



REPUBLIC OF KENYA



**Olaka v Wekesa & 2 others (Miscellaneous Civil Case E003 of 2023)
[2024] KEELC 1292 (KLR) (11 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1292 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
MISCELLANEOUS CIVIL CASE E003 OF 2023**

EC CHERONO, J

MARCH 11, 2024

BETWEEN

WILSON HAGAI MINAB OLAKA APPLICANT

AND

JUSTUS WANYONYI WEKESA 1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION 2ND DEFENDANT

AND

JOSRICK MERCHANTS RESPONDENT

RULING

1. By Notice of Motion dated 21st June, 2021 the Applicant is seeking for the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That the honourable court be pleased to enlarge time within which the applicant may lodge his intended appeal against the judgment delivered on 11th August, 2023 Bungoma Chief Magistrate's Court ELC Suit No. E050 of 2019, Justus Wanyonyi Wekesa v Agricultural Finances Corporation, Josrick Merchants and Wilson Haggai Olaka.
 - d. That the honourable court be pleased to order stay of execution of the decree issued in Bungoma Chief Magistrates Court ELC Suit No. E050 of 2019, Justus Wanyonyi Wekesa vs. Agricultural Finances Corporation, Josrick Merchants and Wilson Haggai Olaka pending the hearing and determination of the intended appeal.



- e. That in the event the decree has already been executed, an order of inhibition to issue inhibiting the registration of any dealing such as transfer, charge etc on the land parcel no. Bungoma/Naitiri/518 pending hearing and determination of the intended appeal.
- f. The costs of this application be provided for.
2. The application is based on the grounds shown on the face of the application and the Supporting Affidavit of the applicant sworn on 21.06.2021. The applicant deposed that judgment was entered against him on 11th August, 2023 in Bungoma CM-ELCNO. E050 of 2023 between Justus Wanyonyi Wekesa v Agricultural Finances Corporation, Josrick Merchants and Wilson Haggai Olaka. It was his statement that no notice of entry of judgment was issued and as a result, he only got to know about the judgment on 12th October, 2023.
3. He further stated that the court in its judgment ordered for the cancellation and/or registration of land parcel no. Bungoma/Naitiri/518 registered in his name. The applicant stated that he was aggrieved by that decision and intends to lodge an appeal. However, the statutory period has since lapsed. He stated that he has an arguable appeal with high chances of success and that this application has been brought without undue delay.
4. Further, the applicant stated that unless the orders sought are granted, he is bound to suffer irreparable loss in the event the title deed is cancelled as the substratum of the intended appeal shall be rendered nugatory. The applicant stated that he is ready and willing to abide by any such terms as the honourable court may impose on him.
5. The application was opposed by the 1st respondent who filed a replying affidavit sworn on 21st November, 2023. In his replying affidavit, the 1st respondent stated that the application is bad in law, frivolous, vexatious and an abuse of the court process. It is his argument that the applicants advocate is improperly on record as no leave was sought before filing the present application. It was argued that the former counsel for the applicant i.e J.B. Otisula & Company Advocates was aware that the matter was coming up for judgment on 11th August, 2023 which information appears not to have been disclosed to the firm of Maloba & Company Advocates.
6. The 1st Respondent averred that he has the right to enjoy the fruits of his judgment and that the applicant has a chance to claim back his money from the 2nd and 3rd respondents. 1st respondent argued that the applicant has not demonstrated the loss he would suffer if the orders sought are not granted. He therefore prays that the application said application be disallowed.
7. The applicant filed a supplementary affidavit sworn on 22nd December, 2023 in which he stated that he filed a consent with the firm of J.B. Otisula & Company Advocates and annexed the said consent to the affidavit. The application was agreed to be canvassed by way of written submissions. The applicant filed submissions dated 22nd December, 2023 and submitted on three issues. He also cited various sections of the law which provide for avenues to file the current application. It was his submission that he filed this application without undue delay and explained that the 67 days delay in filing an appeal was occasioned by the court registry which did not inform them of the date of judgment despite the same having been deferred. The applicant urged the court to find that the delay had been sufficiently explained and relied on the case of *Kamlesh Munsukhala Damki Patni v Director of public & 3 Others* [2015]eKLR.
8. Further, the applicant urged the court to find that they shall suffer damages in the event the application is not allowed and they relied in the case of *Belinda Mural & 9Others v Amos Wainaina* [1978] eKLR and *Haman Sibgn & Others v Mistri* [1971] EA 122.



9. It was also argued by the applicant that the appeal has a high chance of success as can be seen in the draft Memorandum of appeal attached to the application. The applicant equally submitted that he had satisfied the requirements for granting of stay as was prescribed in the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417. He therefore urged the court to consider his application and grant the orders as sought.
10. The 1st respondent on the other hand filed submissions dated 22nd December, 2023 where he submitted that the current advocate was not properly on record as provided for in Order 9 Rule 9 of the *Civil Procedure Rules*. It was further submitted that the applicant has not satisfied the requirements for granting the orders sought. The 1st respondent contends that the current application was filed 3 months after judgment was delivered and that the delay was inordinate.
11. It was further submitted that the applicant had not presented sufficient evidence in support of his allegations that counsel on record was not aware of the date of judgment. The respondent relied in the case of Masoa (no citation was provided). It was further submitted that the applicant has not satisfied the requirements under Order 42 Rule 6(2) of the *Civil Procedure Rules* and relied in the case of *Mary Njeri & Nachasio Kabunyi Ngirigacha v Samuel Chomaba* [2020] eKLR. In conclusion, the 1st respondent urged this Honourable Court to have the application dismissed with costs.
12. I have read and considered the submissions by the Applicant and the various authorities cited in support of the application.
13. The issue for determination which arise therefrom are: -
 - a. Whether leave can be granted to appeal out of time.
 - b. Whether an order for stay of execution can issue.
14. Section 79G of the *Civil Procedure Act* provides that appeals originating from the subordinate court should be filed within thirty (30) days from the date of the decree or order appealed against. Section 95 of the said *Act* gives the court discretion to extend the time as it deems fit, even if the time originally fixed has expired. Section 79G of the *Civil Procedure Act* provides as follows:

“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.”
15. Section 95 of the *Civil Procedure Act* 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.”
16. In both instances, this Court has wide and unfettered discretion to enlarge time to enable time for the filing of appeal. However, it has been stated time and again that such discretion must be exercised judicially and not be exercised capriciously but on sound judgment and consideration of the totality



of the facts and the law. In the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR the Court of Appeal held: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary.

17. The principles to be considered in exercising the court’s discretion on whether or not to enlarge time to file appeal were set out in the case of *Leo Sila Mutiso v Rose Hellen Wangeri Mwangi* Civil Appeal 255/ 1997, where the court held as follows: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

18. These principles were also reiterated in *First American Bank of Kenya Ltd v Gulab P. Shah & Others* HCC 2255/2000 [2002] IEA 65 where it was held as follows: -

- a. The explanation if any, for the delay;
- b. The merits of the contemplated action, whether the appeal is arguable;
- c. Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.
- d. The length of the delay and the explanation if any.

19. The present Application was filed on the 16th October, 2023 after the trial court delivered its judgment on the 11th of August, 2023. The Applicant has explained the delay of 69 days. According to the applicant, the 69 days delay was caused by the court in failing to issue the Notice indicating the judgment date. He stated that him and his advocate were not aware of the judgment date and only came to find out about the same on 12th October, 2023.

- e. Even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR the Court of appeal held that;

The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

- f. The delay in filing this application from the date of the delivery of judgment to the filing of the present application is a period of 69 days. The explanation given by the applicant for the delay in my view is satisfactory and does not amount to inordinate delay.
- g. Chances of success of the intended Appeal. I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case at this stage. However, I note that the draft memorandum of appeal raises triable issues for determination inter alia, whether the trial court applied the applicable laws in arriving at its conclusion. It



is noteworthy that an arguable appeal does not necessarily mean one which must succeed. I also find that the respondent will not suffer substantial prejudice if the application herein is allowed.

- h. The third limb is whether the Respondent can be sufficiently compensated by an award of costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant. In my view, I find that the answer is in the affirmative.
- i. The other issue for determination is whether the applicant should be granted orders of stay of execution pending the intended appeal. The principles to be considered in an application for stay of execution or proceedings pending appeal are well settled. The same was well espoused in *Re Global Tours and Travels Ltd: Winding Up Cause No.43 of 2000* as follows: -

“Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”
- j. Stay of execution and/or proceedings pending appeal is purely a matter of judicial discretion that is exercised in the interests of justice on a case to case basis and the same ought to be exercised with caution. At this stage, I am careful not to comment on the merits of the draft appeal. However, I am also alive to the fact that should the intended appeal be successful without having a stay of proceedings in Bungoma Chief Magistrates Court ELC Suit No. E050 of 2019, then the appeal would be rendered nugatory, a waste of judicial time and an academic exercise.
- k. On the issue raised by the 1st respondent that the applicant did not comply with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* before filing this application, I must say that the court took the unusual liberty and perused the lower court file and confirmed that indeed the Counsel on record filed a consent dated 4th October, 2023 which was attached to the supplementary affidavit dated 22nd December, 2023. As such, this argument fails.
- l. The applicant also sought for inhibition orders in the event the respondents have begun the execution process. This prayer is unsubstantiated by evidence and the same seems to have been abandoned since nothing was placed before this court to prove the threat to execute the trial courts judgment. Awarding this order would therefore amount to speculation and the court issuing an order on a vacuum. I therefore decline to allow the same.
- m. In the final analysis, I find that the application for leave to file the Appeal out of time and for stay of execution of the judgment in Bungoma Chief Magistrates Court ELC Suit No. E050 of 2019 pending hearing and determination of the intended Appeal is merited. In conclusion, I find the Application dated 16th October 2023 merited and the same is hereby allowed in the following terms:



1. The appeal be filed within (15) fifteen days from the date of this ruling.
2. There be an Interim Stay of execution and/or Proceedings in Bungoma Chief Magistrates Court ELC Suit No. E050 of 2019 pending the hearing and determination of the intended Appeal.
3. The Applicant to file and serve a Record of Appeal within 30 days from the date of this Ruling.
4. The applicant to meet the respondent's costs of this application.

DATED AND SIGNED AND DELIVERD AT BUNGOMA THIS 11TH DAY OF MARCH, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

- 1. Mr. Maloba for applicant**
- 2. Mr. Anwar H/B Wamalwa R. for 3rd Respondent**
- 3. Bett C/A**

