



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC MISC CASE NO. 6 OF 2020**

**KINYUA THURANIRA.....APPLICANT**

**VERSUS**

**MOSES M.G. MINYORI.....RESPONDENT**

**RULING**

1. This ruling is in respect of two applications filed by the applicant/ prospective appellant. The first application is dated 22.3.2020 where applicant is seeking leave to file an appeal out of time against the judgment of Hon. Sogomo delivered on 28.11.2019 in Tigania CM ELC 192 of 2014. He contends that he applied for proceedings immediately after the judgment was delivered but he was not given the said proceedings in time.

2. The other application is dated 27.5.2020 where applicant is seeking for a stay of execution of the aforementioned judgment. He contends that the respondent is in the process of executing the said judgment which will result in his eviction.

3. The respondent has opposed both applications vide his replying affidavit filed in court on 30.6.2020 where he contends that applicant has not demonstrated any attempt to acquire the proceedings from the trial court, that the applications were only made after applicant got wind that 1<sup>st</sup> respondent wanted to execute the judgment and that the applications are a delaying tactic. Respondent states that if the orders are granted, the applicant should offer security of 2 million shillings.

4. I have considered all the issues raised herein including the submissions of the parties. The two applications are intertwined hence, I will deal with both of them simultaneously.

5. Starting with the issue of leave to appeal out of time, I do make reference to the provisions of **Section 79G of the Civil Procedure Rules** where it is stipulated 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 (Emphasize added).”***

6. Therefore, an applicant needs to satisfy the court that he/she had good and sufficient reasons for not filing the appeal on time for the court to exercise its discretion in his favour.

7. The Supreme Court in the case of **Nicholas kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** has laid down principles which the court may consider in exercise of this discretion as follows:

**(i) “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;**

**(ii) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court**

**(iii) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**

**(iv) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**

(v) *Whether there will be any prejudice suffered by the respondents if the extension is granted;*

(vi) *Whether the application has been brought without undue delay;*

(vii) .....

8. Thus extension of time is not a right and a party needs to adequately demonstrate that the court's discretion should be exercised in their favour. In the instant case, the applicant has not demonstrated the efforts he made to get the proceedings after he applied for the same. I have also perused the Judgment of the trial court where it is apparent that litigation had earlier on been undertaken by the applicant's father in a case no. 485 of 1997 where he lost. I will therefore take these issues into consideration in the final order.

9. On the issue of stay of execution, this court makes reference to the provisions of Order 42 rule 6 (2) of the Civil Procedure Rules, where it is stipulated as follows:

***“No order for stay of execution shall be made under sub-rule (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”.***

10. To grant or to refuse an application for stay of execution pending appeal is discretionary in that the court when granting a stay, it has to balance the interests of the applicant with those of the respondent. In determining this balance, the court gives due consideration to the three criteria set under the aforementioned provisions of law.

11. Ringera J in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** stated as follows;

***“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”***

12. As earlier stated, I have perused the judgment of the trial court where it is evident that appellant's father had litigated on the matter in case CC 485 of 1997 and lost in a judgment delivered in year 2011. The court has also taken into consideration that applicant has not offered any security as stipulated in order 42 of the civil procedure rules.

13. In the circumstances the court will allow both applications with conditions as follows:

- (1) The applicant is hereby granted leave to file and serve the memorandum of appeal within 14 days from date of delivery of this ruling.**
- (2) There is to be a stay of execution of the judgment in Tigania CM-ELC No. 192 of 2014 for a period of ONE YEAR only.**
- (3) Applicant is to deposit a sum of KShs.2 million in court as security within a period of 30 days.**
- (4) In the event of non-compliance with orders in clause 1 & 3, the orders granted herein shall lapse.**
- (5) Applicant is to bear the costs of the two applications.**
- (6) This Miscellaneous file is marked as CLOSED.**

**DATED, SIGNED AND DELIVERED AT MERU THIS 14<sup>TH</sup> DAY OF JULY, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this ruling was given to the advocates for the parties on 30.6.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**