



**Osangire v Opaye (Environment & Land Case 52 of 2019)
[2024] KEELC 1200 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1200 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 52 OF 2019**

BN OLAO, J

MARCH 7, 2024

BETWEEN

JOHN ISAAC OSANGIRE PLAINTIFF

AND

BENARD OKAPESI OPAYE DEFENDANT

RULING

1. The dispute between John Isaac Osangire(the Applicant) and Benard Okapesi Ipaye(the Respondent) involving the land parcel North Teso/amukura/188 (the suit land), was heard by OmolloJ. By a judgment delivered on 28th April 2022, the judge found in favour of the Respondent and issued various orders against the Applicant.
2. No appeal was filed against that judgment.
3. On 28th September 2023 following an application by the Respondent, I directed the Applicant to surrender the original title deed to the suit land within 15 days to the Land Registrar for cancellation to facilitate execution of that judgment. He did not comply.
4. The Applicant has now filed a Notice of Motion dated 11th October 2023 seeking the following orders:
 1. Spent
 2. That leave be and is hereby granted to the firm of M/S Ipapu P. Jackah& Company Advocates to come on record for the Applicant in place of the firm of M/S Ouma – Okuttta & Associates Advocates to act for him in this appeal.
 3. That the attached draft Notice of change of Advocates in the name of M/S Ipapu P. Jackah& Company Advocates be deemed as duly filed and served.



4. That the Honourable Court be pleased to grant leave to the Applicant upon extension of time within which to lodge a Notice of Appeal and serve out of time.
 5. That pending hearing and determination of this application interparte, this Honourable Court be pleased to issue a stay of execution of the orders issued on 28th September 2023 and all consequential orders herein.
 6. That pending the hearing and determination of this application inter-parte, there be a stay of execution of the judgment/decreed delivered on 28th April 2022 and any consequential orders herein.
 7. That pending the hearing and determination of the intended appeal out of time, this Honourable Court be pleased to set aside all the proceedings and the consequential Decree/ Order inter alia issued pursuant thereto.
 8. That costs of this application be provided for.
5. The application is premised on the provisions of Sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#) as well as Order 3 Rules 6 and 7, Order 9 Rule 1, Order 21 Rule 22, Order 42 Rule 1(1), Order 50 Rule 6 and 9 and Order 51 Rule 1 and 3 of the Civil Procedure Rules.
 6. It is based on the grounds set out therein and supported by the Applicant's affidavit of even date.
 7. The crux of the application is the Applicant is aggrieved with both the judgment delivered on 28th April 2022 and the ruling delivered on 28th September 2023. That the judgment was delivered without notice to him or his counsel. That his then counsel has abandoned him in the midst of the proceedings yet the Respondent is now threatening to execute the judgment which he seeks to appeal. That his previous counsel, knowing that judgment was due on 28th April 2022 deliberately failed to attend Court thus prejudicing him grossly. Further, he does not understand how the Court arrived at the decision which it did and he has therefore instructed the firm of IPAPU P. Jackah & Company Advocates to file this application for the orders sought herein.
 8. Annexed to the application is a copy of Notice of Change of Advocate dated 11th October 2023 by Ipapu P. Jackah & Company Advocates.
 9. The application is opposed and the Respondent has filed a replying affidavit in which he has deposed, inter alia, that judgment was delivered on 28th April 2022 and the Applicant was ordered to sub-divide the suit land and transfer a portion measuring 3½ acres to him plus provision of a road of access. That order was served upon the Applicant on 31st May 2022 together with the relevant transfer forms for execution. The Applicant refused to sign the documents.
 10. An application was then filed seeking an order that the Applicant avails the original title deed for the suit land to enable the Land Registrar sub-divide it. Vide a ruling delivered on 28th September 2023, the Applicant was ordered to produce the original title deed within 15 days of that ruling. That it is not true that the Applicant's previous counsel MR. Ouma-okutta absconded his duties. That the 18 months taken to file this application amounts to inordinate delay and is meant to frustrate the judgment.
 11. Annexed to the replying affidavit is the decree issued herein on 19th May 2022.
 12. The application has been canvassed by way of written submissions. These have been filed by Mr Ipapu instructed by the firm of Ipapu P. Jackah & Company Advocates and for the Applicant and by Mr Otanga instructed by the firm of Bogonko Otanga & Company Advocates for the Respondent.



13. I have considered the application, the rival affidavits and the submissions by counsel.
14. Prayer No2 and 3 of the application are allowed. That leaves the following substantive prayers;
 1. Extension of time of appeal.
 2. Stay of execution of the judgment delivered on 28th April 2022 and ruling delivered on 28th September 2023 pending the intended appeal.
 3. Setting aside of the proceedings herein and the consequential decree/order pending the appeal.I shall consider them in that sequence.

1. Extension of Time to Appeal:

15. Section 7 of the *appellate Jurisdiction Act* grants this Court the power to extend time within which a notice for file an appeal to the Court of Appeal can be filed. It reads:

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court for making an application for leave to appeal or for a certificate that the case is fit for appeal notwithstanding that the time for giving such notice or making such appeal may have already expired;

Provided that in the case of a sentence of death, no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

Following the promulgation of the 2010 Constitution, the reference to “High Court” in Section 7 of the *Appellate Jurisdiction Act*, no doubt also includes other Courts of equal status such as this Court.

16. Extension of time is entirely a matter for the discretion of the Court. In the case of LEO SILA MUTISO -V- HELLEN WANGARI MWANGI CIVIL APPLICATION NO NAI 255 of 1997 [1999 2 EA 231], the Court of Appeal expressed itself thus:

“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.”

In the case of Nicholas Kiptooarap Korir Salat-v- Independent ElectoralandBoundaries Commission& 7 Others, Supreme Court Application No16 of 2014 [2014 eKLR], and which has been cited by Mr Otangain his submissions, the Court laid down the following principles to guide a Court considering such an application. These are:

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 Respondent if 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.
17. The law has not set out what is or is not unreasonable delay. However, any delay must be explained to the satisfaction of the Court. In *Andrew Kiplagat Chemaringo-v- Paul Kipkorir Kibet* C.A. Civil Application No. 91 of 2017 [2018 eKLR] the Court said the following on the issue of delay;

“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.” Emphasis mine.

The judgment sought to be appealed was delivered on 28th April 2022. Rule 75(2) of the Court of Appeal provides that the Notice of Appeal be filed within 14 days of the judgement and be served within 7 days. The judgment sought to be appealed having been delivered on 28th April 2022, the Applicant had at least upto 2nd May 2023 to file the Notice of Appeal and serve it 7 days after. He did not do so. His explanation is that his previous counsel did not attend Court on 28th April 2022 and could not therefore apply for a stay. I have looked at the record of 28th April 2022 when the judgment was delivered virtually by Omollo J it reads:

“Defendant present

Plaintiff absent

Jumba holding brief for Bogonko for plaintiff

Order: Judgment read virtually but parties present in Court.

OmolloJ

28.4.2022”

The Applicant who is the defendant in this suit was present in Court on 28th April 2022 when Omollo J delivered the judgment. He has not disputed that record. He however says his advocated had “absconded his duties” on that day. That may be so. However, nothing stopped him from instructing another advocate to file a Notice of Appeal within the required period. No explanation has been proffered for that lapse. This application was filed on 11th October 2023 some 18 months after the judgment sought to be appealed was delivered. That delay is clearly unreasonable but most importantly, no explanation, plausible or otherwise, has been offered. The remedy sought by the Applicant is an equitable one and he ought to have approached this Court with clean hands but by failing to explain what he was doing for 18 months, this Court can only conclude, which I hereby do, that he had no intention to appeal and has only come to Court to frustrate the execution process. It is also not lost to this Court that when the clear orders were issued for his compliance vide a ruling delivered on 28th September 2023,



the Applicant not only disobeyed them but has also not given any explanation for that contemptuous conduct.

18. The remedy of extension of time is really not merited in the circumstances. I decline it.

2. Stay of Execution pending Appeal:

19. This is provided for under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules as follows:

6(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.” Emphasis mine.

It is clear, therefore, that the Applicant was required to satisfy the following conditions for the grant of the order of stay of execution pending appeal;

1. Show sufficient cause.
2. Demonstrate that unless the order is granted, he will suffer substantial loss.
3. File the application without unreasonable delay.
4. Offer security.

20. The jurisdiction of this Court in considering such an application was circumscribed by the Court of Appeal in the case of Vishram Ravji Halai & Another-v- Thornton & Turpin (1963) Ltd 1990 KLR 365 in the following terms:

“Thus the Superior Court’s discretion is fettered by three conditions. Firstly, the Applicant must establish a sufficient cause; secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the Applicant must furnish security. The application must of course be made without unreasonable delay.”

The Applicant was therefore required to meet all the above conditions to justify the grant of an order of stay of execution pending appeal.

21. With regard to sufficient cause, it was defined in the case of Hon Attorney General-v- Law Society of Kenya & Another C.A. Civil Appeal No133 of 2011 as:

“Sufficient cause or good cause in law means ... the burden placed on a litigant (usually by Court rule or order) to show why a request should be granted or an action excused ...



Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events.”

No sufficient or good cause has been placed before this Court to warrant the order of stay of execution pending appeal. In paragraph 8 of his supporting affidavit, he has deposed:

8. “That since I did not understand how the case turned against me and how the Court arrived at such decision, thus prompting me to appoint the firm of M/S Ipapu P. Jackah & Co. Advocates to do all that is possible to secure my interest not limited to seeking and extension of time to lodge a Notice of Appeal and serve out of time.”

The judgment was delivered in his presence on 28th April 2022. The firm of Ipapu P. Jackah only came on record for him on 11th October 2023. The reason why the Court decided against him are clear in the judgment which was delivered in his presence and if he did not understand it, he did not have to wait until 11th October 2023 to instruct counsel to explain the judgment to him.

22. With regard to substantial loss, it is the “cornerstone” of such an application as was set out in *Kenya Shell Ltd-V- Kibiru & Another* 1986 KLR 410. The Applicant has deposed in paragraph 6 of his supporting affidavit that the judgment “shall be grossly prejudicial to me and my siblings hence in breach of our statutory rights”. He has not explained what prejudice he and his siblings will suffer if the order of stay of execution is not granted. It is not enough simply to allege prejudice. The Applicant was required to demonstrate that if the order sought is not granted, he will suffer substantial loss and then show what that loss will entail. He has not done so.
23. The Applicant was also required to file this application without unreasonable delay. As I have already found above with respect to his application for extension of time, there has been a delay of 18 months which has not been explained. That delay is clearly unreasonable taking into account that he was present in Court when the judgment sought to be stayed was delivered.
24. With regard to the offer of security, none has been made. And neither has the Applicant deposed that he is ready and willing to give any security as the Court may order “for the due performance of such decree or order as may ultimately be binding on him”. Most significantly, among the orders which the Applicant seeks to stay is the ruling delivered on 28th September 2023 in which this Court gave him 15 days to deposit with the Land Registrar Busia the original title deed to the land parcel No South Teso/ Amukura/188 to facilitate the execution of the decree. Even if he is not minded to do so pending any appeal, the Court would have expected him, as a mark of good faith, to at least offer to deposit it in Court assuming he is doubtful about its security at the Land Office in view of the judgment against him. The fact that he has made no such offer only shows that this application is not made in good faith. Rather, it is only meant to frustrate the Respondent.
25. The prayer for an order of stay of execution pending appeal is not merited. It is similarly declined.

Setting Aside Judgment, and Ruling

26. The Applicant also seeks the setting aside of the judgment delivered on 28th April 2022. That was not a default judgment. It was a final judgment made after the Court had heard both the Applicant and the Respondents together with their witnesses. It is not therefore amenable to setting aside. This was settled by the Court of Appeal in the case of *Kenya Power & Lighting Company Ltd -v- Benzene*



Holdings Ltd t/a Wyco Paints C.A. Civil Appeal No 132 of 2014 NBI [2016 eKLR] where the Court said:

“Apart from the provisions of order 10 rule 11, order 12 rule 7 and order 36 rule 10 of the Civil Procedure Rules, dealing with the setting aside of default judgments, the Civil Procedure Rules does not have a provision for the setting aside of the final judgment. A party aggrieved by a final judgment can either move the Court under order 45 for a review of the resultant decree or by lodging an appeal in terms of order 42”.

That was the route that I followed in the case of Christopher Wanga Simiti -v- David Wepukhulu Kasambula & Another Bungoma ELC CASE No 177 of 2014. I notice from the Kenya Law Report that the same case is reported as David Wepukhulu Kasambula & Another -v- Robert Sundwa Wangolo 2018 eKLR. The editor Kenya Law Report – should rectify that discrepancy. It is clear therefore that the remedy of setting aside the judgment dated 28th April 2022 is not available to the Applicant.

27. By the same argument, the ruling delivered on 28th September 2023 was arrived after an inter-partes hearing in which both parties were heard through their affidavits and submissions. It was not a default ruling and is therefore not amenable to setting aside.
28. The totality of all the above is that the Notice of Motion dated 11th October 2023 is devoid of any merit. It is accordingly dismissed with costs.

BOAZ N. OLAO

JUDGE

7TH MARCH 2024

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 7TH DAY OF MARCH 2024 AS WAS ADVISED BY THE DEPUTY REGISTRAR ON 11TH DECEMBER 2023.

BOAZ N. OLAO

JUDGE

7TH MARCH 2024

Explanation Notes:

This ruling was due on 15th February 2024. However, I have been out of the station attending to a patient. The delay is regretted.

BOAZ N. OLAO

JUDGE

7TH MARCH 2024

