Seda v Ogutu (Environment and Land Miscellaneous Application E011 of 2025) [2025] KEELC 5537 (KLR) (24 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5537 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E011 OF 2025

SO OKONG'O, J

JULY 24, 2025

BETWEEN

AGUSTINUS OWUOR SEDA ALIAS AGUSTINE OWUOR SEDA ... APPLICANT

AND

LILIAN ANYANGO OGUTU ..... RESPONDENT

RULING

1. What is before the court for determination is the Applicant's Notice of Motion application dated 27th February 2025, filed on the same date, in which the Applicant has sought an order of stay of execution of the decree dated 18th December 2024 issued by Hon. K. Cheruiyot SPM in Kisumu MCELC No. No. E116 of 2018, pending the hearing and determination of an intended appeal against the same, and an extension of time within which to file an appeal against the said decree.

2. The application was brought on the grounds that the judgment sought to be appealed was delivered by the trial court on 18th December 2024 in favour of the Respondent. The Applicant averred that the judgment and the decree emanating therefrom were extremely prejudicial to the Applicant since the trial court did not take into consideration how the Respondent obtained the property that was in dispute before the trial court. The Applicant averred that the said judgment was read in the absence of the Applicant's advocate, and he only came to learn of the same one month after its delivery. The Applicant averred that when he sought to peruse the court file to confirm the contents of the judgment, he was informed that the court file was locked in chambers and the magistrate who had delivered the judgment was away.

3. The Applicant averred that the file was made available on 6th February 2025, when he got time to peruse the said judgment. The Applicant averred that he intended to prefer an appeal against the whole judgment, and unless the orders sought were granted, the intended appeal would be rendered nugatory. The Applicant averred that the intended appeal was plausible and had good chances of success. The

Applicant averred that the application was brought without unreasonable delay and the balance of convenience weighed in his favour.

4. The application was supported by the affidavit of the Applicant sworn on 27th February 2025, to which the Applicant annexed a copy of the judgment of the trial court and a copy of the draft memorandum of appeal.

5. The Respondent opposed the application through a replying affidavit sworn on 24th March 2025. The Respondent averred that the application was fatally defective as it was supported by an affidavit which the Applicant did not personally sign. The Respondent averred that the purported signature of the Applicant on the said affidavit did not tally with the Applicant's known signatures according to the documents filed at the trial court. The Respondent averred further that the trial court's judgment was delivered on 3rd December 2024 but was uploaded on the CTS on 18th December 2024.

6. The Respondent averred that the Applicant's former advocates knew all along of the delivery of the said judgment. The Respondent averred that the time within which the Applicant should have filed the appeal lapsed on 3rd January 2025. The Respondent averred that the Applicant and/or his former advocates were indolent, which resulted in their failure to appeal within the prescribed time. The Respondent averred that the Applicant filed the application before the court 55 days after the expiry of the time within which he should have filed the appeal.

7. The Respondent averred that she had spent Kshs. 30,000/- in implementing the decree of the trial court, of which Kshs. 20,000/- was legal fees and Kshs. 10,000/- was disbursements at the survey office and land registry. The Respondent averred that the draft grounds of appeal were not arguable. The Respondent averred that in the event the court was inclined to grant any interim order of stay of execution pending the hearing and determination of the intended appeal, it should order the Applicant to deposit in court security for costs as it shall deem fit.

8. The Respondent averred that the application was brought in bad faith so as to drag on the dispute that had raged since 2016. The Respondent averred that the limb of the application seeking a stay of execution had been overtaken by events. The Respondent averred that the office of the Nyanza Regional Surveyor had already cancelled the subdivision of land parcel No. Kisumu/Kasule/5544 and all the resultant titles, namely, parcel Nos. Kisumu/Kasule/5833,5834,8327 and 8228.

9. The Respondent averred that the Nyanza Regional Surveyor had reinstated the suit property on the Registry Index Map and erased the said subdivisions from the Registry Index Map in compliance with the decree of the trial court issued on 20th January 2025, which was lodged at the Nyanza Regional Surveyor's office on 7th March 2025.

10. The application was heard on 26th March 2025. The Applicant submitted that the trial court had indicated that the impugned judgment would be delivered on notice. The Applicant submitted that his previous advocates were not notified of the date of the delivery of the judgment. The Applicant submitted that when he learnt of the judgment, the time within which to file the appeal against the same had lapsed. The Applicant submitted that the delay in filing the appeal was 16 days only and was not inordinate. The Applicant submitted that the impugned judgment would be executed at any time unless stayed. The Applicant submitted that he was willing to furnish security that may be ordered by the court.

11. On his part, the Respondent submitted that the averments in his replying affidavit had not been controverted by the Applicant. The Respondent reiterated that the application was incompetent due to the doubt that had been raised by the Respondent on whether the Applicant swore the affidavit in support of the application. The Respondent submitted that the lower court judgment was delivered on

3rd December 2024, and as such, the appeal should have been filed by 3rd January 2025. The Respondent submitted that the application before the court was filed 55 days after the lapse of the time for filing the Appeal. The Respondent submitted further that the stay sought could not be granted as it was directed at a non-existent judgment delivered on 18th December 2024. The Respondent submitted that in any event, the decree had already been executed by the cancellation of the mutation forms and the amendment of the Registry Index Map. The Respondent submitted that there was nothing to stay and urged the court to dismiss the application with costs.

12. In a rejoinder, the Applicant submitted that the Respondent had not produced expert evidence in proof of her claim that the Applicant did not sign the affidavit in support of the application. On the issue of time, the Applicant submitted that time does not run between 21st December and 13th January. On the claim that the decree had been executed, the Applicant submitted that the decree provided for the eviction of the Applicant from the suit property, which had not been done. The Applicant urged the court to allow the application.

Analysis and Determination

13. I have considered the Applicant's application together with the supporting affidavit. I have also considered the Respondent's affidavit filed in opposition to the application and the submissions by the parties. The Applicant is seeking an extension of time within which to file an appeal against the trial court's decision and a stay of execution of the decision pending the hearing of the intended appeal.

14. Section 16A (1) and (2) of the *Environment and Land Court Act* 2011, provides as follows:

    1. All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the *Environment and Land Court Act*, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

    2. An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time."

15. In Attorney General v. Law Society of Kenya & another [2013]eKLR, the court cited the decision of the same court in Alfred Romani t/a Romani Architect & 3 Others v. Association of Members Episcopal Conference in Eastern Africa, Civil Application No. NAI.375 of 2002, where the court had also cited its earlier decision in Leo Sila Mutiso v. Rose Hellen Wangari Mwangi, Civil Application No. NAI. 255 of 1997, where it stated as follows:

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are: first, the length of delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."

16. In the same case (Attorney General v. Law Society of Kenya & another (supra) the court stated that:

> " 28. "Sufficient cause" or "good cause" in law means:
>
> > ".....the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused". See Black's Law Dictionary, 9th Edition, page 251.
> >
> > Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

17. This court has not received the trial court's file. I have therefore not had sight of the original judgment of the court. A copy of the judgment downloaded from the CTS by the Applicant does not have the date of delivery of the judgment. It only has the date of 18th December 2024, when the judgment was uploaded to the CTS. The Applicant has contended that the judgment was delivered on 18th December 2024, while the Respondent has claimed that the judgment was delivered on 3rd December 2024. From the material before me, I am unable to determine which of the parties is right on the issue of the date of delivery of the impugned judgment. Under Order 50 Rule 4 of the Civil Procedure Rules, time does not run between 21st December to 13th January of any year. This means that if the impugned judgment was delivered on 18th December 2024 as claimed by the Applicant, the Applicant ought to have filed an appeal against the said judgment by 10th February 2025. The present application was filed on 27th February 2025 after a lapse of 17 days from the date when the appeal was due for filing.

18. The Applicant has contended that the judgment of the trial court was to be delivered on notice and that the same was delivered without notice to his previous advocates. The Respondent has not rebutted this claim. There is no evidence before the court that the Applicant's former advocates were notified of the date for the delivery of the trial court's judgment. The Applicant has contended that he learnt of the judgment after the time within which to file the appeal had lapsed. I am satisfied that the Applicant has given a reasonable explanation for his failure to file the appeal within time. I also find that the time it took the Applicant to move the court for extension of time was not unreasonable. It is my finding, therefore, that a case has been made for the extension of time sought.

19. On the limb of the application seeking stay, the following is my view: Order 42 Rule 6 of the Civil Procedure Rules provides as follows:

> " 6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
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> (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."

20. In Kenya Shell Limited v. Karuga (1982 – 1988) I KAR 1018, the court stated that:

> " It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money."

21. In RWW v. EKW [2019] eKLR, the court stated as follows on the purpose of an order of stay of execution pending appeal:

> " 8. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
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> 9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."

22. The trial court ordered that the subdivision of land parcel No. Kisumu/Kasule/5544 be cancelled and the land restored in the name of the Respondent. The court also ordered that the Defendants, the Applicant included, be evicted from the suit property. The Applicant did not deny the Respondent's claim that the subdivision of land parcel No. Kisumu/Kasule/5544 has been cancelled together with the titles of all the plots that arose therefrom. I agree with the Respondent that the limb of the orders of the trial court cancelling the subdivision of land parcel No. Kisumu/Kasule/5544 and restoring the property in the name of the Applicant has been executed and as such cannot be stayed. The limb of the said orders for the eviction of the Applicant has, however, not been executed. I am satisfied that the Applicant is likely to suffer substantial loss if he is evicted from the suit property. The Applicant has therefore established a case for a stay of the order for his eviction from the suit property. As I have already found earlier, the present application was brought without unreasonable delay.

Conclusion

23. In conclusion, the Applicant's application succeeds in part. I therefore make the following orders in the matter;

1. Leave is granted to the Applicant to file an appeal against the judgment delivered in Kisumu MC. ELC No. E116 of 2018, Lilian Anyango Ogutu v. Agustinus Owuor Seda & 5 Others.

2. The appeal shall be filed in an appeal file opened for that purpose, within 14 days from the date hereof.

3. Pending the hearing and determination of the appeal, the execution of part of the judgment in Kisumu MC. ELC No. E116 of 2018, Lilian Anyango Ogutu v. Agustinus Owuor Seda & 5 Others, which provided for the eviction of the Applicant from land parcel No. Kisumu/ Kasule/5544 and/or its cancelled subdivisions is stayed.

4. The Applicant shall deposit in court a sum of Kshs. 200,000/- as security within 60 days from the date hereof, in default of which the stay shall lapse automatically without any reference to the court.

5. Each party shall bear its costs of the application.

DELIVERED AND DATED AT KISUMU ON THIS 24TH DAY OF JULY 2025

S. OKONG'O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Applicant

N/A for the Respondent

Ms. J. Omondi-Court Assistant