



**Jacob v Kobia & another (Civil Miscellaneous E110 of 2024)
[2024] KEHC 15930 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL MISCELLANEOUS E110 OF 2024
EM MURIITHI, J
DECEMBER 17, 2024**

BETWEEN

ALFRED THIRINGI JACOB APPELLANT

AND

LYDIA KOBIA 1ST RESPONDENT

DENNIS GITOBU KIMATHI 2ND RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 16/8/2024, brought under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, Sections 79G, 95, 1A and 1B of the *Civil Procedure Act*, Article 159 (2) (A) (B) (D) of *the Constitution* and all other enabling provisions of the law, the Applicant seeks that:
 1. Spent
 2. This Honorable Court be pleased to grant the Applicant leave to appeal out of time against the Judgment delivered by the chief Magistrate at Meru Hon. J.M NJOROGE dated 27th May 2024 in The Chief Magistrate’s Court Civil Suit No. E065 OF 2022.
 3. There be a stay of execution of the Judgment delivered by the chief Magistrate at Meru Hon. J.m Njoroge dated 27th May 2024 in The Chief Magistrate’s Court Civil Suit No. E065 Of 2022 pending the hearing and determination of this Application and the intended Appeal by the Appellant.
 4. The costs of and incidental to this application be costs in the intended Appeal.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Alfred Thiringi Jacob, the Applicant herein, sworn on even date. He avers that he is aggrieved by the judgment of 27/5/2024 by Hon. J.M. Njoroge and he intends to appeal



against it. He was unable to file the appeal within the stipulated time due to unavailability of certified and typed copies of the judgment. Unless the time to file the appeal is enlarged and stay granted, the intended appeal, which is arguable, will be rendered nugatory since the Respondents shall have fully implemented the judgment. He is economically humbled and in the event the application is disallowed, he shall be displaced from the suit land which shall cause disruption to his life and render him vagabond as that is his only source of livelihood. The application has been brought without undue delay, and he undertakes to prosecute the intended appeal in a timely manner, so as not to prejudice the Respondents. He reiterates that he is poor and implores the court to dispense with ordering him to provide security for costs. He stands to suffer irreparable damage if the orders sought are not granted.

3. The 1st Respondent opposed the application vide her replying affidavit sworn on 5/11/2024. She accuses the Applicant of inordinate delay and avers that there is neither evidence that the Applicant lives on the suit land nor imminent eviction. No security has been provided and the allegations of impecuniosity are not a ground for grant of stay.
4. The 2nd Respondent did not file a replying affidavit.

Submissions

5. The Applicant cites *Diplack Kenya Limited v William Muthama Kitonyi* (2018)eKLR, *Feroz Begum Qurashi and another v Maganbhai Patel and Others* (1964) EA 633, *Daphine Parry v Murray Alexander Carson* (1963) EA 546, *First American Bank of Kenya Ltd v Gulab P Shah & 2 Others* (2002) 1 EA and *Vishva Stone Suppliers Company Limited v RSR Stone* (2020) eKLR on the principles on the enlargement of time to file an appeal. He urges that he will suffer substantial loss if the Respondents execute the decree, and cites *Consolidated Marine v Nampijja & another Civil App. No.93 of 1989 (Nairobi)*, *Mukuma v Abuoga* (1988) KLR 645 and *Charles Wahome Gethi v Angela Wairimu Gethi* (2008) eKLR. He urges that he is a man of straw and implores the court to dispense with the provision of security.
6. The Respondents cite *County Executive of Kisumu v County Government of Kisumu & 8 others* (2017) eKLR where the Supreme Court of Kenya reiterated the settled principles that guide in the exercise of discretion to extend time. They urge that the Applicant inordinately delayed in filing his appeal, and cite *Moriema Cottages Limited v Obadiah Angus Nyanje Manjewa Malindi ELRC Appeal No. E016 of 2023*. They urge that since the Applicant is not in actual possession of the land, he will not suffer any substantial loss if stay is denied, and cite *Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 Others* (2010) eKLR.

Analysis and Determination

7. The twin issues for determination are whether leave to appeal and stay should issue.

Leave to appeal out of time

8. The principles for consideration on an application for extension of time to appeal out of time are that, the power is discretionary but the applicants must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay are plausible, that the appeal is arguable and not frivolous and that the respondent will not be unduly prejudiced by the order being made. See *Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others* (2014) eKLR.
9. The judgment sought to be appealed against is said to have been delivered on 27/5/2024 while the instant application was filed on 18/9/2024. That delay of approximately 4 months is manifestly inordinate. The reason for that delay is attributed to unavailability of the certified copies of the



judgment and proceedings, which were belatedly availed to the Applicant on 2/8/2024. This court, in the spirit of Article 159 of *the Constitution* and the overriding objectives, finds that reason for the delay to be plausible and satisfactory, the absence of a letter bespeaking the lower court proceedings, notwithstanding.

10. On the arguability or otherwise of the intended appeal, the grounds raised in the draft memorandum of appeal inter alia whether the subject matter was matrimonial property and whether there was breach of any term of the agreement between the Applicant and the 2nd Respondent cannot be said to be frivolous. For the reasons set out above, this court deems it fit to enlarge time to lodge the appeal out of time.

Stay of Execution

11. Order 42 Rule 6 of the Civil Procedure Rules empowers a court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided under Rule 6 (2) as follows:

- “(2) No order for stay of execution shall be made under subrule (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.”

12. There is no doubt that the filing of the instant application was unreasonably delayed. The Applicant contends that he will suffer substantially unless stay is granted, because he will be displaced from the suit land risking loss of his only source of livelihood. On their part, the Respondents insist that the Applicant is not in occupation of the suit land and there is no evidence of any imminent eviction.
13. The impugned judgment and/or the decree have not been exhibited to enable the court gauge who is indeed in occupation of the suit land. It behooved the Applicant to prove that he is in occupation. The contention that there is a real and impending danger of eviction is farfetched and unfounded. The court finds that the Applicant has not demonstrated what substantial loss he will suffer if stay is denied.
14. The Applicant beseeches the court to dispense with the provision of security for the due performance of the decree on account of his impecuniosity. An allegation of impecuniosity alone, it has been held is not a condition for grant of stay. There is, therefore, no basis upon which the court can grant stay.

ORDERS

15. Accordingly, for the reasons set out above, the court allows the Applicant’s application dated 16/8/2024 on the following terms:-
 1. The Applicant is granted Leave to appeal out of time against the Judgment delivered by the chief Magistrate at Meru Hon. J.M Njoroge dated 27th May 2024 in Meru CMCC Suit No. E065 of 2022.
 2. Stay of execution is denied.
 3. The record of Appeal to be filed within 60 days from the date hereof.



4. In the event of default, the leave hereby granted shall lapse and be of no effect.
5. In terms of Order 50 Rule 6 of the Civil Procedure Rules, the costs of this application shall be paid by the Applicant to the Respondents.

Order accordingly.

DATED AND DELIVERED ON THIS 17TH DAY OF DECEMBER 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Petitioner in Person.

Protestor in person.

