



Nyawara & another (Suing/appealing as officials/trustees of Evangelical Church of Christ in Africa ECCA-Hera Mar Adier) v Marimu & another (Being sued as official/trustee of Church of Christ iin Africa CCA) (Environment & Land Miscellaneous Case 2 of 2023) [2024] KEELC 846 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEELC 846 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND MISCELLANEOUS CASE 2 OF 2023**

AY KOROSS, J

FEBRUARY 22, 2024

BETWEEN

JEHU ODUOR NYAWARA 1ST APPLICANT

AMOS BEN AWANGE 2ND APPLICANT

SUING/APPEALING AS OFFICIALS/TRUSTEES OF EVANGELICAL CHURCH OF CHRIST IN AFRICA ECCA-HERA MAR ADIER

AND

TITUS Z OBUNGA MARIMU 1ST RESPONDENT

HABAKUK ONYANGO ABOGNO 2ND RESPONDENT

BEING SUED AS OFFICIAL/TRUSTEE OF CHURCH OF CHRIST IIN AFRICA CCA

RULING

1. The notice of motion dated 11/08/2023 that is the subject of this ruling was filed by the applicants and in it, this court was moved under Section 16A (2) of the [Environment and Land Court Act](#). The applicants have sought leave to appeal out of time against the ruling of Hon. J.P.Nandi that was rendered on 29/06/2023 in Bondo ELC Case No. E014 OF 2023 and they also prayed for an order staying the impugned ruling.
2. The motion was predicated on grounds thereon and it was supported by an affidavit sworn on the same date by the 1st applicant Jehu Oduor Nyawara.
3. Some of the grounds thereon are replicated in the supporting affidavit and in summary, the 1st applicant averred that being aggrieved by the impugned ruling and in anticipation of lodging a record of appeal,



his counsel on record M/s. Mulinge & Ochieng Co. Advocates numerous wrote to the trial court registry seeking for copies of the ruling to no avail.

4. Further, the 1st applicant contended that he was apprehensive an execution of the impugned ruling would make them suffer irreparable loss.

Respondents' case

5. The respondents who were represented by the firm of M/s. Owiti, Otieno & Ragot Advocates strenuously opposed the motion by filing a replying affidavit that was deposed on 18/10/2023 by the 2nd respondent Archbishop Emeritus, Dr.Habbakuk Onyango Abogno.
6. In the lengthy affidavit which this court has summarized, the 2nd respondent stated the applicants were indolent and uncandid since upon rendering the impugned ruling which was in the presence of both parties' counsels, the trial court informed parties it would upload the ruling on the e-filing portal; which it did.
7. In addition, the 2nd respondent averred the impugned ruling had struck out the applicants' case with costs and in his view, such a decision was incapable of being stayed and further, the appeal had zero chances of success. He further averred that a similar suit by the applicants to wit Siaya ELC (OS) Case No. E018 of 2022 had also been struck out and the applicants were therefore guilty of abusing the court process. According to the 2nd respondent, they had been saddled with anxiety and expensive legal proceedings.

Applicant's submissions

8. The motion is canvassed by written submissions. In submissions filed by their counsel on record dated 24/08/2023 and relying on averments contained in the 1st applicant's affidavit, counsel augmented his arguments on Section 79 G of the *Civil Procedure Act* and submitted the delay was not inordinate.
9. Counsel submitted the applicants had proffered good and sufficient reasons. To buttress his arguments, counsel relied on the persuasive case of *Tonui v National Bank of Kenya (Miscellaneous Civil Appeal E002 of 2022) [2022] KEHC 2977 (KLR) (20 June 2022)* where the court held that a period of one and half months was not inordinate.
10. Counsel submitted that from the impugned ruling, it was evident the applicants had arguable grounds of appeal with chances of success and they should not be denied a right to appeal.

Respondents' submissions

11. The respondents' counsel on record filed written submissions dated 19/10/2023. Counsel acknowledged 3 issues arose for resolution which were inter alia (a) whether the applicants deserved being granted leave to appeal out of time (b) whether the court should stay the impugned ruling and (c) costs.
12. On the 1st issue and relying on averments contained in the 2nd respondent's replying affidavit, counsel argued the applicants had not tendered good and sufficient reasons.
13. Further, that in exercising its discretion, this court should be guided by principles that were settled by the Supreme Court of Kenya in case of *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others [2014] eKLR* which are:-

“...the under-lying principles that a Court should consider in exercise of such discretion:



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 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.”
14. According to counsel, the applicants had not met the threshold outlined in Nicholas Kiptoo Arap Korir Salat (Supra) case and since the applicants were dishonest and had not approached the court with clean hands, they were not entitled to the equitable reliefs they had sought.
15. On the 2nd issue, counsel relied on provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules and argued the impugned ruling was incapable of being stayed and no loss sufficed and on the 3rd issue, sought for costs.

Issues for determination, analysis and determination

16. Having considered the motion, affidavits and annexures thereto together with provisions of law and well cited authorities, three issues emerge for this court’s consideration: -
- a. Whether the impugned ruling can be stayed.
 - b. Whether the applicants should be granted leave to appeal out of time.
 - c. What about costs.

a. Whether the impugned ruling can be stayed

17. My invitation to intervene on behalf of the applicants is invoked by Order 42 Rule 6 (2) of the Civil Procedure Rules which provides 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.”



18. By this rule, an applicant who seeks stay of execution pending appeal has to satisfy that;(i) he will suffer substantial loss (ii)he has moved the court without unreasonable delay and (iii) he will furnish security for due performance.
19. Being an appellate court, in addition to these principles, it is settled law this court will consider additional principles such as arguability of the appeal and the appeal being rendered nugatory. The list is non-exhaustive and these principles were enunciated by the Court of Appeal decision of *Butt v Rent Restriction Tribunal* [1979] as thus: -
- “ a. 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.
 - b. Secondly, the general principle in granting or refusing a stay is, if there is no other 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.
 - c. 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.
 - d. 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 security of costs as ordered will cause the order for stay of execution to lapse.”
20. Now, having examined the impugned ruling, the trial magistrate found the suit that was before him was *res judicata*, an abuse of court process and struck it out with costs to the respondents.
21. The significance of this decision is that it issued negative orders save for costs which in my view, cannot be stayed. A negative order was explicated in the Court of Appeal decision of *George Ole Sangui & 12 others v. Kedong Ranch Limited* [2015] eKLR which stated as follows: -
- “The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent... It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”
22. In adopting this decision, I must agree with the respondents’ counsel that a negative order is incapable of being executed or stayed and I find and hold the relief being sought fails.



b. Whether the applicants should be granted leave to appeal out of time.

23. Leave to appeal out of time is underpinned within the provisions of Section 16A (2) of the *Environment and Land Court Act* which is a mirror of Section 79G of the *Civil Procedure Act*. The former proviso states 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.”
24. Accordingly, since the applicants were aggrieved against the decision of the trial magistrate that was rendered on 29/06/2023, they ought to have lodged their memorandum of appeal on or before 29/07/2023 or thereabouts. However, they filed the motion on 14/08/2023 which was just over two weeks outside the stipulated timeline. Therefore, they were not inordinately late. See Nicholas Kiptoo Arap Korir Salat (Supra).
25. On the issue of arguability of the intended appeal, the applicants did not tender a draft memorandum of appeal to enable this court interrogate whether it was arguable or substantiate on the grounds of appeal. This error albeit significant does not impede this court since it can examine other supportive facts that have been tendered to establish the grievances the applicants intend to raise on appeal. See Court of Appeal decision of Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited [2020] eKLR.
26. The applicants vaguely contended they intended to appeal against the entire ruling and this position was reiterated in their submissions. A glimpse of the entire ruling demonstrates the trial magistrate addressed himself on points of law on the doctrine of res judicata. Since this court cannot enter into the arena of litigation, it is very difficult to discern the intended grounds of appeal. On this basis I am constrained but to find that the appeal is not arguable.
27. Additionally, the applicants had a duty to satisfactorily explain to this court why they did not file the appeal timeously. In the case Nicholas Kiptoo Arap Korir Salat (Supra), the apex court stated that since extension of time is a creature of equity and the principle of he who seeks equity must do equity comes into force in such cases, the applicants who were seeking to enjoy this equitable remedy had a duty to show that they were not at fault as to let time lapse.
28. Since the applicants have blamed the trial court, the onus was on them to so discharge. The applicants have attached two letters respectively dated 30/06/2023 and 28/07/2023 ostensibly addressed to the trial court.
29. However, a scrutiny of these letters does not show they were stamped by the trial court or that they were ever uploaded on the e filing platform or at least, sent to the court’s official email address. Had the applicants checked the e filing platform, unquestionably they would have established that the impugned ruling was uploaded on the very day it was rendered.



30. The applicants could not sit on their laurels and then turn around and blame the trial court's registry for their mistake. The applicants' insincerity does not augur well with this court. I am not satisfied the applicants have tendered good and sufficient cause to warrant an order for leave to appeal out of time. Therefore, I find and hold this prayer fails.
31. For the foregoing reasons, I ultimately find the notice of motion dated 11/08/2023 is unmerited and it is hereby dismissed with costs to the respondents.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 22ND DAY OF FEBRUARY 2024.

HON. A. Y. KOROSS

JUDGE

22/2/2024

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

Mr. Ochieng for the applicants

Mr. Ndolo for the respondents

Court assistant: Ishmael Orwa

