



Kaguna v Njeru (sued as the legal administrator of the Estate of Njeru M’Njama) & 3 others (Environment and Land Miscellaneous Application E001 of 2023) [2024] KEELC 1019 (KLR) (21 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1019 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2023
A KANIARU, J
FEBRUARY 21, 2024

BETWEEN

GREGORY MWANIKI KAGUNA APPLICANT

AND

GECERENA NGAI NJERU (SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF NJERU M’NJAMA) 1ST RESPONDENT

JACOB NJERU NYAGA 2ND RESPONDENT

LAND REGISTRAR EMBU WEST 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. The application before me for determination is a Notice of Motion dated 31.01.2023 and filed on 02.02.2023. It is expressed to be brought under Order 50 Rule 6 and Order 51 Rule 1 of the [civil Procedure Rules](#), Section 3A of the [Civil Procedure Act](#), and all enabling laws. The applicant – Gregory Mwaniki Kaguna – was the plaintiff in the lower court suit while the 1st to 4th Respondents were the 1st to 4th Defendants respectively. It is seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of the intended appeal, there be a stay of execution of the judgement delivered on 23.08.2022.



- d. That this Honourable court be pleased to grant leave to the applicant to file an appeal out of time against the judgement made by Senior Principal Magistrate J.W Gichimu at Runyenjes on 23.08.2022.
 - e. Costs of the application be provided for.
2. The application is premised on the grounds on the face of and on the Supporting affidavit sworn by the Applicant on 31.01.2023 interalia; that being dissatisfied with the judgement delivered on 23.08.2022, he instructed his former advocate to apply for certified copies of the judgement and proceedings to enable him file an appeal; that from then on he was unable to get in touch with him since every time he visited his office he was told that he was out for a doctor's appointment after having a major medical surgery; that he later received a call from the advocates secretary who told him that they had been supplied with a copy of the judgement but by then, the time to file an appeal had lapsed; that he instructed the advocate to file an appeal but on enquiring on whether the appeal had been filed, he was asked by the same advocate to have his case dealt with by a different advocate; that through his new advocate, he has applied for typed proceedings and a Certificate of delay which he was issued with on 18.01.2023; that the mistakes of his former counsel should not be visited upon him; that the court also failed to supply him with the judgement on time to enable him file the appeal thus necessitating this application; that he also prays for stay of execution pending the hearing of the appeal since he lives on the suit land; that his appeal has a high chance of success and thus he should not be condemned unheard.
 3. The application was responded to vide a replying affidavit by the 2nd Respondent filed on 17.04.2023 in which he deposed that the Applicant was aware of the judgement herein and that his application is meant to delay justice for him and prevent him from enjoying the fruits of the judgement. He asks that in the alternative, the Applicant be ordered to deposit security for the said appeal.
 4. The 3rd & 4th Respondents responded by way of Grounds of Opposition filed on 07.03.2023. They say that the application lacks merit and that the appeal does not raise triable issues; that the applicant has not given a reasonable explanation as to the delay in lodging the appeal. They ask that the application be dismissed.
 5. The application was canvassed through written submissions. The applicant's submissions were filed on 21.06.2023. The 2nd Respondents submissions were filed on 24.10.2023 whereas the 3rd & 4th Respondents filed their submissions on 17.05.2023.
 6. I have considered the application, the responses made to it, and the rival submissions. I find that there are two issues for determination;
 - a. Whether the Applicant is entitled to leave to file an appeal out of time.
 - b. Whether the Applicant is entitled to orders of stay of execution pending appeal.
 7. Section 79G of the [Civil Procedure Act](#) is the operative provision in answering the question whether the prayer to enlarge time to file an appeal can be granted. 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 appellants 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.”

8. Section 95 of the same Act also grants this court the power to enlarge the time and provides thus:-

“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.”

9. From the provisions above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This therefore means that an appeal may indeed be admitted out of time at the discretion of the court. Some of the factors that aid courts in exercising the discretion whether or not to extend time to file an appeal out of time were laid out in the case of Edith Gichungu Koine v Stephen Njagi Thoithi [2014]eKLR as cited in Stecol Corporation Limited v Susan Awuor Mudembu [2021] eKLR thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.” Emphasis mine.

10. The judgment in this case was delivered on 23.08.2022 while the present application was filed on 02.02.2023 which translates to a period of about 5 months. The appellant has submitted that the delay in filing the appeal was occasioned largely by his former advocate who owing to illness, failed to file the appeal on time despite being instructed to do so. That there was also delay in getting the judgment to enable him to file the appeal. He attached a copy of a Certificate of delay which confirms that he requested for a copy of the judgement on 02.09.2022 and the same was issued on 28.11.2022. This can also explain the delay in bringing this application as he explained that he had to procure the services of another advocate. I find that the delay of 5 months though inordinate has been sufficiently explained by the applicant and may be excusable in the circumstances.

11. In addition to the above, the court in the case of Giuliano Zanette t/a Mediterraneo Restaurant v Amache (Appeal E006 of 2021) [2023] KEELRC 329 (KLR), citing the case of Factory Guard Limited v Abel Vundi Kitungi observed;

“That the right of appeal should not be impeded as it is a constitutional right and the cornerstone of the rule of law. Where there is delay and it is explained and the court accepts that explanation in order to render substantive justice and to facilitate access to justice for all ensuring that deserving litigants are not shut out of judgment such leave should be granted.”

12. On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties; that is, the injustice to the applicant in denying him an extension against the prejudice to the respondent in granting an extension. I find that there will be no prejudice to the Respondent’s should the applicant’s application to file the appeal out of time be allowed. But to disallow the application would shut the applicant out without being heard which would occasion injustice to him. The court therefore allows the said application and grants leave to the Applicant to file an appeal out of time.

13. The second issue for determination is whether the Applicant is entitled to orders of stay of execution pending appeal.

14. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the Civil Procedure Rules, 2010 which provides as follows: -



- (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.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
15. As outlined above, the power to grant stay of execution is a discretionary one. The Court of Appeal in the case of *Butt v Rent Restriction Tribunal* {1982} KLR 417 as cited in *Francis K. Chabari & another v Mwarania Gaichura Kairubi* [2022] eKLR gave guidance on how a court should exercise the said discretion. It held that:
- “1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. 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.
 3. 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.
 4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. 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 for costs as ordered will cause the order for stay of execution to lapse.”
16. From the foregoing, it is clear that in order for an applicant to succeed in an application for stay of execution, they must satisfy the court that substantial loss may result to them unless the stay is granted,



that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.

17. On the issue of delay, as noted above judgement herein was delivered on 23.08.2022 while the present application was filed on 02.02.2023. This translates to a period of about 5 months. The applicant explained the challenges he faced with his former advocate which this court found to be satisfactory. I am of the opinion that the delay though inordinate has been sufficiently explained.
18. On the issue of substantial loss, the applicant stated that he has been in occupation of the suit land for over 40 years which fact has not been denied by the Respondents. The lower court however found the 2nd Respondent to be the registered proprietor of the suit land and allowed his application to evict the Applicant from the said land. Should the court not stay the said judgment, the Applicant stands the risk of being evicted from the land which he occupies, which to me amounts to substantial loss.
19. Although the applicant has not expressed whether he is ready to offer security of costs, this Court is of the opinion that the Applicant can be directed by the Court to do so. Thus, this court shall exercise its discretion regarding the security for costs to be offered by the Applicant.
20. The upshot of the foregoing is that I allow the Notice of Motion Application dated 31.03.2023 on the following terms:
 - a. The Applicant is granted leave to file an appeal out of time within the next 30 days.
 - b. There shall be a stay of execution of the judgement delivered on 23.08.2022 pending the hearing and determination of the Appeal.
 - c. The Applicant to file and serve the Record of Appeal within the next 30 days of this ruling.
 - d. That the Applicant deposit the sum of Kshs. 40,000/= in court within the next 14 days as security for costs.
 - e. Costs of the application to be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 21ST DAY OF FEBRUARY, 2024.

In the presence of;

Applicant – present

2nd respondent – present

Ms Mutegi for applicant

Mutuo for Kiongo for 3rd and 4th respondent

Court Assistant - Leadys

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A. KANIARU

JUDGE – ELC, EMBU

21.2.2024

