



Lowar v Lowar (Appeal 8 (E006) of 2021) [2022] KEELC 13268 (KLR) (5 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13268 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
APPEAL 8 (E006) OF 2021
FO NYAGAKA, J
OCTOBER 5, 2022

BETWEEN

PETER NAKUPIANG LOWAR APPELLANT

AND

NAUTU LOWAR RESPONDENT

RULING

1. On March 21, 2022 the appellant filed the instant application which invoked sections 1A, 1B, 3 and 95 of the *Civil Procedure Act* as well as order 50, rule 6 and order 51, rule 1 of the *Civil Procedure Rules*. He prayed for the following:
 1. ...spent;
 2. That the order made by court *vide* its ruling dated February 17, 2022 directing the appellant to deposit in a fixed joint interest earning account the sum of Kshs 250,000.00 within 14 days be enlarged;
 3. ...spent;
 4. Any other order the court shall deem fit;
 5. Costs be in the cause.
2. The gist of the application espoused in the grounds and affidavit in support is that while this court's ruling on stay of execution pending appeal was delivered on February 17, 2022, it was only dispatched to the Appellant on the evening of March 1, 2022. He attached the email extract marked PWM1 as well as the opposing counsel's letter dated March 12, 2022 marked PNL2. In the decision in issue, this court granted him conditional stay of execution to the extent that he was to deposit a sum of Kshs 250,000.00 within fourteen (14) days from the date of the ruling failing which the orders would automatically lapse. The appellant thus sought enlargement of time due to no fault of his own as the



ruling was inadvertently remitted late by the court. He urged that it was in the interest of justice that the application be granted as prayed.

The Response

3. The application is vehemently opposed by the respondent vide its replying affidavit filed on April 22, 2022. He remained emphatic that the application was baseless, incompetent, an abuse of the process of the court, mala fides and misplaced thus ought to be struck out. He protested that the appellant has not complied with any of the court's orders and was intent on wasting the court's time. He accused the appellant of illegally ploughing on the suit land. He further alleged that the appellant had threatened to harm the respondent if he dared set foot on the suit land. He proposed that had the appellant been interested in pursuing the appeal, he would have sought clarity on February 17, 2022 when the ruling was delivered. He noted glaring disparities with the orders sought and the grounds espoused in the appellant's affidavit and stated that the entire process of the court continues to remain prejudicially delayed.

Submissions

4. Parties extended their arguments on the application via their respective rival written submissions. The appellant filed his submissions on July 18, 2022 while the respondent filed his on July 13, 2022 and supplemented them on June 29, 2022.

Analysis and Determination

5. I have carefully considered the application, the affidavits and the submissions filed by the respective parties. It is trite law that execution is a lawful process. Cogent grounds must be furnished, in that regard, to establish that it should not proceed by way of stay of execution. It is a matter for the court's discretion to ascertain whether an application for stay brought before it is merited.
6. In this instant appeal, this court granted conditional stay with a mention date to confirm compliance being reserved for June 22, 2022. It is not gainsaid that the appellant is yet to comply with the orders. His explanation is that he only received the ruling on March 1, 2022 despite the same having been rendered on February 17, 2022. In essence he argues that he would have had no time to comply with it even if he was granted the conditions set out therein.
7. The application was based on that ground that by reason of the foregoing the appellant had sought enlargement/extension of time to comply with those orders of the court.
8. The Supreme Court of Kenya in *Mombasa County Government v Kenya Ferry Services & another* [2019] eKLR set out the guiding principles that this court will be bound by as follows:

“Concerning extension of time, this court has already set the guiding principles in the Nick Salat case as follows:

“... It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. ... We derive the following as the underlying principles that a court should consider in exercising such discretion:

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 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. Where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the court;
 5. Whether there will be any prejudice suffered by the respondents, if 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”
9. Guided accordingly and turning to the present application, I have interrogated the grounds in support of the application. Since the applicant placed blame in failing to comply squarely at the door step of the court, and at no fault of his own, this court had to confirm the facts as pertained the exact time and date the ruling was dispatched. It is a fact the ruling was delivered via electronic mail. Having delivered it in that manner, it was incumbent on the registry to deliver it to the respective parties’ or their learned counsel emails. The question that then follows is whether or not that was done immediately upon delivery or within such time as was indicated in the ruling.
10. I observe that, as rightly pointed out by the appellant, the decision was unintentionally forwarded, by the registry to his last known email address on March 1, 2022, and indeed the respondent’s twelve (12) days after the ruling was rendered. The import of the decision of the court delivered on February 17, 2022 was that time for compliance started running from the date of delivery of the ruling which occurred on February 17, 2022. Flowing from the above, the appellant was only left with two (2) days to comply.
11. However, I note that when parties appeared before me on January 18, 2022, they were sufficiently present and informed that the ruling would be delivered on February 17, 2022. Since it was the appellant’s application, his vigilance would have well demanded that should he have not been in receipt of the ruling on that day, he would have followed up on the matter on that very day. Nonetheless, the appellant instigated the present application by filing the same on March 17, 2022, one (1) month after the decision had been delivered.
12. Ultimately, the application is premised on the unwitting late dispatch of the court’s ruling; the consequence of that being that the appellant had only two (2) days to comply. The applicant cannot be faulted in the circumstances. Consequently, and in the interest of justice, I will allow the application in the following terms:
- a. The appellant is granted extension of time for a period of twelve (12) days from the date of this ruling to deposit the sum of Kshs. 250,000.00 in a fixed joint-interest earning account in the names of both counsel for the parties.
 - b. The orders given on February 17, 2022 and supplemented by this present ruling shall automatically lapse without any further reference to this court if the appellant fails to comply with (1) above.



c. I further direct the registry to ensure that the ruling is dispatched in the course of day today, without failure. A print-out of the dispatch email should be placed in the court file within two days of this ruling for ease of reference and presented to the Deputy Registrar for noting compliance.

d. Finally, costs of the application shall abide by the outcome of the appeal.

13. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 5TH DAY OF OCTOBER 2022.

HON DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

