



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC MISC NO. E002 OF 2020

HENRY KABERE KATHUU APPLICANT

VERSUS

STANLEY KIBORO MBOROKI RESPONDENT

RULING

1. Before me is a notice of motion dated 28th September 2020 filed by the applicant who is seeking the following orders;

A stay of execution of the judgment/decree in GITHONGO ELC NO. 26 OF 2018 and all consequential orders pending the hearing and determination of this application and the intended appeal and that leave be granted to the applicant to file an appeal out of time against the aforementioned judgment.

2. Through his supporting affidavit, the applicant avers that judgment was entered in favor of the respondent on 4th May 2020 without his knowledge or that of his counsel and it was not until the respondent served his counsel with an application dated 4/09/2020 which was coming up for hearing 25/09/2020 that they discovered that judgment had already been delivered. That in the said judgment the court indicated that it had informed parties and counsels of the date via WhatsApp platform, but this message was never received by either party.

3. The applicant contends that his appeal has an overwhelming chance of success and it is in the interest of justice that leave be granted to file an appeal out of time. There is also need to have the judgment stayed as the respondent has already filed an application seeking eviction orders of the applicant and he will suffer substantial loss and damage if stay orders are not granted and the appeal will be rendered nugatory.

4. The applicant filed a 2nd certificate on the grounds that the respondent has already obtained eviction orders on 11/01/2021 and he was apprehensive that he would be evicted from his land parcel.

5. The respondent filed a replying affidavit dated 22/05/2021 but the same was filed wrongly as it relates to a different application, as he is responding to applicant's affidavit dated 15.3.2021!, as such it is not applicable herein.

6. The matter proceeded orally where counsel for the applicant averred that the lower court matter was concluded where the court stayed the execution for 30 days. The respondent's counsel averred that execution has already taken place. The applicants were aware that execution took place but they still went to the lower court forum shopping and are not interested in prosecuting this appeal.

7. The issue for determination is crystallized as: **whether to grant leave for an appeal to be filed out of time and whether to grant a stay of execution of the magistrate's court judgment?**

8. On the issue extension of time, I make reference to the provisions of section 79G of the Civil Procedure Act which 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.”

9. 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.

10. 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.

11. It is not disputed that judgment in the trial court was delivered on 4th May 2020 in the absence of both parties and their counsels. The court cannot rule out a possibility that the applicant only learnt of the judgment when they were served with the application dated 4/9/2020 by the respondent and taking into account that the application before this court was filed on 30/9/2020 I am of the view that he has given sufficient explanation for the inordinate delay. I find that the applicant was not indolent and the respondent will not suffer any prejudice if time is extended to file an appeal.

12. On the issue of stay of execution, both parties have confirmed that execution took place though none has clarified what aspects of the execution have taken place and which ones have not; has the applicant been evicted? Has the land registrar issued new titles in respect to both parcels of land? The court is being asked to issue stay of execution orders yet it is not clear what is being stayed. The law is clear that courts do not issue orders in vain. To this end, I find that the order for stay of execution is not merited.

13. The final orders are issued as follows;

1) The applicant is granted 14 days from the date of this ruling to file and serve his appeal failure to which, the order given shall lapse.

2) Costs of the application shall abide the outcome of the intended appeal.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 21ST DAY OF JULY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE