters in his Affidavit. The Applicant’s Advocate had made a visit to the registry only to be informed that the file was missing which made it difficult for the Advocate to know the progress of the file.
- 24. It is my finding that the Applicant has given sufficient reasons explaining delay in filing the Appeal out of time as the court ought to have communicated the date of delivery of Judgment.



find that the reasons for the delay have not been explained by the Applicants to the satisfaction of this court.

Chances of the appeal succeeding if the application is granted

25. The Trial Court delivered Judgment on 16th December 2021 without notifying parties of the said Judgment. The Applicant herein only came to know about the Judgment after being served with the 1st Respondent's Bill of Costs. It is clear that the Applicant took the necessary steps to file the instant Application 32 days after being served with the Bill of Costs.
26. In the case of *Kenya Power & Lighting Company Ltd v Rose Anyango & another* the Court stated that;

‘On whether the intended appeal has chances of success is not for this court to decide at this stage save that from the draft intended memorandum of appeal annexed, I am satisfied that the intended appeal is not frivolous on the face of it. The applicant will have an opportunity to satisfy the court on the merits of its appeal and the Respondents will have a chance to respond to the merits or demerits of the appeal once filed.’
27. In *Divya J. Patel v Guardian Bank Limited* [2020] eKLR, Mohammed JA. held that an arguable appeal is not one that must succeed but one which is not frivolous and merits consideration by the court.
28. I have looked at the Memorandum of Appeal and am of the view that the same is not frivolous and has raised triable issues that have to be considered.

The degree of prejudice to the Respondent if the application is granted

29. The Applicant in his Affidavit stated that unless the orders sought are granted, he stands to suffer substantial loss for being required to pay a sum in excess of Kshs.1,000,000/=. I am of the view that the Respondent will not be prejudiced if the Applicant is granted leave to file an Appeal out of time.
30. On the prayer for stay of execution of judgment or decree of the trial court pending the hearing and determination of the intended appeal, Order 42 Rule 6(2) of the Civil Procedure Rules which provides that:

“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.
31. In the case of *JMM v PM* [2018] e KLR it was stated:

“As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”
32. The power of the court to stay execution of Judgment or Decree is discretionary and therefore having looked at the Memorandum of Appeal, the same raises triable issues. The Applicant has demonstrated that he is likely to suffer substantial loss as he will be required to pay more than Kshs. 1,000,000/=.



The Applicant has also demonstrated that he is ready and willing to deposit security as may be directed by the court.

33. On the prayer for stay of taxation of the Respondent's Bill of Costs pending the hearing and determination of the Application and the intended Appeal; It is the Applicant's case that taxation of the 1st Respondent's Bill of Costs should not proceed as it will prejudice him. The Applicant has demonstrated that he is likely to suffer substantial loss for being required to pay more than Kshs. 1,000,000/=.
34. This court therefore finds that the instant Application has merit and issues the following orders:
 1. That the Applicant to file an Appeal within 45 days.
 2. That there be stay of execution of the Judgment of Hon. R.K. Ondieki dated 16th December 2021 pending the hearing and determination of the Appeal.
 3. That there be stay taxation of the Plaintiff/Respondent's Bill of Costs dated 14th February 2022 pending the hearing and determination of the Appeal.
 4. That the costs of this application be costs in the Appeal.

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

ANTONY OMBWAYO

JUDGE

