



**Wachira v Mbogori (Environment and Land Miscellaneous Application
E53 of 2021) [2024] KEELC 1290 (KLR) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1290 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E53 OF 2021
CA OCHIENG, J
MARCH 12, 2024**

BETWEEN

RUTH WANYUA WACHIRA APPELLANT

AND

MONICA MBOGORI RESPONDENT

RULING

1. What is before Court for determination is the Appellant/Applicant's Notice of Motion Application dated the 6th August, 2021 where she seeks for the following Orders:-
 1. Spent.
 2. That pending the hearing of this Application, this Honourable Court be pleased to grant an order of stay of execution of the decree obtained from the Judgment delivered on 9th June, 2021 and all the consequential orders of the Chief Magistrate's Court in Mavoko CMCC No. 51 of 2019.
 3. That upon hearing and determination of this Application, this Honourable Court be pleased to grant an order for the extension of time to the Appellant/Applicant to Appeal out of statutory time as per the draft Memorandum of Appeal annexed to the Supporting Affidavit of Ruth Wanyua Wachira.
 4. That pending the hearing and determination of the intended Appeal, this Honourable Court be pleased to grant an order of stay of execution of the decree obtained from the Judgment delivered on 9th June, 2021 and all the consequential orders of the Chief Magistrate's Court in Mavoko CMCC No. 51 of 2019.
 5. That the costs of this Application be in the cause.



2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Ruth Wanyua Wachira where she deposes that on 9th June, 2021 the Honourable Chief Magistrate's Court delivered a Judgment against her in Mavoko CMCC No. 51 of 2019 by making the following final orders:-
 - i. A declaration that the Respondent is the lawful owner of Title Number Mavoko Town Block 3(Waswa)/4168 (formerly Estate Lukenya-Ranch Plot No. 505/253);
 - ii. The Land Registrar Machakos, to cancel the title deed for Mavoko Town Block 3 (Waswa)/4168 issued on 27th April, 2009 in the name of the Appellant and a new title deed be issued to the Respondent;
 - iii. A permanent injunction restraining the Respondent and/or her agents, or any other person from interfering with the Respondent's quiet possession for Mavoko Town Block 3(Waswa)/4168; and
 - iv. The Appellant/Applicant to bear the costs of the suit.
3. She claims she is at the risk of execution by the Respondent and now intends to Appeal against the said Judgment out of time. She is hence seeking extension of time to lodge the Appeal, out of time. She explains that when the Chief Magistrate's Court delivered the Judgment, which is subject of this Appeal, on 9th June, 2021, she was aggrieved by that decision and on 14th June, 2021 instructed the firm of Chimera, Kamotho & Company Advocates LLP to file an Appeal on her behalf. Further, that the said firm which was not previously on record for her, could not proceed further without the consent of her erstwhile advocates' messrs Kwengu & Company Advocates. She reiterates that on 14th June, 2021 the firm of Chimera, Kamotho & Company Advocates LLP wrote to messrs Kwengu & Company Advocates seeking consent and requesting for her file as regards Mavoko CMCC No. 51 of 2019 for purposes of filing the Appeal. She confirms that the said file was released and consent given on 24th June, 2021, on which date the firm of Chimera, Kamotho & Company Advocates LLP wrote a letter to the Executive Officer, Mavoko Law Courts requesting for the certified copy of the typed Judgment and proceedings to enable her file the Appeal. Further, that the certified typed copy of the Judgment and proceedings were however, only furnished on 30th June, 2021, twenty two (22) days after the delivery of Judgment in Mavoko CMCC No. 51 of 2019. She states that she was unable to obtain the trial court's Judgment in a record of three (3) weeks following the delivery of the same hence causing delay to file an Appeal. Further, that the said delay was beyond her control and it was not in any way aimed to delaying justice. She reaffirms that the said delay will not occasion any injustice to the Respondent. She further reiterates that she is bound to suffer irreparably and the intended appeal will be rendered nugatory, unless the orders sought are issued.
4. I note the Respondents and Interested Party despite being served vide the Daily Nation Newspaper dated the 25th April, 2023, failed to file their responses to oppose the instant Application.

Analysis and Determination

5. Upon consideration of the instant Notice of Motion Application including the Supporting Affidavit and the submissions, the following are the issues for determination:-
 - a. Whether time should be enlarged and the Applicant granted leave to lodge a Memorandum of Appeal against the Judgement of Hon. Charity Oluoch dated the 9th June, 2021 in Mavoko CMCC No. 51 of 2019.
 - b. Whether there should be stay of execution pending the intended Appeal.



6. On enlargement of time to lodge a Memorandum of Appeal, 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."

7. Further, Section 95 of the [Civil Procedure Act](#) stipulates 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."

8. While Order 50 Rule 6 of the [Civil Procedure Rules](#) stipulates 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."

9. In this instance, the Applicant seeks enlargement of time to file the Memorandum of Appeal, out of time. She explains that she delayed in doing so, as she had to obtain fresh legal representation as well as certified copies of proceedings and Judgement. The Respondents including Interested Parties though duly served did not oppose the instant Application. The Applicant has annexed a draft Memorandum of Appeal to the instant Application. In the case of [Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another](#) [2018] eKLR, the Learned Judge stated that:-

" Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in *Mwangi v Kenya Airways Ltd* [2003] KLR. They include the following:

- a. The period of delay;
- b. The reason for the delay;
- c. The arguability of the appeal;
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- e. The importance of compliance with time limits to the particular litigation or issue; and



- f. The effect if any on the administration of justice or public interest if any is involved.....
10. Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is not required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden.
11. While in the case of *[Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others](#)* [2015] eKLR, the Court of Appeal stated that:-
- " It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the *[Constitution](#)* which succinctly states that "judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution." Judicial officers are also state officers, and consequently, are enjoined by Article 10 of the *[Constitution](#)* to adhere to national values and principles of governance which require them whenever applying or interpreting the *[Constitution](#)* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.
- For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice."
12. In the current scenario, the Applicant in the trial Court was the 1st Defendant. She was the registered proprietor of land parcel number Mavoko Town Block 3 (Waswa)/4168 hereinafter referred to as the 'suit land'. On perusal of the pleadings, proceedings and Judgment from the trial court, I note the court proceeded to cancel the title to the suit land which had been issued to the Applicant, on 27th April, 2009 and issued a permanent injunction restraining her from the said land. On perusal of the draft Memorandum of Appeal, I note the Applicant has an arguable Appeal. From the explanations given by the Applicant, it is my considered view that the delay in filing the draft Memorandum of Appeal are plausible. I am of the view that the Respondents and Interested Party will not suffer any prejudice if the orders sought are granted.
13. Based on my analysis above while relying on the legal provisions I have cited as well as associating myself with the quoted decisions, I find that the reasons advanced by the Applicant is plausible and will exercise my discretion to enlarge time to enable her file the Memorandum of Appeal.
14. On the issue of stay of execution pending Appeal, the legal provisions governing the same, is contained in Order 42 Rule 6(2) of the *[Civil Procedure Rules](#)* which stipulates *inter alia*:-
- " 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.”

15. I note the Appellant/Applicant is the registered proprietor of the suit land. Further, that the trial court proceeded to issue an order cancelling her title as well as permanently restraining her therefrom. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal while dealing with an Application for stay of execution pending Appeal held that a stay must be granted so that an Appeal may not be rendered nugatory and Judge should not refuse a stay if there are good grounds for granting it. From the proceedings including Judgment from the trial court, I find that the Appellant/Applicant will suffer irreparable harm if the order of stay of execution pending the intended Appeal is not granted.
16. It is against the foregoing that I find the Appellant/Applicant’s Notice of Motion dated the 6th August, 2021 merited and will allow it in the following terms:-
 1. Leave be and is hereby granted to the Applicant to file and serve the Memorandum of Appeal within fourteen (14) days from the date hereof failure of which the Orders granted herein stand vacated.
 2. Upon filing the Memorandum of Appeal, an order of stay of execution of the decree obtained from the Judgment delivered on 9th June, 2021 and all the consequential orders of the Chief Magistrate’s Court in Mavoko CMCC No. 51 of 2019 be and is hereby granted.
 3. Costs of this Application will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 12TH DAY OF MARCH, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of;

Mrs. Kimaita holding brief for Ogotti for Applicant

No appearance for Respondent

Court Assistant – Simon/Ashley

