



**Okeyo v Okoth (Environment and Land Miscellaneous Application
E006 of 2023) [2024] KEELC 164 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 164 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2023
BN OLAO, J
JANUARY 25, 2024**

BETWEEN

FREDRICK OKEYO APPLICANT

AND

CHARLES OKOTH RESPONDENT

*(Being an application for leave to appeal out of time and stay of execution
of the un-dated judgment of HON. LUCY AMBASI CHIEF MAGISTRATE
in BUSIA CHIEF MAGISTRATE'S COURT ELC CASE NO 85 of 2020)*

RULING

1. The dispute between fredrick okeyo (the applicant) and charles okoth (the respondent) over the ownership of the land parcel no south teso/angoromo/6xxx (the suit land and which is wrongly referred to as south teso/angrom/6xxx in the un-dated judgment of hon lucy ambasi chief magistrate) was heard and determined in the subordinate court in favour of the Respondent.
2. I now have before me for my determination the Applicant's Notice of Motion dated 12th June 2023 and premised under the provisions of Section 79G of the [Civil Procedure Act](#) in which he seeks the following orders:
 1. Spent
 2. The Applicant be granted leave to file an appeal out of time against the un-dated judgment delivered on un-disclosed date in Busia chief magistrate's court Environment & Land Case No E85 of 2020 Charles Okoth v Fredrick Okeyo.
 3. Pending the hearing and determination of this application inter partes there be a stay of execution of the judgment and decree in busia chief magistrate's court Environment & Land



Case No E85 of 2020 Charles Okoth V Fredrick Okeyo and thereafter pending the hearing and determination of the intended appeal.

4. Costs be in the intended appeal.
3. The application is premised on the grounds setout therein and supported by both the affidavits of the applicant and that of his counsel mr francis omondi dated 12th June 2023.
4. The crux of the application is that the dispute between the parties was heard by hon lucy ambasi chief magistrate busia court being eld case no e85 of 2020 on 8th december 2022. she then reserved the judgment for delivery on 2nd february 2023 by which time she had already been transferred from busia court. the judgment was therefore not delivered on the appointed date.
5. On 11th April 2023 while on a routine visit to the lower Court Registry, counsel for the Applicant came across the Court file and upon perusal, he found a copy of the trial magistrate's signed but un-dated judgment bearing no date of when it was delivered. Counsel therefore wrote to the Chief Magistrate seeking to find out when the said judgment could have been delivered but received no response. He then shared the findings of the trial magistrate with his client the Applicant who, being aggrieved by the same, instructed him to appeal. This has also been confirmed by the Applicant himself in his affidavit of even date in which he has deposed, inter alia, that if the judgment is executed, he is likely to be evicted from his land and his home will be demolished resulting in substantial loss and his appeal being rendered nugatory.
6. The following documents are annexed to the application:
 1. The un-dated judgment signed by hon. lucy ambasi chief magistrate.
 2. copy of a letter dated 12th april 2023 by f. omondi advocate addressed to the chief magistrate busia law court.
 3. copy of report dated 15th january 2018 from james onyinkwa county surveyor, busia.
 4. memorandum of appeal.
7. the application is opposed and the respondent filed a replying affidavit dated 14th july 2023 in which he has deposed, inter alia, that the applicant has not met the threshold for the grant of the orders sought. that there has been unreasonable delay in filing this application and the applicant has not shown that he is likely to suffer loss which cannot be compensated by an award of damages. further, that the Applicant has not given any cogent reason why the appeal was not filed within the timeliness provided for in the law and that delay cannot be attributed to the Respondent. That the application is denying him the opportunity of enjoying the fruits of his judgment and it should be dismissed with costs.
8. The application has been canvassed by way of written submissions. these have been filed by mr omondi instructed by the firm of omondi & company advocates for the applicant and by mr okanda instructed by the firm of otieno okanda & company advocates for the respondent.
9. I have considered the application, the rival affidavits, the annexures and the submissions by counsel.
10. What calls for my determination are two (2) issues namely;
 1. Extension of time within which to appeal.
 2. Stay of execution of the judgment and decree in buisa chief magistrates court elc case no e85 of 2020.



Extension Of Time

11. 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 95 of the same Act reads:

“Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

Order 50 Rule 6 of the [Civil Procedure Rules](#) on the other hand states that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these rules or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed;

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application unless the court orders otherwise.”

Similarly, Section 16A(1) of the [Environment and Land Court Act](#) is in similar terms as Section 79G of the [Civil Procedure Act](#) and provides that appeals from the Subordinate Courts and Local Tribunals shall be filed within 30 days from the date of the decree or order appealed against. There is also a proviso in Section 16A(2) of the same Act which reads:

“An appeal may be admitted out of time if the appellant satisfies the Court that he had a good and sufficient reason for not filing an appeal in time.” Emphasis mine.

12. The term “sufficient cause” or “good cause” was defined in the case of [Attorney General v Law Society of Kenya & another](#) c.a. civil appeal no 133 of 2011 95;

“... 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.” Emphasis mine.

Finally 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], the supreme court stated that the discretion to extend time is unfettered and it is incumbent upon the person making the application to explain the reasons for the delay and any extenuating circumstances which can enable the Court exercise its discretion in the Applicant’s favour. The Court then laid down the following principles to guide a Court considering such an application;



1. “Extension of time is not a right of a party. It is and 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 respondents 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.
13. This Court will be guided by the above provisions and precedents in determining this application and in particular, the prayer for extension of time.
14. It is not in dispute that the judgment of hon Lucy Ambasi Chief Magistrate and which the applicant seeks to appeal is not dated. The final sentence under disposition simply reads:

“Signed, dated and delivered in open court this day of February 2023.

hon Lucy Ambasi Chief Magistrate.”

It is the Applicant’s case that although the magistrate had indicated 2nd February 2023 as date for delivery of judgment, it was not delivered and no notice of delivery was issued to the parties. That is not in dispute as the record of the proceedings in the trial Court confirms the same. Counsel for the Applicant has deposed in paragraph 5 of his supporting affidavit that it was not until 11th April 2023 while on a routine visit to the registry that he came across the file with a copy of the signed but undated judgment. The Respondent does not believe that that lapse is a matter of concern. Indeed his counsel has submitted at page 2 of his submission as follows:

“It is trite that once a judgment is issued, it becomes a public record available for access by parties. The Applicant has not demonstrated any cogent or reasonable basis upon which he did not prefer his appeal within thirty (30) days provided for by law. The fact that the applicant had no notice of impugned judgment is not reasonable reason for bringing an application for leave to file appeal out of time.”

Nothing can be further from the truth. While a judgment is a public document, it is first and foremost the property of the litigants because the dispute which it is meant to resolve belongs to them. It cannot therefore be a secret weapon to be surreptitiously sneaked from the judicial officer’s chambers and hidden in the registry for the parties and their counsel to bump into it. And if for some reason the judgment is not ready on the appointed date, which often happens, the parties and their counsel are entitled to a notice on the next delivery date. It should not be the responsibility of counsel, as happened in this case, to rummage through the registry looking for judgments and rulings. The date on which the judgment is delivered by the Court is what triggers off the filing of the appeal. As is now clear, the judgment was neither delivered nor dated. How then could the Applicant be expected to invoke the provisions of Section 79G of the *Civil Procedure Act* within the timelines set therein?



15. It is not disputed that counsel for the Applicant came across the judgment on 11th April 2023 and filed this application on 12th June 2023. Prior to that, he wrote to the Chief Magistrate on 12th April seeking to know when the judgment was delivered. As at the time of filing this application, he had not received any response to this enquiry. Clearly, the Applicant has shown “good and sufficient cause for not filing the appeal in time.” His explanation is not only “rational, plausible, logical, convincing, reasonable and truthful,” – *Attorney General v Law Society of Kenya & others* (*supra*) – but it is also sad that he was starved of the necessary information to enable him appeal. I am satisfied that the Applicant has established a basis for extension of time and in the circumstances, the delay has been explained and is not unreasonable.
16. The prayer for extension of time is accordingly allowed.

Stay Of Execution:

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

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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 the Applicant was required to prove the following in order to justify the grant of an order of stay of execution pending appeal:

- a. Show sufficient cause.
- b. Demonstrate that unless the order is granted, he will suffer substantial loss.
- c. offer security
- d. File the application without unreasonable delay.

The Court has already allowed the Applicant an extension of time to file an appeal and I shall be issuing directions shortly. The Applicant has indeed annexed a draft memorandum of appeal to the application. That is sufficient cause.



18. The Applicant has also deposed that he is apprehensive that should the judgment be executed, his home may be demolished and he is likely to be evicted. The Respondent has on the other hand averred that there is nothing to show that he intends to or has threatened to execute the judgment. However, without an order of stay of execution, nothing stops the Respondent from doing so with the result that the Applicant will no doubt suffer substantial loss.
19. On the issue of filing the application without unreasonable delay, it is clear from what I have already stated above that the judgment was not delivered to the parties on 2nd February 2023 or at all. Applicant's counsel only came across it in the registry on 11th April 2023 and his attempts to seek clarification from the Court as to when it was delivered bore no fruits. The Applicant moved to this Court on 12th June 2023. I do not consider that delay to be unreasonable in the circumstances of this case. In my view, it has also been satisfactorily explained. It must always be remembered that there is no definition of unreasonable or inordinate in the law. Therefore, that is an issue to be determined on a case to case basis but a delay which is excusable, as in this case, cannot be said to be unreasonable or inordinate.
20. With regard to the offer of security, the un-dated judgment was not delivered to the parties. It is difficult therefore for the Applicant to have been expected to make any offer for security in respect to such a judgment. By the said judgment, the Applicant was enjoined from the suit land and the Court ordered for the demolition of his house and eviction from the suit land. In terms of Order 42 Rule 6(2) (b) of the *Civil Procedure Rules*, I do not discern what orders this Court can impose which "may ultimately be binding" on the Applicant "for the due performance of such decree or order". If his appeal is dismissed, he will remain evicted from the suit land and permanently enjoined therefrom. I see no need therefore to make any orders as regards security.
21. Ultimately therefore, and having considered the Notice of Motion dated 12th June 2023, I make the following disposal orders:
 1. The Applicant is granted leave to file an appeal out of time arising from the un-dated judgment of Hon. Lucy Ambasi Chief Magistrate in Busia ELC Case No E85 of 2020.
 2. The said appeal be filed within thirty (30) days of the delivery of this ruling.
 3. An order of stay of execution is hereby issued in respect to the said judgment and decree pending the hearing and determination of the appeal.
 4. Costs shall be in the intended appeal.

BOAZ N. OLAO

JUDGE

25TH JANUARY 2024

RULING DATED, SIGNED AND DELIVERED ON THIS 25TH DAY OF JANUARY 2024 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

