



REPUBLIC OF KENYA



**Madiang'i v Wandera (Environment and Land Miscellaneous Application
E005 of 2023) [2024] KEELC 341 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 341 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E005 OF 2023
BN OLAO, J
JANUARY 30, 2024**

BETWEEN

PHILIP MADIANG'I APPELLANT

AND

GODFREY ANYIMO WANDERA RESPONDENT

*(Arising out of the Judgment delivered by HON. P.A. OLENGO SPM
11th September 2023 in BUSIA CMC ELC CASE NO 92 of 2019)*

RULING

1. Godfrey Anyimo Wandera (the Respondent herein) filed a suit in the subordinate court seeking an order that Suzy Modesta Shiukwa and Philip Madiangi do surrender vacant possession of the land parcel No Samia-wakhungu/Odiado/1935 (the suit land herein) and that they be enjoined therefrom.
2. In a judgment delivered on 11th September 2023, the trial court found in favour of the Respondent and dismissed the defendants' counter-claim.
3. Philip Madiangi (the Applicant herein) who was the 2nd defendant in the suit in the subordinate court has now moved to this court vide his Notice of Motion dated 10th November 2023 in which he seeks the following orders:
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to enlarge the time within which the Applicant may lodge an appeal against the judgment delivered on 11th September 2023 in Busia Chief Magistrate's Court Elc Case No 92 Of 2019 *Godfrey Anyimo Wandera v Suzy Modesta Shiukwa & Philip Madianga*.



4. That this Honourable Court be pleased to order stay of execution of the decree issued in Busia Chief Magistrate's Court Elc Case No 92 Of 2019 *Godfrey Anyimo Wandera v Suzy Modesta Shiukwa & Philip Madianga* pending the hearing and determination of the intended appeal.
5. That costs of this application be provided for.
4. The application is premised on the provisions of Order 22 Rule 22, Order 50 Rule 5 and Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules](#) and Sections 3A, 63, 79G and 95 of the [Civil Procedure Act](#).
5. It is based on the grounds set out therein and is also supported by the affidavit of the Applicant of even date.
6. The gist of the application is that the trial court scheduled the delivery of the judgment on 21st July 2023 but it was not ready. The parties were then informed that the judgment would be delivered on notice.
7. However, on 11th September 2023, the trial magistrate delivered a judgment in which the Applicant was decreed to be a trespasser on the suit land. That neither the Applicant nor his counsel were aware of the delivery of the judgment until 25th October 2023 when counsel made an enquiry at the Registry following information that the trial magistrate was on transfer. The Applicant is aggrieved by the said judgement and intends to file an appeal. Since the 30 days period within which to file an appeal have elapsed, it is prudent to seek leave of this court to appeal out of time and also preserve the subject matter. That the delay was occasioned by the failure of the court to issue notice of judgment. That the appeal is highly meritorious and stands a good chance of success as demonstrated in the Memorandum of Appeal. Unless the execution of the decree is stayed, the Applicant and the family will be evicted from the suit land thereby suffering irreparable loss and destroying the substratum of the intended appeal. That he is willing and ready to abide by such terms as the Honourable Court may impose.
8. Annexed to the application are the following documents:
 1. Copy of the judgement delivered on 11th September 2023.
 2. Copy of the Memorandum of Appeal.
9. When the application was placed before me on 10th November 2023, I directed that it be canvassed by way of written submissions to be filed on or before 11th December 2023. However, by that date, only the Applicant had filed his submissions. The Respondent did not file any response nor submissions. The application is therefore not opposed.
10. I have considered the application, un-opposed as it is as well as the submissions by Ms Wakoli Counsel for the Applicant.
11. The Applicant seeks two orders:
 1. Extension of time to appeal.
 2. Stay of execution of the judgment in Busia Chief Magistrate's Court Elc Case No 92 Of 2019 pending appeal.

Extension Of Time To Appeal:

12. Section 79G of the [Civil Procedure Act](#) 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.” Emphasis mine.

Section 16A (1) and (2) of the [Environment and Land Court Act](#) is couched in similar terms. It reads:

16A

- (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 satisfied the court that he had a good and sufficient cause for not filing the appeal in time.” Emphasis mine.

Section 95 of the [Civil Procedure Act](#) empowers this court to enlarge, at its discretion, any time fixed by law. Similarly, Order 50 Rule (6) of the [Civil Procedure Rules](#) provides that any time limited for doing any act may be extended by the court.

13. It is clear therefore that whereas the law provides that an appeal from the judgment of a subordinate court to this court must be filed within 30 days of the delivery of that judgment, such period may be enlarged by the court. In so doing, the court exercises its discretion which must be on good grounds and not capriciously or as a matter of course.
14. The principles that guide a court considering such an application were set out in the case of [Nicholas Kiptoo Arap Korir Salat -v- Independent Electoral And Boundaries Commission & 7 Others](#), Supreme Court Application No 16 of 2014 [2014 eKLR] where the Court laid down the following guidelines:
 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 respondent if extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.



As to what is “sufficient cause” or “good cause”, this was defined in the case of *Attorney General -v- Law Society of Kenya & Another* C.a. Civil Appeal No 133 of 2011 to mean:

“... the burden placed on a litigant (usually by Court rule or order) to show why a request should be granted or an action excused ...

sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

The application being un-opposed the averments by the Applicants are not rebutted. It is the Applicant’s case that the judgment sought to be appealed was earlier scheduled for delivery on 21st July 2023 but was not delivered on that day. Instead, the parties were informed that it would be delivered on notice. It was subsequently delivered on 11th September 2023 without notice and in the absence of the parties and it was not until 25th October 2023 that the Applicant was informed about the delivery of the judgment. A copy of the said judgment and which is annexed to the application confirms that it was indeed delivered on 11th September 2023 with;

“N/A for both parties”

As the Applicants and counsel were not present in court on 11th September 2023 when the judgment was delivered, he could not have been able to exercise his rights under Section 79G of the *Civil Procedure Act* or Section 16A of the *Environment and Land Court Act* by filing the appeal within the stipulated 30 days. It is not clear why the judgment was delivered in the absence of both parties. A judgment belongs to the parties involved in the litigation. It resolves their disputes. They are entitled to know what decision the court has made in the determination of what they placed before it for resolution. The judgement, if it is to make any sense, must be therefore be conveyed to them either in open court or through other acceptable and legal channels. When it is delivered in the absence of the parties, then the party aggrieved by the decision is denied an opportunity to file any other application which he may have wished to. And whereas there are occasions when parties fail to attend the Court for delivery of their judgments or rulings, every effort must be made to ensure their attendance. Certainly, a judgment should not be delivered surreptitiously. How then will the parties know what their rights and obligations are? They should not be left to “rummage through the registry looking for judgments and rulings” as happened recently in the case of *Fredrick Okeyo -v- Charles Okoth* Busia Elc Miscellaneous Application No E006 of 2023. That the judgment was not delivered in the presence of the parties is itself good and sufficient cause to grant the prayer for extension of time.

15. Secondly it is clear from the un-rebutted averment of the Applicant that he only knew about the judgment on 25th October 2023. This application was filed some 14 days later on 10th November 2023. The Applicant therefore approached this court expeditiously once he became aware of the judgment.
16. The prayer for extension of time is merited. I allow it.

2. Stay Of Execution Pending Appeal:

17. This is provided for under Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules* as follows:

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- (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.

- (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.”
Emphasis mine.

It is clear from the above that in order to be entitled to the orders of stay of execution pending appeal, the Applicant has to meet the following:

1. Show sufficient cause.
2. Demonstrate that unless the order is granted, he will suffer substantial loss.
3. File the application without unreasonable delay.
4. Offer security.

I have already allowed the applicant an extension to file his appeal out of time. That is sufficient cause.

18. The applicant has deposed in paragraph 10 of his supporting affidavit that unless the order sought is granted, he and his family “will be evicted from the suit land which may be transferred to third parties.” In that case, this will have the effect of “destroying the substratum of the intended appeal rendering the same nugatory”. Again those averments have not been rebutted. There is no doubt in my mind that if that were to happen, the loss which the applicant and his family will suffer will be “substantial” which, as was stated in this case of *Kenya Shell Ltd -v- Kibiru & Another* 1986 KLR 410, “is the cornerstone of both jurisdictions for granting a stay.”
19. I am also guided by the principles enunciated in the case of *Butt -v- Rent Restriction Tribunal* 1982 KLR 417 where the court of Appeal said:
 - 1) The power to grant or refuse an application for stay of execution is discretionary and should be exercised so as not to render the appeal nugatory should the appeal court reverse the trial court’s decision.
 - 2) If there is no other overwhelming hindrance a stay should be granted.
 - 3) A judge should not refuse to grant a stay if there are good grounds for doing so merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
 - 4) Finally, a court exercising it’s discretion whether or not to grant a stay will consider the special circumstances of each case.

In my view if a stay is not granted and the Applicant and his family are not only evicted from the suit land but the same is sold to third parties, the loss which he will suffer will not only be “substantial”



but also, the suit land may no longer be available thus rendering the intended appeal nugatory. That entitles the Applicant to the order sought.

20. The Applicant has also deposed in paragraph 13 of his supporting affidavit that he is ready and willing to abide by such terms as the Honourable Court may deem fit to impose. It is also clear from his supporting affidavit that he and his family are on the suit land. A stay order will therefore not prejudice the Respondent.
21. Ultimately therefore, and having considered the Notice of Motion dated 10th November 2023, I allow it and make the following disposal orders:
 1. The applicant shall file and serve his appeal within 15 days from the date of this ruling.
 2. An order is hereby issued staying the execution of the decree and any further proceedings in Busia CMC ELC Case No 92 of 2019 pending hearing and determination of the appeal or any orders of this court.
 3. There shall be no orders as to costs of this application.

BOAZ N. OLAO

JUDGE

30TH JANUARY 2024

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 30TH DAY OF JANUARY 2024 WITH NOTICE TO PARTIES.

BOAZ N. OLAO

JUDGE

30TH JANUARY 2024

