



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KILGORIS**

**MISCELLANOUS APPLICATION NUMBER 1 OF 2021**

**( FORMERLY ELC NAROK MISC.APPLICATION NUMBER 2 OF 2020).**

**TALEO KANASA KALAMOYO.....APPLICANT**

**VERSUS**

**SHADRACK LEKAKENY SUSWA.....RESPONDENT**

**RULING**

The Applicant herein filed a Notice of Motion Application dated 11<sup>th</sup> December 2020 under the Provisions of Order 50 Rule 6, Order 42 Rule 6 of the Civil Procedure Rules & Section 1A,1B,3A and 70 of the Civil Procedure Act, Cap 21 (hereinafter referred to as “the present Application”)

The Prayers in the present Application are; -

1. Spent.
2. An order of Stay of execution of the Judgement of the Learned Hon.R.M.Oanda , Principle Magistrate delivered on 28<sup>th</sup> October 2020 in Kilgoris PMCC ELC No.52 of 2018 pending the hearing and final determination of the Intended Appeal.
3. Leave be granted to the Applicant to file an Appeal out of time against the Judgment of the Principal Magistrate’s Judgment dated, signed and delivered on the 28<sup>th</sup> of October 2020 in Kilgoris ELC.52 of 2018.
4. Upon granting of leave this Honourable Court be pleased to give further Orders, directions and writs as may deem just, expedient and appropriate.

The present Application is supported by Six (6) grounds as outlined hereinbelow; -

- a) The impugned judgement of the Court was delivered without notice to parties hence non-attendance by Counsel for the Applicant.
- b) The Applicant only became aware of the said judgment from the registry on the 10<sup>th</sup> of December 2020 and immediately applied for a copy of the judgment.
- c) By the time the Applicant’s Counsel obtained a copy of the ruling and seeking instructions from his client, the time for filing appeal had lapsed.
- d) In the impugned judgement the trial court directed that the Applicant vacates the suit land within 90 days failing which he be evicted.
- e) The Defendant is dissatisfied with the whole reasoning of the learned trial magistrate and as such he is desirous of appealing the said decision.
- f) There is real and present damages that unless the orders herein are issued, the applicant stands to suffer irreparable loss and damage incapable of being compensated by use of money.

The present application has been supported by the Affidavit of the Applicant dated 11<sup>th</sup> December 2021.

The Respondent on the other hand opposed the present application through a Replying Affidavit sworn on the 10<sup>th</sup> of February 2021 and filed in Court on the 24<sup>th</sup> February 2021.

The grounds relied upon by the Respondent in this present application can be summarized into the following; -

- a) Although the Applicant has filed a Notice of Appeal on the 14<sup>th</sup> of December 2020, the same has never been served on the Respondent Counsel.
- b) The failure by the Applicant to serve the Respondent Counsel with the Notice of Appeal within the prescribed time by law gives the Respondent false belief that the matter has been concluded, only to be ambushed later with the present application.
- c) The Applicant has no good and sufficient cause for not filing the appeal within statutory stipulated time.
- d) The Respondent will suffer irreparable loss and damage as the unlawful action of the Applicant has deliberately kept him away from the suit property as it is apparent that the Applicant is a trespasser.
- e) Lastly is that the Respondent's rights regarding the suit property are under threat with a likeliness that the loss and damage thereof can not be compensated in monetary terms.

The Applicant filed their Submissions on the 28<sup>th</sup> June 2021 and the Respondent filed their Submissions on the 18<sup>th</sup> September 2021.

A perusal of this present application, the Replying affidavit and the Submissions by both parties, the Court crystallizes the issues as follows;

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1. Whether or not the Applicant should be granted leave to file the Notice of Appeal out of time and/or enlarge the time of filing a Notice of Appeal and well as all other relevant documents which are out of time.
2. Whether or not the Applicant has satisfied the principles guiding the issuance of Stay of execution Orders of the Judgment of the Learned Principal Magistrate Hon.R.M.Oanda sitting in Kilgoris delivered on the 28<sup>th</sup> October 2020 in the proceedings known as KILGORIS PMCC ELC NO.52 OF 2018.
3. Costs of this present Application.

## **ANALYSIS OF THE FACTS & THE LAW.**

### **ISSUE NUMBER 1.**

The provisions relating to enlargement of time for filing appeals from sub-ordinate Courts is expressly provided for in **Section 79 G of the Civil Procedure Act, Cap 21** to which it provides as follows; -

***“Every appeal from a sub-ordinate court to the High Court shall be filed within 30 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.”***

It is therefore important to expressly confirm that an application for enlargement of time invokes the discretion of the Court to make a finding based on the facts and circumstances of each case.

Nevertheless, case law has developed a number of factors which aid Courts in exercising these discretionary powers on whether or not to extend time of filing an appeal out of time.

In the Case of **Mwangi -Versus- Kenya Airways Limited (2003) KLR**, the Court of Appeal outlined the following factors to be considered by a court exercising its discretion under Section 79 G;-

#### ***a) The period of delay.***

In this case, the Judgement in the lower Court was delivered on the 28<sup>th</sup> October 2020 and the time for filing of the Notice of Appeal and/or Memorandum of appeal expired on 28<sup>th</sup> November 2020.

No Notice of Appeal or Memorandum of Appeal has been filed so far but the Applicant has attached a Draft Memorandum of Appeal in the present Application.

Going by the date in which the Applicant filed this present application together with the annexed Draft Memorandum of Appeal on the 14<sup>th</sup> of December 2020, the Applicant can be said to be Seventeen (17) days out of time from the 28<sup>th</sup> of November 2021.

The Honourable Court's finding as regards to the lateness of Seventeen (17) days is not inordinate.

***b) The reason for the delay***

According to the grounds provided for in the present application as well as the Supporting Affidavit of the Applicant, it is averred that the Judgment was delivered without the knowledge of the Applicant's Counsel.

The Applicant states that they only came to be aware of the Judgment on the 10<sup>th</sup> December 2020 after it had been delivered on the 28<sup>th</sup> October, 2021 and filed this present Application of the 14<sup>th</sup> December 2021.

According to the Replying Affidavit of the Respondent filed on the 24<sup>th</sup> of February 2021, Paragraph 11 confirms that the Applicant filed their submissions on the 24<sup>th</sup> September 2020 but does not confirm whether the Applicant's Counsel was present when the date for delivering the Judgment was pronounced by the trial Court in the Lower Court.

Consequently, they is a valid ground that the Judgement delivered on the 28<sup>th</sup> of October 2020 would have been pronounced in the absence of the Applicant and/or his Counsel and therefore resulting to a delay in filing the Memorandum of Appeal within time.

***c) The arguability of the appeal.***

On this point of consideration, the Applicant annexed a Draft Memorandum of Appeal in the present Application dated 11<sup>th</sup> December 2020.

The Annexed Draft Memorandum of Appeal contains Five(5) grounds of Appeal which if the Applicant/Appellant succeeds might result to the judgment pronounced on the 28<sup>th</sup> of October 2020 being set-side.

A perusal of the said Memorandum of Appeal provides for grounds which both the Appellant and the Respondent will square it out at the full hearing of the appeal if successfully filed.

This Honourable Court is not allowed to comment on the merits and/or demerits of those grounds of Appeal.

The Honourable Court's work at this juncture is just to confirm that indeed, the draft Memorandum of appeal is couched in a manner that can be urged at the full hearing.

On this aspect, this Honourable Court is of the view that the applicant has discharged this burden appropriately.

***d) The degree of prejudice which could be suffered by the Respondent if the extension is granted.***

On the issue of prejudice, this Honourable Court's view is that the enlargement of time for the Applicant to file its Memorandum of Appeal does not in any way prejudice the Respondent herein against the already delivered judgement dated 28<sup>th</sup> October 2020.

The Applicant is simply seeking to exhaust the lied down legal process of dispute adjudication within the provisions of the law and in any event, the Respondent will also have an opportunity to state his side of the story during the full hearing and bring this litigation to a proper closure.

***e) The importance of compliance with time limits to the particular litigation or issue and***

This Honourable court indeed concurs that parties are required to ensure compliance with time limits, it is also of the opinion that such time limits should not be a hinderance to the administration of justice and the right to litigants being heard on their merits in a court of law.

***f) The effect if any on the administration of justice for extension of time against these factors.***

Lastly, the effect of the extension of time in this particular case would be positive as it gives an opportunity for the Applicant to ventilate and enjoy the right to a fair hearing during the intended Appeal thereof.

**ISSUE NUMBER 2.**

The second issue in the present application is whether or not this Honourable Court should grant a stay of execution of the Judgement delivered on the 28<sup>th</sup> of October 2020 by the Learned Magistrate Hon.R.M.Oanda Principal Magistrate in the proceedings namely KILGORIS PMCC NO.52 OF 2018.

An application for stay of execution of a decree or order pending appeal is guided by the provisions of **Order 42 Rule 6 (1) & (2)** of the Civil Procedure Rules.

Order 42 Rule 6 (2) of the Civil Procedure Rules provide as follows; -

(2) No order for stay of execution shall be made under sub-rule (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.

The leading case of **Butt -Versus-Rent Restriction Tribunal (1979)**, the Court of Appeal stated as follows; -

***“ The power of the court to grant and/or refuse an application for 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 the 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 and 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.”***

This position was reconfirmed in **Civil Appeal No.107 of 2015 between Masisi Mwita Versus- Damaris Wanjiku Njeri (2016) eKLR** where the Court held that; -

***“The application must meet a criteria set out in the precedents and the criteria is best captured in the case of Halal & Another - Versus- Thornton & Turpin Ltd where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag.JA) held that: -***

***“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - sufficient cause, substantial loss would ensue from a refusal to grant stay , the applicant must furnish security, the application must be made without unreasonable delay.”***

During consideration of whether or not to exercise the discretionary power of granting a stay of execution, the Court should also be alive that preservation of the subject matter is key so as not to make the Appeal nugatory.

This position was clearly affirmed in the case of **Consolidated Marine Versus Nampijja & Another , Civil Appeal Number 93 of 1989** where the court observed as follows;-

***“The purpose of the application of stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”***

Having identified all the appropriate guidelines in exercising my discretionary powers, and the pleading before this Court, the Honourable court states as follows; -

a) On the issue of sufficient cause, the Honourable Court is of the View that the Applicant indeed has an arguable appeal to be canvassed at the hearing and therefore discharges this burden.

b) On the issue of substantial loss, the Honourable Court recognizes the fact that the Applicant has been in occupation in the disputed parcel of land known as Transmara/Moita/253 and his eviction thereof as ordered by the Judgment of 28<sup>th</sup> October 2020 would cause a lot of anguish, financial burden and logistical burden.

Although the Court recognizes that Respondent’s position that it should be allowed to enjoy the fruits of its judgement delivered on the 28<sup>th</sup> October 2020, it is the Court’s position that the Applicants avenues of Appeal have not been exhausted.

Consequently, this Court again holds in favour of the Applicant on this aspect.

c) On the issue of unreasonable delay, this Honourable Court has already made a finding on the same earlier to the effect that the Seventeen (17) Days delay is not inordinate.

d) On the issue of whether or not this suit will be rendered nugatory, this Honourable Court makes a finding that the execution being provided in the Judgment pronounced on the 28<sup>th</sup> October 2020 included the eviction of the Applicant from suit property known as Transmara/Moita/253.

Consequently, if indeed the Applicant is evicted and whatever is on the ground demolished, then the Appeal will be rendered nugatory as a reversal of the judgement by the High Court will not assist in the damaged property and/or assets which are on the disputed property.

The Applicant again succeeds on this principle.

e) On the issue of security, this Honourable Court makes a finding that the Applicant should deposit a sum Kenya Shillings Four Hundred Thousand (KShs 400,000/-) as security of costs within the next Thirty (30) days from the date hereof.

In Conclusion thereof, the Application dated 11<sup>th</sup> December 2020 is allowed as follows;-

A) This Honourable court grants leave to the Applicant and/or enlarge the time to the effect that the Applicant files and serves the Memorandum of Appeal within Fourteen (14) Days from the date of delivering this ruling.

B) The substantive Record of Appeal be filed and served within Thirty (30) Days from the date of Filing of the Memorandum of appeal thereof.

C) The Respondent to file and serve its reply within Fourteen (14) days after service of the Record of Appeal.

D) The Applicant deposits in court a sum of Kenya Shillings Four Hundred Thousand (KShs 400,000/-) as security of the costs of this Appeal within Thirty (30) Days from today's date.

E) Mention in Sixty (60) days from today's date to confirm compliance and take directions on the hearing thereof.

F) Mention on 13/12/2021 for directions on the hearing.

**Delivered in Kilgoris ELC Court on the 4<sup>th</sup> day of October, 2021.**

**HON.EMMANUEL.M.WASHE**

**JUDGE**

**In the Presence of:-**

1. Court Assistant – Matiko
2. Counsel for Applicant – Begi
3. Counsel for Respondent - Shira