



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. E039 OF 2021

EDGAR NAMUSENDE LIKONOAPPELLANT

VERSUS

ISAAC KHALISIA BUBIRU..... RESPONDENT

RULING

1. The appellant and respondent were litigating in Kakamega CM MCL & E No. 955 of 2018. Judgment was delivered in the said matter on 30th April 2021. Being dissatisfied with the outcome, the appellant filed Memorandum of Appeal on 14th September 2021. Simultaneously, he also filed Notice of Motion dated 14th September 2021. That application is the subject of this ruling.

2. The following orders are sought in the application:

1. *[Spent]*

2. *[Spent]*

3. *THAT this Honourable Court be pleased to stay execution of the Judgment/Decree delivered on 30th April 2021 and subsequent orders made on 7th September 2021 respectively pending hearing and final determination of the Appeal lodged in KAKAMEGA HC ELCA NO. 39 OF 2021*

4. *THAT this Honourable Court be pleased to grant leave to the Appellant/Applicant's appeal lodged and or filed herein in KAKAMEGA HC ELCA NO. 39 OF 2021 be deemed as having been properly filed and served out of time.*

5. *THAT costs of this application be provided for*

3. The application is supported by an affidavit sworn by the appellant. He deposed that despite the judgment being delivered, he convinced the respondent to try and settle the matter amicably and that they engaged in that regard through letters dated 18th August 2021 and 20th August 2021. That the delay in filing the appeal was occasioned by the attempt to settle the matter. He added that the respondent obtained orders on 7th September 2021 to enforce the judgment and that he shall suffer irreparable damage if the orders sought in the appeal are not ultimately granted.

4. The respondent opposed the application through a replying affidavit in which he deposed that the judgment gave the appellant 60 days within which to comply but the appellant did not comply thus forcing him to file an application dated 30th July 2021 before the subordinate court seeking orders to enforce compliance. That on 17th August 2021, the subordinate court gave the appellant one week to comply and that ultimately, the subordinate court granted orders on 7th September 2021 to enforce the judgment. He further deposed that the appellant only started making efforts to discuss compliance four and a half months after the date of the judgment and that it is not true that his failure to file an appeal within time was due to negotiations.

5. The appellant filed a supplementary affidavit in which he reiterated that he will suffer irreparable damage and loss if the orders sought in the appeal are not granted and that the respondent will not suffer any prejudice if the orders sought are granted.

6. The application was canvassed through written submissions which both sides duly filed. I have considered the application, the affidavits and the parties' respective submissions.

7. I will deal first with prayer 4 of the application which, in my understanding, is an application for extension of time within which to appeal against the judgment delivered by the subordinate court on 30th April 2021. If the applicant fails to satisfy the court to extend time, it will follow that the prayer for stay of execution pending appeal will equally fail.

8. The Supreme Court of Kenya stated in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR as follows regarding principles applicable to an application such as the present one:

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of 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 for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;*
- 6. Whether the application has been brought without undue delay; ...*

9. The judgment and decree that is sought to be appealed from was passed by the subordinate court in exercise of its environment and land jurisdiction pursuant to **Section 9 (a)** of the **Magistrates' Courts Act, 2015** as read with **Section 26** of the **Environment and Land Court Act, 2011**. In terms of **Section 16A** of the **Environment and Land Court Act, 2011**, the appellant was required to file any appeal against the decree to this court within 30 days of delivery of the judgment. In other words, the appeal ought to have been filed not later than 30th May 2021.

10. The appellant filed the Memorandum of Appeal herein on 14th September 2021, some three and a half months late. I have considered the reasons advanced for the delay. It is my finding that the reasons given are not true. While the appellant claims that he was delayed by negotiations, he has not offered evidence of any negotiations having taken place within 30 days of delivery of the judgment. The letters he has availed were written from mid-August 2021 onwards, over two and a half months after the time for filing appeal had lapsed. Consequently, the letters or negotiations could not have been the reason for the delay.

11. The present application was filed four and a half months after the date of delivery of the judgment. The judgment had a timeline of 60 days for compliance, thereby putting the appellant on his toes right from the date of delivery. The present application was filed long after expiry of the period allowed for compliance, and only after the respondent had started steps towards forcing compliance. The applicant ought to have been more forthright in explaining the delay. I find that the delay is both inordinate and unexplained. The applicant has failed to discharge the burden of satisfactorily explaining the delay and is not therefore entitled to exercise of discretion to enlarge time in his favour. That being the case, I need not consider the prayer for stay of execution since there is no valid appeal.

12. In the result, I find no merit in Notice of Motion dated 14th September 2021. I dismiss the application with costs to the respondent. Since the Memorandum of Appeal dated 14th September 2021 is incompetent and invalid for being filed out of time, I strike it out with no order as to costs. For the avoidance of doubt, since there was no valid appeal, the only costs payable shall be costs in respect of Notice of Motion dated 14th September 2021 and the proceedings towards its determination.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 23RD DAY OF NOVEMBER 2021.

D. O. OHUNGO

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

MR OSANGO FOR THE APPELLANT/APPLICANT

MR INDIMULI HOLDING BRIEF FOR MR MUKAVALE FOR THE RESPONDENT/RESPONDENT

COURT ASSISTANT: E. JUMA