



**Laikera v Kalula (Environment and Land Miscellaneous Application
E015 of 2022) [2022] KEELC 13514 (KLR) (5 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13514 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E015 OF 2022
CK YANO, J
OCTOBER 5, 2022**

BETWEEN

STEPHEN MUTUNGA LAIKERA APPLICANT

AND

RAPHAEL MUTHE KALULA RESPONDENT

RULING

1. The application for consideration is the notice of motion dated 20th May 2022 and stated to be brought under Section 3A, 79G and 95 of the *Civil Procedure Act*, Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 of the *Civil Procedure Rules*. In the application Stephen Mutunga Laikera, the applicant is seeking for the following orders;
 1. That this Honourable court be pleased to certify this application urgent and grant orders in the first instance.
 2. That this Honourable court be pleased to grant leave to the applicant to file appeal out of time against the ruling of Hon. Wechuli in Tigania ELC No. 79/2019 dated 3/3/2022.
 3. That this Honourable court be pleased to stay execution of the judgment and ruling dated 3/3/2022 in Tigania ELC No. 79/2019 pending the hearing and determination of this application.
 4. That this Honourable court be pleased to stay execution of judgment and decree in Tigania ELC No. 79/2019 pending the hearing and determination of this suit.
 5. That the cost of this application do abide the outcome of the intended appeal.
2. The application is based on the grounds that:
 - i. The ruling was furnished to counsel for the applicant after time for filing elapsed.



- ii. The applicant stands to be evicted and his permanent building demolished.
 - iii. That in the event the applicant is forcefully evicted, he stands to suffer irreparably.
3. The application is further supported by the affidavit of the applicant sworn on 20th May 2022 in which he deposes that a ruling in respect of an application dated 30th November, 2021 was made on 3rd March 2022. That after the ruling was delivered, the applicant applied for a certified copy of the same vide a letter dated 8th March 2022 and the ruling was duly typed and delivered to the applicant's counsel after 30 days for appeal had elapsed. Copies of the said application, letter and ruling have been annexed and marked "SL1" "SL2" and "SL 3" respectively.
 4. The applicant states that the application dated 30th November 2021 sought to evict him from land parcel No. Meru North/athinga/athanja/7960 on the erroneous belief that the applicant had constructed a permanent building on the respondent's land when he had in fact constructed on his own land. That the orders sought by the respondent in the said application were prayers that were not in the plaint. The applicant's contention is that the said application was irregular and it was wrong for the trial court to issue eviction orders when the same was not part of the judgment of the court. The applicant avers that the respondent is seeking to demolish his permanent shop on the applicant's parcel L.R No. Meru North/athinga/athanja/6262 on the erroneous belief that the applicant is on the respondents parcel LR No. Athinga/athanja/7960. The applicant has exhibited his title marked 'SL4'.
 5. The applicant deposes that according to the impugned ruling, the applicant was supposed to be evicted within 60 days from 3rd March 2022. The applicant is therefore apprehensive that the respondent will implement the said court order. The applicant states that he has a very good appeal that raises strong points of law and fact with high chances of success. A draft of the intended memorandum of appeal has been annexed. The applicant states that he has brought the application herein without delay.
 6. In opposing the application, the respondent filed a replying affidavit sworn by himself on 17th June, 2022 in which he deposes inter alia, that the application is frivolous, without merit and lacks a reasonable cause of action. That the applicant is out to waste the court's time by filing unnecessary, premature, baseless and facetious application so as to defeat the just and expeditious disposal of suit and thwart the respondent from enjoying the fruits of his judgment.
 7. The respondent deposed that the respondent (sic) has not given any sufficient explanation as to why there was a delay in filing the appeal, adding that he has been advised by his advocate that filing of memorandum of appeal does not require the filing of typed and certified proceedings. That the instant application was a knee-jack reaction aimed at frustrating the respondent since the sixty (60) days given by the court had lapsed.
 8. The respondent avers that the applicant has not shown with clear evidence the date in which he purportedly received the typed (copy) of the judgment for purposes of filing this application and how the same caused the delay. The respondent states that at no point did the court issue eviction orders as alleged, but rather called for the implementation of the findings by the land surveyor.
 9. It is the respondent's contention that the intended appeal is hapless, vexatious and has no legs to stand on and therefore does not have chances of success. That the court in entertaining the application dated 30th November, 2021 invoked section 34 of the *Civil Procedure Act* relating to execution or satisfaction of a decree. The respondent states that the lower court has never pronounced itself on the application for eviction and as such, this court cannot entertain the stay in anticipation of a question before another court. That it is clear that the applicant is determined to frustrate the respondent from enjoying the fruits of judgment. The respondent states that this court cannot issue orders without a substantial



justification of likelihood of harm being meted on a party, and that the court cannot grant order premised on mere speculation and conjecture.

10. It is stated that the applicant has not tried to annex or produce a surveyor report challenging the report on record showing that indeed he has not encroached on the respondent's land. Relying on legal advice, the respondent believes that the import of section 34 of the *Civil Procedure Act* is to prevent a party seeking further execution of order in a filed suit from initiating a new similar suit. The respondent prays for the application to be dismissed with costs since it is full of falsehoods, scandalous, unmeritorious, vexatious and abuse of the court process.
11. In his submissions dated 17th June 2022 and filed on 22nd June 2022, the applicant through his advocates M/s Ayub K. Anampiu & Co. Advocates reiterated the grounds in the application and the averments contained in the supporting affidavit and urged the court to grant the orders sought.
12. The respondent did not file submissions within the time granted by the court or at all.

Analysis and Determination

13. I have carefully considered the application, the affidavits on record and the submissions made. The applicant primarily seeks for leave to appeal out of time against the ruling of the subordinate court delivered on 3rd March 2022 as well as stay of execution of the same. The matter that was before the lower court and on which a ruling was made on 3rd March 2022 was an application dated 30th November 2021 in which the respondents herein sought for an order of eviction of the applicant from the property known as land parcel No. Meru North/athinga/athanja/7960 as well as an order of permanent injunction, among other prayers. The respondent's application was based on the grounds that pursuant to an order of the court, the Meru County surveyor visited the land Parcels No. Meru North/athinga/athanja/7960 and Meru North/athinga/athanja/6262 to ascertain their boundaries. That the surveyors visited the said parcels in the presence of the parties and filed a report in court indicating that the applicant had erected a permanent building on the two parcels. That on 21st October, 2021, the respondent issued notice to the applicant to demolish his building from the respondent's land No. Meru North Athinga/athanja/7960, but the applicant refused to comply hence the said application dated 30th November, 2021.
14. The lower court considered the application and ordered inter alia, that the findings of the surveyor be adhered to and implemented within 60 days from 3rd March 2022. The applicant was aggrieved by the ruling and orders of the trial court and filed the instant application. The main ground the application is made is that the ruling was furnished to counsel for the applicant after the time for filing appeal had elapsed. The applicant further avers that he stands to suffer irreparably as he is likely to be evicted and his building demolished.
15. The decision which is sought to be appealed is from the subordinate court. Under Section 79G of the *Civil Procedure Act*, appeals from the decisions of the lower court to this court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to said section however allows for extension of time to appeal where good and sufficient cause has been shown. As such extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.
16. The principles upon which the court should exercise the said discretion and grant leave to appeal out of time are now settled. The court ought to consider the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. (See *Leo Silas Mutiso V Hellen Wangari Mwangi* (1995) 2EA 231 and *Thuita Mwangi Vs Kenya Airways Limited* [2003] eKLR).



17. This application was filed on 23rd May 2022 while the impugned ruling was delivered on 3rd March 2022. The length of delay is about 2½ months. The applicant has cited the delay to have been occasioned by the late furnishing of the ruling to the applicant's counsel. It is my opinion that the reason for the delay has been well explained and the delay is not inordinate.
18. As for the chances of the intended appeal succeeding as alleged by the applicant, it is not in my province currently to determine definitely the merits of the intended appeal. That will be determined by the court hearing the appeal. However, it is trite that the court is bound to consider whether the said intended appeal raises a bona fide issue for determination by the court.
19. I have perused the draft memorandum of appeal. The applicant is challenging, among others, the jurisdiction of the subordinate court to hear and determine the application dated 30th November, 2021 and the fact that the ruling was in respect of substantive orders not sought in the plaint. I am satisfied that the intended appeal is not frivolous but arguable and may possibly succeed.
20. As regards the prejudice which the parties might suffer, the applicant argues that he stands to suffer irreparably since he may be evicted and his building demolished. On his part, the respondent argues that the applicant is determined to frustrate him from enjoying the fruits of judgment.
21. As it has always been held, extension of time to file appeal is a matter of exercise of discretion. Where a party is aggrieved and wishes to pursue an appeal, it would be fair to exercise discretion in his favour and especially where the delay in filing the appeal is not inordinate and has been adequately explained to the satisfaction of the court. Discretion of the court must always be exercised judiciously. In this case, with regard to the issue of prejudice, it is my view that the weight tilts in favour of the applicant. The applicant has thus satisfied the parameters set in the *Leo Sila Mutisa* (supra) and various other decisions and I therefore grant the applicant leave to appeal out of time.
22. The other issue for determination is whether to grant orders of stay of execution pending the intended appeal. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. In *Butt Vs Rent restriction Tribunal* (1982) KLR 417 the Court of Appeal gave guidance on how a court should exercise the said discretion and held that:-
 1. “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. 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 that appeal court reverse the judge's discretion.
 3. 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.
 4. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances of this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its power under order XLI rule 4(2) of the Civil Procedure Rules, can order security upon application by either party or on its own motion.



Failure to put security for costs as ordered will cause the order for stay of execution to lapse”

23. Generally, stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules, and Sub – Rule 1 gives the court discretionary powers to stay execution. For an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for the due performance of the decree.
24. In *Kenya shell Limited V. Benjamin Karuga Kigibu & another (1982 – 1988) KAR 1018*, the Court of Appeal pronounced itself thus;
- “It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it may be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay”
25. The applicant has a burden to show the substantial loss he is likely to suffer if stay is not ordered. This is in recognition that both parties have rights, the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory, and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination (see *Absolom Dora Vs Turbo Transporters (2013) eKLR*).
26. As already stated, the applicant has submitted that if the orders of the lower court as delivered are not stayed, he will be evicted and his permanent structure demolished, and he would suffer irreparably.
27. From the depositions on record, it is more probable that the issue at hand calls for status quo pending the hearing of the intended appeal. Indeed, if the respondent is left to execute the orders, it will complicate the situation further as the applicant will be evicted and his building demolished, thus rendering the intended appeal nugatory. I therefore exercise my discretion in the applicant’s favour and allow the application for stay but on condition that the applicant gives security.
28. In the end, the application dated 20th May 2022 is allowed in the following terms.
- a. Leave is granted to the applicant to file appeal out of time and the same to be filed and served within Seven (7) days from today.
 - b. There shall be stay of execution of the ruling delivered on 3rd March 2022 in *Tigania ELC No. 79 of 2019*.
 - c. The stay is granted in (b) above on condition that the applicant shall deposit into an interest earning account in the joint names of the advocates for the parties the sum of Kshs. 100,000/= as security within twenty one (21) days from the date hereof, in default the conditional stay of execution shall automatically lapse.
 - d. Costs of the application are awarded to the respondent.
29. It is so ordered.

DATED SIGNED AND DELIVERED AT MERU THIS 5TH DAY OF OCTOBER, 2022

In presence of



C.A Mwenda

Mrs Mutegi for Ayub Anampiu for applicant

No appearance for Mwirigi Kilonzo for respondent but respondent present in person.

C.K YANO

ELC JUDGE

