



**Wanjohi v Wainaina (Environment and Land Appeal E007 of 2023)
[2024] KEELC 18 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 18 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E007 OF 2023
JO OLOLA, J
JANUARY 19, 2024**

BETWEEN

STEPHEN MWANGI WANJOHI PLAINTIFF

AND

PAUL KURIA WAINAINA DEFENDANT

RULING

1. By the Notice of Motion dated 3rd May 2023, Stephen Mwangi Wanjohi (the Applicant) prays for orders that this court be pleased to grant a stay of execution of the whole Judgment and decree delivered on 23rd March 2023 in Nyeri MCELCE No. 39 of 2020 and all consequential orders thereto pending the hearing and determination of the intended Appeal. In addition, the Applicant prays for leave to be granted to himself to file a Memorandum of Appeal out of time.
2. The application which is supported by an affidavit sworn by the Applicant is founded on the grounds that:-
 - i). The Judgment delivered on 23rd March 2023 was in favour of the Respondents and the Applicant being dissatisfied therewith intends to lodge an Appeal;
 - ii). The counsel previously representing the Applicant who was the 1st Defendant in the suit has only recently informed the Applicant that he will not proceed with the matter by lodging an Appeal;
 - iii). The new Advocates not being privy to the lower court hearing had to wait for the court to issue the proceedings and the Judgment first so as to familiarize themselves with the matter before lodging the Appeal;
 - iv). By the time the new Advocates procured the Judgment and proceedings, the 30 days period for lodging an Appeal had lapsed;



- v). The application has been made only 5 days after the period provided lapsed and the court should do equity by excusing him for such delay;
 - v). It is also of utmost importance that a stay of execution of the Judgment of the lower court be allowed to ensure that the suit property is preserved since the 30 days period of stay issued by the lower court has since lapsed;
 - vi). Without there being such stay the Appeal may be rendered nugatory should the property be disposed and/or dealt with in a manner detrimental to the interest of the parties;
 - vii). For all intent and purposes, the Respondents will not be adversely affected should the orders of stay be granted as the orders will only ensure the suit property is preserved and protected;
 - viii). The Applicant has an arguable Appeal with a high chance of success; and
 - ix). There will be occasioned a great injustice and irreparable loss and damage to the Applicant unless the orders sought are granted.
3. Paul Kuria Wainaina and Fatuma Nyaguthii Chege (the Respondents) are opposed to the grant of the orders sought. by their Grounds of Opposition dated 5th June 2023, they oppose the Applicant's Motion on the grounds set out as follows:-
- 1. The application is incompetent, bad in law and fatally defective for being presumptuous. It has lumped the application for leave to file appeal out of time and (an) application for stay of execution into one making it difficult to respond to. It is an abuse of this Honourable Court's process;
 - 2. The application has failed to satisfy the conditions for orders for stay under Order 42 Rule 6 (2);
 - 3. The application has not addressed nor met the criteria required to extend time and allow the Applicant to appeal out of time;
 - 4. The application is made in bad faith to deny the Respondents the fruit of their rightfully obtained Judgment; and
 - 5. The application is ill conceived and an abuse of this Honourable Court's process.
4. In further response to the application, the two Respondents have sworn two similar Replying Affidavits in which they reiterated the position taken vide their Grounds of Opposition. It is the Respondents' case that as at the time of filing of this application, no Appeal had been filed and it is therefore not appropriate for the Applicant to seek stay of execution pending an Appeal which does not yet exist.
5. The Respondents further aver that the Applicant has failed to sufficiently demonstrate what loss he stands to suffer and accuse him of bringing the application after an inordinate delay.
6. On the issue of extension of time, the Respondents aver that the Applicant has not demonstrated reasonable grounds explaining the delay in filing the Appeal in time. They assert that the application is prejudicial as it will deny them the fruits of their rightfully obtained Judgment and keep them from freely dealing with the land for a long period of time.
7. I have carefully perused and considered the application as well as the respective responses thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.



8. In the application before me, the Applicant prays for leave to file his Memorandum of Appeal to the Judgment delivered by the lower court out of time and for a stay of execution of the said Judgment and the decree emanating therefrom.
9. The factors to be considered when determining an application for extension of time are found in various Judicial Pronouncements of the Courts. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, laid down the principles that govern the exercise of discretion in such an application as follows:-
 - “ 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 by 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 the 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.”
10. I have considered the prayer for extension of time in light of the above principles. The first question to be answered in my view is whether the Applicant has rendered a satisfactory explanation for the delay in filing the Memorandum of Appeal.
11. In the matter herein, the Judgment which the Applicant intends to appeal against was delivered on 23rd March 2023. That being the case, the period within which the Applicant was required to file the Memorandum of Appeal lapsed on or about 23rd April 2023. This application was filed on 4th May 2023. The period of delay is therefore approximately 11 days.
12. In the Supporting Affidavit to the application, the Applicant has explained that sometime after the Judgment was delivered, his previous advocate suddenly decided to terminate his representation of the Applicant and the Applicant was then compelled to look for the services of another Advocate.
13. In support of that contention the Applicant has exhibited a consent dated 14th April 2023 between his previous Advocate with the current one which consent allowed the new Advocate to take over the conduct of these proceedings. The Applicant has further explained that the current Advocate not being familiar with the proceedings and the Judgment in the lower court formally applied for the same as he needed time to familiarize herself with the same before making a decision to Appeal. It is his case that those proceedings were issued after the statutory period to file the Memorandum of Appeal had lapsed.
14. Given those circumstances, I was satisfied that the Applicant had provided sufficient justification for the 11 days of delay in filing the application for leave to file the Appeal out of time. I was equally satisfied, that that delay was not inordinate and that the same would not cause any prejudice upon the Respondents.



15. In regard to the prayer for stay of execution, the Applicant has stated that the initial period of stay of execution granted by the Lower Court did lapse at the same time as the time for filing the Appeal. It is his case that the said property is now susceptible to adverse dealings by the Respondents who are now deemed as the owners thereof.

16. As to what should be considered in determining whether to grant or refuse an application for stay of execution, the Court of Appeal stated as follows in the case of *Butt –vs- Rent Restrictions Tribunal 1979*.

“The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.

Secondly, the general principle in granting or refusing a stay is, if there is no overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the Judge’s discretion.

Thirdly, a Judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own Motion. Failure to put up security for costs as ordered will cause the order of stay of execution to lapse.”

17. In the matter herein, I note that the suit property is currently occupied by the Respondents and that their only discomfort is the fact that an order of stay shall prevent them from dealing more freely with the suit property for a much longer period. In my humble view, that is a small price to pay in a matter where the court requires to satisfy itself that justice has been done to both sides of the dispute.

18. Given that the Respondents are the ones in actual possession of the suit property which has now been put in their hands by the impugned Judgment, I am again satisfied that the Applicant’s fears that the same may be disposed of to third parties is not far fetched.

19. Accordingly, I find merit in the application and hereby grant the following orders:-

- i). Leave is hereby granted to the Applicant to file the Memorandum of Appeal within seven (7) days from the date hereof.
- ii). An order is hereby issued staying execution of the Judgment and decree delivered on 23/3/2023 in Nyeri MCELC Case No. 39 of 2020 and all consequential orders thereto pending the hearing and determination of the intended Appeal.
- iii). The Applicant is hereby directed to deposit the sum of Kshs. 150,000/= in court being security for costs within 14 days from today. In default this application shall stand dismissed with costs.
- iv). The Applicant shall in any event bear the costs of this application.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF JANUARY, 2024.

In the presence of:

Mr. Githaiga holding brief for Kabathi for the Respondent.



No appearance for the Applicants.

Court Assistant: Kendi

.....

J. O. OLOLA

JUDGE

