



Barasa & another v Watoka (Legal representative of the Estate of Stepen Watoka Chemiti (Deceased)) (Civil Application E085 of 2022) [2023] KECA 38 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 38 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E085 OF 2022
F TUIYOTT, JA
FEBRUARY 3, 2023**

BETWEEN

GLADYS BARASA 1ST APPLICANT

AUGUSTINE SIMIYU WEKESA 2ND APPLICANT

AND

**MARTIN SIMIYU WATOKA RESPONDENT
LEGAL REPRESENTATIVE OF THE ESTATE OF STEPEN WATOKA CHEMITI
(DECEASED)**

(Being an application for extension of time to file an Appeal from the Judgment of the High Court of Kenya at Bungoma (B. Olao, J) dated 22nd July, 2021 in BUNGOMA ELC APPEAL CASE NO. 16 OF 2020)

RULING

1. The applicants have filed a Notice of Motion dated April 27, 2022 under Rule 5, 9 and 64 of the [Court of Appeal Rules](#) seeking the following orders:-
 - a. That leave be granted to the applicants to file an appeal out of time;
 - b. That there be temporary stay of execution of eviction and attachment against the applicants and family from land parcel no. East Bukusu/South Kanduyi/3057 arising from the decree and judgment in ELC No 16 of 2020 and costs pending hearing and determination of the application interpartes.
 - c. That there be stay of execution of eviction and attachment against the applicants and family from land parcel no East Bukusu/South Kanduyi/3057 arising from the decree and judgment in ELC No 16 of 2020 and costs pending hearing and determination of the intended appeal.



2. As this Court has reiterated, the power of a single Judge sitting on behalf of the Court is restricted to those matters provided for under rule 53 (now rule 55) of the Rules of the Court. An application for stay of execution or for an injunction is not one such matter and I must decline the invitation to hear and determine the plea for stay.
3. In support of the motion, the 2nd applicant swore an affidavit on even date on his own behalf and on behalf of the 1st applicant where he deposes that the judgment was delivered on July 22, 2021 and a notice of appeal filed on July 28, 2021. They requested for certified copies of the proceedings and judgment vide a letter dated April 12, 2022 and received by the superior court below on April 14, 2022. He deposes that there was a delay in typing of the proceedings which were ready in September 2021 and a decree issued and certified much later on April 14, 2022. That by the time the decree was signed and certified, the time to file an appeal had lapsed.
4. The application was opposed by the respondent through the replying affidavit sworn on August 31, 2022. In it, he states that he was never served with the notice of appeal and that the present application does not comply with rule 77 of the rules of this Court. He further deposes that whereas the applicants had 30 days to apply for the typed proceedings, there is nothing attached to their application to show that they did so within the prescribed time nor was such letter served upon the respondents. In addition, the letter of April 12, 2022 bespeaking proceedings is proof that they were 8 months late. Similarly, the delay is unexplained and inordinate since, by their admission, the typed proceedings were ready in September 2021 and the attached decree was extracted on November 18, 2021. They are therefore not deserving of this Court's discretion. He further deposes that the present application will prejudice him as it was brought over 4 months after the applicants' property had been proclaimed and after he had put in motion the process of executing the decree.
5. Both parties have filed their submissions which are substantially a regurgitation of the position taken in their respective affidavits set out above.
6. The discretion granted to this Court by Rule 4 of the *Court of Appeal Rules* when considering an application for extension of time is to be exercised judiciously and as a guide, are the well settled principles restated in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR) :-

“The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors...”

7. The institution of an appeal is provided for under rule 82 of the *2010 rules* (now rule 84):-

82. "Institution of appeals

1. Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-
 - a. a memorandum of appeal, in quadruplicate;
 - b. the record of appeal, in quadruplicate;
 - c. the prescribed fee; and
 - d. security for the costs of the appeal.



Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such times may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

2. An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.
3. The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction. outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

8. The mainstay of the application is that the delay in filing the appeal was caused by the delay of the trial court in typing and delivering proceedings. This is the contention that has to be interrogated. I start by observing that by dint of the proviso to subrule 1, an applicant who desires to benefit from the respite in computation of time granted by the proviso is required to request for typed proceedings within 30 days of the date of the judgment. The objective of the proviso is that, as sometimes happens, there could be delay in the typing and delivery of certified proceedings and a party who desires to appeal should not be penalized for a delay which is not of the party's making. Here, judgment was delivered on July 22, 2021 and proceedings sought on April 12, 2022, this would be about seven (7) months after the time prescribed by the rule and no explanation is offered for this lateness. Further, the applicants' claim that the signing and certification of the Decree was overly late falls in the face of evidence that it was issued on November 18, 2021. Similarly, by the admission of no less the applicants, the proceedings were ready in September 2021.

9. Another issue. The respondent contends that the notice of appeal dated July 27, 2021 and filed on July 28, 2021 was not served upon him and he was not aware of the intended appeal. The notice of appeal ought to be served on persons affected by the appeal and the relevant provision is rule 77(1) (now rule 79) which reads:

"77. Service of notice of appeal on persons affected

- (1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal:

Provided that the Court may on application, which may be made ex parte, within seven days after lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court."

10. This is no evidence to rebut the contention that the notice of appeal was not served upon the respondent as required by rule 77. The same holds true for the letter bespeaking the proceedings.



11. There is more than one lapse that is not properly or at all explained and the application dated April 27, 2022 is bereft of any merit. It is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

SIGNED

DEPUTY REGISTRAR.

