



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC MISC NO. 10 OF 2020

SAMUEL MUTUGI MUGAMBI.....APPELLANT

VERSUS

LAWRENCE BUNDI AYUB.....RESPONDENT

RULING

1. Before me is a notice of motion dated 18th June, 2020 brought pursuant to Section 79G of the Civil Procedure Act, Order 51 and Order 42 rule 6 of the Civil Procedure Rules 2010, where the applicant is seeking the following orders;

a. Spent

b. Spent

c. That the Honorable Court be pleased to grant leave to the applicant to file an appeal against the judgment in Nkubu ELC NO. 30 of 2017 delivered on 29/04/2020.

d. That pending the filing and determination of the intended appeal, there be a stay of execution of the judgment of the court in Nkubu ELC NO. 30 of 2017.

e. That cost of the application be costs in the intended appeal.

2. The application is based on the grounds on the face of it and on the supporting affidavit dated 18/06/2020 of the applicant who avers that he was the defendant in the trial court where the court had directed that judgment would be delivered on 18/3/2020 but due to the corona pandemic directives were issued for courts to be closed. It was not until 3/06/2020 when he went to court that he learnt that judgment had been delivered on 29/04/2020.

3. He immediately went to see his advocate who advised him to get a copy of the said judgment as the advocate was also not issued with a notice of delivery of judgment. He desires to file an appeal, but time has lapsed and the delay was not occasioned by any failure on his part.

4. He also avers that he has been in occupation of the suit land since 1984 and he is apprehensive that the respondent will execute the judgment as he has already made attempts to do so. Further he stands to suffer substantial loss if eviction takes place as his developments will go to waste and the intended appeal will be rendered nugatory. He contends that the respondent has not been in possession of the land and will therefore not suffer any loss or damage if orders sought are granted.

5. The applicant submitted that he has a good and sufficient cause for the delay and a denial of his application will amount to denying him his fundamental rights and access to justice as enshrined in Article 48 of the Constitution. He relied on the following cases; **Sarah N. Sakwa v Elizabeth Wamwanyi t/a Namukhosi Ltd & another [2017] eKLR, Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, Kinyua Thurania v Moses MG Minyori [2020] eKLR, Mukuna vs Abuoga [1988] KLR 645, Praxades Okutoyi V Medical Practitioners And Dentists Board [2008] eKLR.**

6. The application is opposed by Edith Mukiri Mutwiri on behalf of the respondent by virtue of a power of attorney vide a replying affidavit dated 24/7/2020, averring that the applicant is untruthful as the notice for delivery of judgment was sent to the parties' respective advocates, and that the courts had not closed as alleged by the applicant. It is further contended that the applicant has not demonstrated that he has an arguable appeal by availing a draft memorandum of appeal nor has he met the requirements set out under order 42 rule 6 of the Civil Procedure Rules. The applicant has also not demonstrated what loss he will suffer if the orders are not granted, hence he should be allowed to enjoy the fruits of his judgment.

7. In his submissions, the respondent termed the application as an afterthought averring that no plausible grounds have been raised to warrant the court to exercise its discretion in favor of the applicant. He relied on the cases of; Mwangi V Kenya Airways Ltd [2003] eKLR, Wasike vs. Swala (1984) KLR 591.

8. I have considered the application, affidavits and submissions by both parties. To grant or not to grant a stay of execution as well as leave to lodge an appeal are the main issues for determination.

9. On the issue of leave to appeal out of time, I make reference to the provisions of Sections 79G of the Civil Procedure Act which 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.”

10. The applicant has explained that he was not aware of the time when judgment was delivered and upon discovery of the same, he immediately filed this application, thus he is not guilty of inordinate delay.

11. This court takes judicial Notice that owing to Covid 19 pandemic, court services were interrupted and the applicant may have been in the dark regarding the date of delivery of judgment.

12. On whether the intended appeal has chances of success, it is not for this court to decide that issue at this stage. Further, the applicant did not attach a draft memorandum of appeal to at least demonstrate to the Court the nature of his intended appeal. However, that does not render the application as incompetent. In Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR, the court expressed itself by stating that:-

“I am not convinced that the fact that the applicant failed to attach the draft Memorandum of Appeal necessarily makes this current application incompetent. Even if the Memorandum of Appeal were attached this Court would not at this juncture determine the merits of the grounds of appeal. In Joseph Wanjohi Njau -vs- Benson Maina Kabau- Civil Application No. 97 of 2012 K. M'inoti, J.A held,

“The Court of Appeal has observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before the Court.”

I find that the demands of justice will be better met by allowing the application so as to allow the parties to ventilate their respective positions on merit.”

13. The right of appeal or the right to be heard is a constitutionally entrenched right which can only be withheld in exceptional circumstances. In this particular case, I find no prevailing circumstances to warrant the withholding of the relief sought and I hold that the prayer for leave to appeal out of time is merited.

14. In regard to the prayer for stay of execution, I make reference to the case of Loice Khachendi Onyango v Alex Inyangu & another [2017] eKLR where the court held that;

“The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the Civil Procedure Rules. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicants unless stay of execution is granted; and thirdly 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....”

15. Having found merits in the prayer to file the appeal out of time, I will not be-labour on the point of delay, and I will go straight to consider if the applicant has demonstrated that he stands to suffer substantial loss.

16. In the case of Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63, it was held that;

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

17. In Wellington Lusweti Baraza & 47 others v Lands Limited & another [2015]eKLR, the court stated as follows with regard to the issue of substantial loss;

“Other than cultivating on the land the Judgment debtors have not shown any substantial loss they are likely to suffer. I do find that living on the land and cultivating food crops is not sufficient reason for the grant of stay pending appeal. In Charles Wahome Sethi vs Angela Wairimu Gethi Court of Appeal Civil Appeal No. Nai 302 of 2007 the court of Appeal held that It is not enough for the appellants to say that they reside or live on the suit land and that they will suffer substantial loss. The applicants must go further and show the substantial loss that the applicants should suffer if the respondent executes the decree in this suit against them”.

18. I have perused the judgment of the trial court where I discern that the applicant’s home is 2 ½ kilometers away from the suit land. He has planted trees and food crops on the suit land and he has also put up a temporary structure. This in itself does not amount to substantial loss.

19. The upshot of all the above assessment is that the prayer for stay of execution is not merited. **I find merit in the application in regards to prayer (c) thereof.** The prayer for stay of execution is hereby declined. The applicant is hereby ordered to file and serve his memorandum of appeal within fourteen (14) days of the date of this ruling failure to which the orders granted shall lapse. Costs shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26TH DAY OF MAY, 2021 IN PRESENCE OF:

C/A: Kananu

M/s Mbogo for applicant

Muchiri for respondent

HON. LUCY. N. MBUGUA

ELC JUDGE