



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC MISC NO. E004 OF 2021

SARAH MOHAMED1ST APPLICANT

FATUMA MOHAMED2ND APPLICANT

VERSUS

WAKO GOLLO1ST RESPONDENT

JUDGMENT

1. This miscellaneous suit was filed through the notice of motion dated 10th February 2021, where the applicant seeks the following orders;

1) Spent.

2) The honorable court be pleased to grant leave to the applicant to file an appeal out of time against the judgment delivered by Hon. E. Ngigi in Isiolo Chief Magistrates court CM ELC case no 29 of 2013 on 14th January 2020.

3) The honorable court be pleased to order a stay of execution of the directions issued by the National Land Commission-Isiolo County on 28/01/2021 pending the hearing and determination of the intended appeal.

4) Costs of the application be provided for.

2. The application is premised on the supporting affidavit of the 1st applicant, where it is averred that the applicants were aggrieved by the judgment of the trial court. They intended to appeal against the said judgment but the deponent was summoned by the National Land Commission Isiolo County to appear for their Alternative Dispute Resolution Committee who heard the dispute and decided in favor of the respondent. She did not have an advocate and she honestly believed that that was the proper procedure. She would suffer great prejudice if she is denied an opportunity to pursue the intended appeal.

3. The respondent opposed the said application vide the grounds of opposition dated 10th February 2021, where it is stated that the application is misconceived in so far as it seeks a stay of execution of directions issued by the National Land Commission, since the said directions are not the subject of the intended appeal. It is also averred that the applicants have not demonstrated that the appeal is arguable and it is being made 12 months after delivery of the judgment without any reasonable excuse for the inordinate delay. The respondent therefore avers that the present application is an afterthought calculated to waste precious judicial time.

4. The issue for determination is crystalized as: **whether to grant leave for an appeal to be filed out of time, whether to grant a stay of the judgment in Isiolo ELC case no. 29 of 2013, as well as the directions of the National Land Commission given on 28.1.2021.**

Leave to appeal out of time

5. Section 79G of the Civil Procedure Act provides that:

“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.”

6. In **First American Bank of Kenya Ltd v Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the principles/factors to be considered in exercising its discretion when deciding whether or not to enlarge time.

- i. The explanation if any for the delay;
- ii. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
- iii. Whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favor of the applicant.

7. These conditions were reiterated by the Court of Appeal in **Joseph Kakomo Mbenga v Maingi Charles & another [2018] eKLR**. The Court has unfettered discretion in granting leave to file an Appeal out of time; however there must be some material before it to enable its discretion to be so exercised. The applicant seeking enlargement of time to file an appeal must show good cause for doing so.

8. It is not in dispute that judgment in the trial court was delivered on 14th January 2020, while the current application was filed more than a year later on 10/02/2021. The applicants have averred that they were engaged in an alternative dispute resolution meetings with the National Land Commission of which a decision was given on 29/01/2021.

9. I find that the Applicants have given a plausible explanation for the inordinate delay. I have seen a certified copy of the ruling from the National Land Commission. The respondent has not disputed that there were such ongoing proceedings before the aforementioned entity. Thus the applicants have met the criteria of good cause to warrant the orders to appeal out of time.

Stay

10. I will first deal with the issue of stay of the directions given by the National Land Commission. I find that the intended appeal is in respect of the decision of the trial magistrate delivered on 14.1.2020. On what basis would the court then delve into the issue of stay of execution of the directions given by the National Land Commission. This court to some extent agrees with the respondent that the orders of court should not be made in vain and should be directed at verifiable persons or entities. The proceedings of the National land Commission are not the subject of the intended appeal hence the orders of stay against the aforementioned entity are hereby denied.

11. Regarding the issue of stay against the judgment of the trial court, this court is at a loss as to what is being executed. The applicants here in were the plaintiffs before the trial court and their case was dismissed. No positive orders were issued against or in favour of any party. Even on costs, each party was directed to bear their own costs.

12. It is trite law that stay orders can only be issued in respect of positive orders. In the case of **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR**, Kantai JA stated thus:

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with”.

13. In light of the foregoing analysis, I find that the prayer for stay of execution is not merited.

14. The final orders are as follows; -

- (1) Leave is hereby granted for the applicant to file and serve their appeal within 14 days from the date of delivery of this ruling.
- (2) The orders of stay of execution are hereby denied.
- (3) The applicant is to meet the costs of this suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 19TH DAY OF MAY, 2021 IN PRESENCE OF:

C/A: Kananu

Sandi for applicants

HON. LUCY. N. MBUGUA

ELC JUDGE